# EVIDENCE

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## I. INTRODUCTION

This Article discusses significant developments in the law of evidence during the *Survey* period.[1] The Article focuses primarily on published decisions of the Michigan Court of Appeals and the Michigan Supreme Court. To the extent that they discuss significant issues of Michigan evidence law, however, unpublished decisions and decisions by the federal courts are also discussed.[2]

The Michigan courts were relatively quiet during this *Survey* period on evidentiary issues. Although the Michigan Court of Appeals issued a number of decisions addressing issues of relevance, other acts evidence, and expert testimony, the *Survey* period is best characterized by what the Michigan Supreme Court *failed* to do, passing on several opportunities to clarify the law with respect to other acts evidence in domestic abuse and sexual assault cases, as well as with respect to hearsay and confrontation issues.

## II. INFERENCES & PRESUMPTIONS

"It has been aptly observed that 'presumption' is the slipperiest member of the family of legal terms, except its first cousin, 'burden of proof.'" Generally, there are three types of "presumptions," only one of which is truly a presumption. The confusingly named "conclusive" or "mandatory" presumption operates to establish irrefutably a party's claim or defense, and cannot be rebutted by any evidence. "These legal rules are not really presumptions as the term is ordinarily understood, but substantive principles expressed in the language of presumptions." The "mandatory presumption," also referred to as the "rebuttable presumption" and the "presumption of law," is the term which "refer[s] to the true presumption." This term describes a device that sometimes requires the trier of fact to draw a particular conclusion on the basis of certain facts. If the "basic facts" are established, the trier must find the "presumed fact," at least in the absence of evidence tending to disprove it ("counterproof"). In effect, presumptions have at least the effect of shifting the burden of production to the party who would be disadvantaged by a finding of the presumed fact.

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1. The *Survey* period covers cases decided between June 1, 2008, and May 31, 2009.

2. M. Bryan Schneider, *Evidence, 2006 Ann. Survey of Mich. Law*, 52 WAYNE L. REV. 661, 662 (2006).

The third presumption, called variably the "permissive presumption" or the "presumption of fact," but more accurately described as simply the inference, "refer[s] to conclusions that are permitted but not required."[3]

The Michigan Court of Appeals considered the distinction between presumptions and inferences in one case during the *Survey* period. In *Gadigian v. City of Taylor*,[4] the plaintiff brought a negligence action against the defendant City of Taylor after she tripped on a public sidewalk. The plaintiff brought her suit pursuant to the highway exception to governmental immunity.[5] Notwithstanding the general highway immunity exception, the governmental immunity statutes also provide that "[a] discontinuity defect of less than 2 inches creates a rebuttable inference that the municipal corporation maintained the sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel in reasonable repair."[6] On the basis of this inference, the city moved for summary disposition, and the trial court denied the motion.[7] The court of appeals affirmed, concluding that the inference established by section 691.1402a(2) did not entitle the city to judgment as a matter of law.[8]

The court began its analysis by discussing the history of the two-inch rule set forth in section 691.1402a(2).[9] At common law, the two-inch rule prohibited any recovery for injuries caused by a discontinuity defect in a sidewalk which was less than two inches. In other words, the common

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3. *Id.* at 674-75 (quoting 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE §§ 61, 66 at 308, 320-323 (2d ed. 1994) [hereinafter MUELLER & KIRKPATRICK] (citing CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 342 (John W. Strong 5th ed. 1999) [hereinafter MCCORMICK])). Such inferences occur in almost any case when the jury draws inferences from the evidence based on its own views of the testimony. *See* MUELLER & KIRKPATRICK, *supra*, § 66, at 322. "Inference" is generally used more formally to describe the specific type of inference that "the judge mentions to the jury in formal instructions–a conclusion permissible on the basis of the evidence, to which the judge openly draws the jury's attention." *Id.*; *see also* McCormick, *supra*, § 342. A jury is free to accept or reject the judge's invitation to draw the inference, and the judge's instruction on the inference alters neither the burden of production nor the burden of proof. *See* County Ct. of Ulster County, N.Y. v. Allen, 442 U.S. 140, 157 (1979).

4. 282 Mich. App. 179, 774 N.W.2d 352 (2008).

5. *See id.* at 180, 774 N.W.2d at 354. The highway exception allows a plaintiff to recover damages sustained "by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel[.]" MICH. COMP. LAWS ANN. § 691.1402(1) (West 2000). Under the exception, a sidewalk is considered a "highway." *See* MICH. COMP. LAWS ANN. § 691.1401(e) (West 2000).

6. MICH. COMP. LAWS ANN. § 691.1402a(2).

7. *Gadigian*, 282 Mich. App. at 180, 774 N.W.2d at 354.

8. *Id.* at 189, 774 N.W.2d at 358.

9. *Id.* at 182-84, 774 N.W.2d at 354-55.

law rule created a mandatory or conclusive presumption barring recovery. The Michigan Supreme Court abrogated the two-inch rule in 1972.[10] After the 1986 amendments to the governmental immunity statutes, the Michigan Supreme Court determined that the two-inch rule was not mandated by the governmental immunity statutes and declined to resuscitate the rule as a matter of common-law, leaving that determination to the Legislature.[11] The Legislature responded by enacting the rebuttable inference of reasonable repair reflected in section 691.1402a(2).[12] With this background in mind, the court of appeals turned to the language used by the Legislature.

The court noted that instead of reviving the common law two-inch rule, and instead of using "presumption" language, the Legislature chose to use the term "rebuttable inference."[13] Because this phrase is a legal term of art, the court was required to give the term its peculiar legal meaning.[14] Under Michigan law, the court explained, "an 'inference' does not equate to a 'presumption,'"[15] and that "a presumption operates differently than an inference," because "'a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption.'"[16] An inference, on the other hand, "does not carry a corresponding obligation to find a certain fact."[17] In other words, in the case of a presumption, the jury is obligated to find the presumed fact unless the party against whom it operates offers evidence to rebut the presumption, in which case a question of fact remains for the jury. However, in the case of an inference, a jury has no obligation to "'infer fact B from proof of fact A irrespective of the presence or absence of contrary evidence of fact B.'"[18]

With this understanding of the inference, the court of appeals concluded that the trial court had not erred in denying the city's motion for summary disposition.[19] The court explained that the plaintiff's expert opined that the height difference between the adjoining slabs of concrete

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10. *Id.* at 182, 774 N.W.2d at 355 (discussing Rule v. Bay City, 387 Mich. 281, 195 N.W.2d 849 (1972)).

11. *See id.* at 183, 774 N.W.2d at 355 (discussing Glancy v. City of Roseville, 457 Mich. 580, 577 N.W.2d 897 (1998)).

12. *See id.* at 183-84, 774 N.W.2d at 355.

13. *Gadigian*, 282 Mich. App. at 184, 774 N.W.2d at 355-56.

14. *Id.*, 774 N.W.2d at 356.

15. *Id.* at 184, 774 N.W.2d at 356.

16. *Id.* at 186, 774 N.W.2d at 356-57 (quoting MICH. R. EVID. 301).

17. *Id.*, 774 N.W.2d at 357.

18. *Id.* at 187, 774 N.W.2d at 357 (quoting 21B CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5124, at 490 (2d ed. 2005) [hereinafter WRIGHT & GRAHAM]).

19. *Gadigian*, 282 Mich. App. at 189, 774 N.W.2d at 358.

created a trip hazard, and that this hazard was greater than a simple two inch high defect because the affected slab moved in a "teeter-tauter" effect, and thus was not readily apparent to pedestrians.[20] The court concluded that this evidence was sufficient to rebut the inference created by section 691.1402a(2), and created a question of fact for the jury.[21]

## III. PRIVILEGES

Evidentiary rules generally fall into two categories: rules of relevancy and rules of probative policy, both of which are directed at improving the search for truth.[22] This Part deals with a third category of evidentiary rules, those relating to rules of extrinsic policy, more commonly referred to as privileges. These rules "forbid the admission of various sorts of evidence because some consideration extrinsic to the investigation of truth is regarded as more important and overpowering."[23] Indeed, contrary to the first two categories of rules, the effect of privilege law "is to obstruct not to facilitate the search for truth," based on some overriding non-evidence based policy consideration.[24] Because privileges are recognized in derogation of the search for truth, a privilege (1) should not "be recognized unless it is clearly demanded by some specific important extrinsic policy"[25]; and (2) must be narrowly construed.[26] The Michigan courts considered two privilege issues during the *Survey* period.

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20. *See id.* at 188-89, 774 N.W.2d at 358.

21. *See id.* at 189, 774 N.W.2d at 358. In another case decided during the *Survey* period, the court of appeals concluded that the two-inch rule codified in section 691.1402a(2) applies to sidewalks adjacent to any highway, even though section 691.1402a(1) refers to liability arising only in connection with county highways. *See* Robinson v. City of Lansing, 282 Mich. App. 610, 616-18, 765 N.W.2d 25, 29-30 (2009).

22. *See* 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2175, at 3 (John T. McNaughton rev. ed. 1961) [hereinafter WIGMORE].

23. *Id.* Professor Wigmore divides rules of extrinsic policy into two separate subcategories: rules of absolute exclusion which completely bar admission of evidence on policy grounds, such as the Fourth Amendment exclusionary rule, and rules of optional exclusion, that is, privileges. *See id.* at 4. This Part discusses only privileges.

24. *Id.*; *see also* MCCORMICK, *supra* note 3, § 72, at 269 (stating that privilege rules are designed not to aid the search for truth but to protect "interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some incidental sacrifice of availability of evidence relevant to the administration of justice").

25. 8 WIGMORE, *supra* note 22, § 2175, at 3.

26. *See* United States v. Nixon, 418 U.S. 683, 710 (1974); *see also* People v. Fisher, 442 Mich. 560, 574-75, 503 N.W.2d 50, 56 (1993).

*A. Attorney-Client Privilege*

"The attorney-client privilege is one of the oldest recognized privileges for confidential communications,"[27] dating to at least the sixteenth century.[28] Although the privilege was originally grounded on the lawyer's duty of honor to maintain his client's confidences,[29] since the eighteenth century the rule has been, and continues to be, grounded upon the desire "to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'"[30] Under the common law privilege, as applied in Michigan, "[c]ommunications from a client to an attorney are privileged when they are made to counsel who is acting as a legal advisor and made for the purpose of obtaining legal advice."[31]

During the *Survey* period, the federal district court, applying Michigan privilege law, expounded on the "purpose of obtaining legal advice" requirement of the attorney-client privilege. In *State Farm Mutual Automobile Insurance Co. v. Hawkins*,[32] the plaintiff insurance company brought an action against the defendant alleging fraud and unjust enrichment in connection with the defendant's insurance claims for attendant care services. The insurance claims involved claims by the defendant to have provided attendant care services for her niece.[33] At a deposition of the defendant, the insurance company sought to question her concerning documents prepared by the defendant for her prior attorney, who had represented her in previous litigation brought by the defendant to recover payments owed to her by the insurance company (which ended in a settlement between the parties).[34] The documents allegedly contained records regarding the attendant care services provided by the defendant to her niece, and apparently consisted of forms prepared by either the insurance company or the defendant's attorney, which she then filled out and mailed back to her attorney.[35] The insurance company brought a motion seeking an order compelling the

27. Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998).

28. *See* 8 WIGMORE, *supra* note 22, § 2290, at 542.

29. *See id.* at 543.

30. *Swidler & Berlin*, 524 U.S. at 403 (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)); *see also* 8 WIGMORE, *supra* note 22, § 2290, at 543.

31. People v. Compeau, 244 Mich. App. 595, 597, 625 N.W.2d 120, 122 (2001); *see also* 8 WIGMORE, *supra* note 22, § 2292, at 554.

32. No. 08-CV-10367-DT, 2008 WL 5383855 (E.D. Mich. Dec. 23, 2008).

33. *Id.* at *1.

34. *Id.*

35. *Id.*

defendant to answer the questions posed at the deposition, and the court granted the motion.[36]

For purposes of its analysis, the court broke down the requested discovery into three broad categories: (1) facts relating to the timing and frequency of the defendant's contact with her attorney; (2) facts relating to the information provided by the defendant in the forms prepared by her attorney or the insurance company; and (3) the facts underlying the defendant's conversations with her attorney regarding the defendant's care of her niece.[37] Turning to the first category of information, the court concluded that the attorney-client privilege did not bar disclosure because the proposed questions did not seek confidential communication made for the purpose of obtaining legal advice.[38] The court reasoned that these questions did "not require [d]efendant to reveal anything regarding the information actually conveyed," but only required her "to state whether she mailed a letter or form to her attorney on a specific occasion, whether she continued mailing him letters or forms after a certain date, and so on."[39] These questions focused not on any communications between the defendant and her attorney, but only on her own conduct, and thus were not covered by the privilege.[40]

With respect to the second category, the court noted that the information sought would be privileged if it consisted of confidential communications made for the purpose of obtaining legal advice, but not if it consisted solely of forms submitted to the plaintiff or another insurance company for reimbursement.[41] Because the parties did not provide enough information to answer this question, and because the party asserting the privilege has the burden of demonstrating that it is applicable, the court ordered disclosure of these matters.[42] Finally, the court concluded that the third category of questions was likewise not barred by the attorney-client privilege.[43] These questions regarding the facts of the defendant's care for her niece, the court explained, "constitute underlying facts of which [d]efendant has direct knowledge," and a party may not "cloak such facts with the attorney-client privilege merely by communicating them to her attorney."[44]

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36. *Id.* at *5-6.
37. *Id.* at *3.
38. *State Farm*, 2008 WL 5383855, at *3.
39. *Id.*
40. *See id.*
41. *Id.*
42. *See id.*
43. *Id.* at *4.
44. *Id.*

*B. Psychotherapist-Patient Privilege*

Michigan law provides, by statute, for a privilege protecting psychotherapist-patient communications.[45] The statute provides that:

> [a] psychologist licensed or allowed to use that title under this part or an individual under his or her supervision cannot be compelled to disclose confidential information acquired from an individual consulting the psychologist in his or her professional capacity if the information is necessary to enable the psychologist to render services.[46]

The statute provides three exceptions to the privilege, permitting disclosure where (1) the patient (or minor patient's guardian) consents; (2) necessary to report certain statutory violations in accordance with section 333.16222; and (3) a child protective service worker demonstrates a compelling need for the information in order to determine whether child abuse has occurred in accordance with section 333.16281(1).[47] The Michigan Court of Appeals considered the scope of this statutory privilege in *In re Petition of Attorney General for Investigative Subpoenas*.[48]

In *Attorney General*, the Michigan Attorney General, on behalf of the Department of Community health, petitioned the circuit court for subpoenas relating to Gerard Williams, a licensed psychologist, as part of an investigation of numerous licensed health care providers.[49] The subpoenas sought information concerning billing and treatment, including medical records and reports, with respect to ten identified patients.[50] The circuit court initially issued the subpoenas but Williams filed a subsequent motion to quash, arguing that the subpoenas required the production of information protected by the statutory psychotherapist-patient privilege set forth in section 333.18237.[51] In response, the Attorney General argued that production of the information was permissible under section 333.16235, which authorizes the issuance of investigative subpoenas.[52] The Attorney General argued that the

45. MICH. COMP. LAWS ANN. § 333.18237 (West 2001).
46. *Id.*
47. *See id.*
48. 282 Mich. App. 585, 766 N.W.2d 675 (2009).
49. *Id.* at 586-87, 766 N.W.2d at 676.
50. *See id.*
51. *See id.* at 587-88, 766 N.W.2d at 676.
52. Specifically, section 333.16235 provides:

psychotherapist-patient privilege statute should be interpreted in light of section 333.16235, particularly given that any records disclosed pursuant to the investigative subpoenas would remain confidential pursuant to section 333.16238(1).[53] Following a hearing, the circuit court granted Williams's motion to quash, concluding that the language of the privilege statute contained no language qualifying the privilege for investigative subpoenas.[54] The Attorney General appealed, and the court of appeals affirmed.[55]

The court of appeals began its analysis by noting that "[t]he psychologist-patient privilege statute clearly and unambiguously envisions that a state-licensed psychologist '*cannot be compelled to disclose information acquired from an individual consulting the psychologist in his or her professional capacity* if the information is necessary to enable the psychologist to render services.'"[56] The court also noted that the statute lists three circumstances in which disclosure may be made.[57] However, the parties agreed that none of these three exceptions were implicated by the investigative subpoenas.[58] Because the plain language of the privilege statute protected the information sought by the Attorney General, and because none of the statutory exceptions applied, the court of appeals presumed that the Legislature intended to protect the information sought by the Attorney General from disclosure.[59]

The court of appeals also rejected the Attorney General's argument that section 333.16235 and the court's prior decision in *In re Petition of*

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> Upon application by the attorney general or a party to a contested case, the circuit court may issue a subpoena requiring a person to appear before a hearings examiner in a contested case or before the department in an investigation and be examined with reference to a matter within the scope of that contested case or investigation and to produce books, papers, or documents pertaining to that contested case or investigation. A subpoena issued under this subsection may require a person to produce all books, papers, and documents pertaining to all of a licensee's or registrant's patients in a health facility on a particular day if the allegation that gave rise to the disciplinary proceeding was made by or pertains to 1 or more of those patients.

MICH. COMP. LAWS ANN. § 333.16235(1) (West 2001).

53. *See Attorney General*, 282 Mich. App. at 588-89, 766 N.W.2d at 677; *see also* MICH. COMP. LAWS ANN. § 333.16238(1) (West 2001).

54. *Attorney General*, 282 Mich. App. at 589-90, 766 N.W.2d at 677-78.

55. *Id.* at 597-98, 766 N.W.2d at 682.

56. *Id.* at 592, 766 N.W.2d at 679 (quoting MICH. COMP. LAWS ANN. § 333.18237 (West 2001)) (emphasis by quoting court).

57. *Id.* at 592, 766 N.W.2d at 679.

58. *See id.* at 593, 766 N.W.2d at 679.

59. *Id.* at 593, 766 N.W.2d at 679-80.

*Attorney General for Investigative Subpoenas ("Dental Subpoenas")*,[60] which considered the Attorney General's power to subpoena records protected by the dentist-patient privilege. In *Dental Subpoenas*, the court of appeals found that the Attorney General had the power to issue investigative subpoenas under section 333.16235 covering information protected by the dentist-patient privilege because the privilege statute at issue in that case explicitly provided that disclosures pursuant to the Health Insurance Portability and Accountability Act and the regulations made thereunder, pursuant to which the Attorney General was proceeding in that case, were not barred by the dentist-patient privilege.[61] The *Attorney General* court distinguished *Dental Subpoenas* because the psychotherapist-patient privilege statute did not contain the language critical to the conclusion of the *Dental Subpoenas* court.[62] Rather, the language of the psychotherapist-privilege statute contained three express exceptions which were not applicable in this case.[63] In light of the language of the investigative subpoena and psychotherapist-patient privilege statutes, the court of appeals "detect[ed] no ambiguity tending to suggest that the Legislature envisioned mandatory psychologist disclosure in the absence of patient consent[.]"[64] Accordingly, the court affirmed the trial court's quashing of the subpoenas.[65]

## IV. JUDICIAL NOTICE

Under Rule 201, a court may take judicial notice of adjudicative facts which are "not subject to reasonable dispute in that [they are] either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[66] During the *Survey* period, the Michigan Supreme Court briefly considered Rule 201 in a footnote. In *Smith v. Khouri*,[67] the court considered the appropriate

60. 274 Mich. App. 696, 736 N.W.2d 594 (2007) [hereinafter *Dental Subpoenas*]. Because this case bears the same caption as the case under discussion, for purposes of clarity it is referred to hereafter as "*Dental Subpoenas.*"

61. *See id.* at 703-04, 736 N.W.2d at 599 (discussing MICH. COMP. LAWS ANN. § 333.16648(1) (West 2001)); *see also Attorney General*, 282 Mich. App. at 594-95, 766 N.W.2d at 680 (discussing *Dental Subpoenas*).

62. *Id.* at 594-95, 766 N.W.2d at 680.

63. *See Attorney General*, 282 Mich. App. at 595-96, 766 N.W.2d at 680-81.

64. *Id.* at 596, 766 N.W.2d at 681.

65. *Id.* at 597-98, 766 N.W.2d at 682.

66. MICH. R. EVID. 201(b).

67. 481 Mich. 519, 751 N.W.2d 472 (2008).

method for calculating an award of attorney fees[68] as a mediation sanction. In determining a reasonable fee, the court explained, a trial court must consider a number of factors, including the fee customarily charged for similar legal services in the relevant locality.[69] Although the bulk of the court's decision is beyond the scope of this Article, it is relevant here that the Michigan Supreme Court concluded that the trial court had erred in basing its award on judicial notice of that fact that top attorneys in Oakland County charge $450 or more per hour.[70] Primarily concluding that this reliance was inappropriate because "reasonable fees are different from the fees paid to the top lawyers by the most well-to-do clients,"[71] the court also explained that "the hourly rate charged by top trial attorneys in Oakland County was not a proper fact for judicial notice."[72] The court did not discuss why this was so, beyond quoting the language of Rule 201.[73]

## V. RELEVANCE

With respect to evidentiary issues, the Michigan courts were most active during the *Survey* period in considering issues of general relevance and other acts evidence.

### *A. Relevance and Undue Prejudice Generally*

The rules of relevance are addressed in Article IV of the Michigan Rules of Evidence.[74] Rules 401 and 402 provide the general rules of relevance for the admission of evidence.[75] Rule 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[76] Rule 402 provides, simply, that relevant evidence is admissible (unless otherwise prohibited by the United States or Michigan Constitutions, or

68. As the Sixth Circuit noted in *Stallworth v. Greater Cleveland Regional Transit Authority*, 105 F.3d 252, 253-54 n.1 (6th Cir. 1997), as a threshold matter of style and usage it is not clear whether it is more proper to refer to "attorney fees," "attorneys fees," "attorney's fees," or attorneys' fees." Consistent with the *Smith* court's usage, this Article uses "attorney fees."

69. *See Smith*, 481 Mich. at 529-30, 751 N.W.2d at 479.

70. *See id.* at 533, 751 N.W.2d at 481.

71. *Id.*

72. *Id.* at 533 n.18, 751 N.W.2d at 481 n.18.

73. *See id.*

74. MICH. R. EVID 401-03.

75. MICH. R. EVID 401-02.

76. MICH. R. EVID. 401.

other rules of evidence) and irrelevant evidence is not admissible.[77] The remainder of the rules in Article IV establish rules of limited relevance, prohibiting the introduction of otherwise "relevant" evidence under Rules 401 and 402 for various policy reasons. Taken together, Rules 401 and 402 "constitute[] the cornerstone of the . . . evidentiary system."[78]

The threshold established by Rules 401 and 402 is not demanding. Under the rules, an item of evidence that has any probative value, no matter how slight, is relevant and presumptively admissible. In Professor McCormick's famous formulation:

> An item of evidence, being but a single link in the chain of proof, need not prove conclusively the proposition for which it is offered. . . . It is enough if the item could reasonably show that a fact is slightly more probable than it would appear without that evidence. . . . A brick is not a wall.[79]

In other words, under Rules 401 and 402 "[e]vidence is not subject to exclusion solely because its probative value is extremely low. If evidence has any probative value whatsoever, it is relevant and admissible unless otherwise excludable for an affirmative reason."[80]

As noted above, Rules 401 and 402 provide the general rules of relevance, while the remaining rules of Article IV establish rules of limited admissibility based on various policy considerations. The most prominent of these rules of limited admissibility is Rule 403, which provides that otherwise relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[81] "The underlying premise of the [r]ule is that certain relevant evidence should not be admitted to the trier of fact where the admission would result in an adverse effect upon the effectiveness or

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77. *See* MICH. R. EVID. 402.

78. GLEN WEISSENBERGER & JAMES J. DUANE, FEDERAL EVIDENCE § 401.1, at 73 (4th ed. 2001) [hereinafter WEISSENBERGER]. Professor Weissenberger discusses the Federal Rules of Evidence and the federal evidentiary system. However, Michigan Rules 401 and 402 are substantively identical to Federal Rules 401 and 402. Michigan courts look to federal courts when analyzing these rules. *See, e.g.*, People v. Hall, 433 Mich. 573, 581, 447 N.W.2d 580, 583 (1989).

79. MCCORMICK, *supra* note 3, § 185. The Michigan Supreme Court has cited approvingly Professor McCormick on this point. *See* People v. Brooks, 453 Mich. 511, 519, 557 N.W.2d 106, 109-10 (1996).

80. WEISSENBERGER, *supra* note 78, § 401.3, at 75; *see also* JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 17-18 (1827).

81. MICH. R. EVID. 403.

integrity of the fact finding process."[82] Because the question of undue prejudice under Rule 403 is inextricably bound to a determination of the probative value of the evidence, Rule 403 determinations in large part derive from general relevance determinations under Rules 401 and 402. It is therefore appropriate to consider all three rules together. During the *Survey* period, the Michigan courts issued eight published decisions addressing these general principles of relevance, five arising in civil cases and three in criminal cases.

The court of appeals considered the rules of relevance and undue prejudice in *Taylor v. Mobley*,[83] a case brought under the Michigan dog-bite statute[84] for injuries sustained when the defendant's pit bull bit the plaintiff. The jury ruled in the plaintiff's favor, but declined to award noneconomic damages for pain and suffering.[85] On appeal, the plaintiff argued that the trial court had erred in excluding, under Rule 403, evidence that the dog that bit her was a pit bull.[86] The court of appeals disagreed, concluding that the trial court had not abused its discretion in prohibiting evidence relating to the type of dog that attacked her.[87] The court noted the trial court's ruling that "while the size of the dog is relevant, the fact that the dog is a pit bull is irrelevant to the issue of damages . . . ."[88] The court also noted the trial court's concern that, given the reputation of pit bulls, evidence that the dog in question was a pit bull could be given undue weight by the jury and cause the jury to confuse the issues of liability and damages.[89] The court of appeals explained that

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82. WEISSENBERGER, *supra* note 78, § 403.1, at 85-86. As Professor Weissenberger notes, the policy underlying Rule 403 is the same as that underlying the remaining rules of limited admissibility set forth in Article IV of the Rules of Evidence. These other rules "represent applications of the balancing of relevancy and countervailing adverse effects which have recurred with sufficient frequency to have resulted in a specific rule." *Id.* at 86; *see also* 22 WRIGHT & GRAHAM, *supra* note 18, §5235, at 340 (providing that the rules of limited admissibility "emerged from repeated applications of the doctrine of relevance to recurrent patterns in the use of circumstantial evidence"). Rule 403 is thus akin to the "catch-all" exception to the hearsay rule.

83. 279 Mich. App. 309, 760 N.W.2d 234 (2008).

84. MICH. COMP. LAWS ANN. § 287.351 (West 2003). The statute provides:

> If a dog bites a person, without provocation while the person is on public property, or lawfully on private property, including the property of the owner of the dog, the owner of the dog shall be liable for any damages suffered by the person bitten, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness.

*Id.*

85. *See Taylor*, 279 Mich. App. at 310, 760 N.W.2d at 236.

86. *Id.*

87. *Id.* at 310, 760 N.W.2d at 239.

88. *Id.* at 315-16, 760 N.W.2d at 239.

89. *See id.* at 316, 760 N.W.2d at 239.

the plaintiff's interest in presenting evidence of her noneconomic damages was accommodated by the trial court's ruling allowing her to describe both the size of the dog and the nature of the attack.[90] Viewing the evidentiary issue as a close question, "and precisely because this is a close question,"[91] the court of appeals concluded that the trial court did not abuse its discretion in prohibiting evidence that the dog that bit the plaintiff was a pit bull.[92]

Judge Gleicher dissented from the court's decision. In Judge Gleicher's view, the trial court had failed to properly apply Rule 403's requirement that the prejudicial nature of the evidence *substantially* outweigh the probative value of the evidence. Judge Gleicher reasoned that because the plaintiff "was attacked by a pit bull, not a toy poodle,"[93] evidence that the dog was a pit bull "had strong probative value in substantiating plaintiff's fear and shock during the attack, and the risk of any undue prejudice was minimal."[94] Therefore, in her view, the risk of unfair prejudice did not substantially outweigh the probative value of the evidence that the dog was a pit bull, and the trial court erred in excluding the evidence under Rule 403.[95]

The Michigan Court of Appeals also considered the rules of relevance in *Morales v. State Farm Mutual Automobile Insurance Co.*[96] In that case, the plaintiff was injured on June 12, 2002, when the truck he was driving as part of his business rolled over.[97] He was diagnosed with a closed head injury, but returned to work in a supervisory capacity in November 2002.[98] The defendant insurance company initially paid the plaintiff three months' of work-loss benefits, but paid no other no-fault insurance benefits.[99] The plaintiff subsequently suffered angina and a transient ischemic attack.[100] In November 2003, the plaintiff sought

90. *See id.*

91. *Taylor*, 279 Mich. App. at 316, 760 N.W.2d at 239.

92. *Id.*

93. *Id.* at 322, 760 N.W.2d at 242 (Gleicher, J., dissenting).

94. *Id.* at 322-23, 760 N.W.2d at 242.

95. *See id.* at 323, 760 N.W.2d at 242.

96. 279 Mich. App. 720, 761 N.W.2d 454 (2008) (per curiam), *leave to app. denied*, 483 Mich. 877, 759 N.W.2d 211 (2009). *Morales* was decided four days prior to this *Survey* period, but was not released for publication until July of this *Survey* period and was not discussed in last year's *Survey*. Accordingly, it is discussed in this Article. *Morales* also considered an issue regarding expert testimony, which is addressed *infra* notes 464-86 and accompanying text.

97. *Morales*, 279 Mich. App. at 722, 761 N.W.2d 456-57.

98. *Id.*

99. *Id.* at 721-22, 761 N.W.2d at 456-57.

100. *Id.* at 723, 761 N.W.2d at 457.

pension benefits from the Department of Veterans Affairs (VA).[101] The initial letter prepared by the plaintiff's treating physician claimed that the plaintiff suffered from a number of medical problems, but did not mention the vehicle accident or the plaintiff's closed head injury.[102] In a December 14, 2003, letter, the plaintiff's treating physician included his motor vehicle accident and resulting closed head injury as a basis of the plaintiff's disability.[103] The VA eventually awarded benefits to the plaintiff.[104]

In the meantime, the plaintiff brought an action against the defendant seeking personal protection insurance benefits (PIP benefits) pursuant to his no-fault insurance policy and the no-fault statute.[105] As explained by the court of appeals, the principle issue at trial was whether "plaintiff's inability to work and his need for attended care [were] causally related to injuries he received in the June 12, 2002, rollover accident," as the plaintiff argued, or whether he had "recovered from any auto-accident injuries by November 2002 and subsequently become disabled by his preexisting diabetes-related diseases that gave rise to the 100 percent VA disability rating," as defendant argued.[106] The plaintiff presented a number of medical witnesses who testified as to his closed head injury and its disabling effect and the defendant presented some conflicting medical evidence.[107] The jury returned a verdict in favor of the plaintiff, finding that he had suffered an injury in the rollover accident and awarding over $300,000 in compensatory damages, and an additional $62,786.00 in penalty interest under section 500.3142.[108]

Amongst other issues, on appeal the defendant argued that the trial court erred in allowing the plaintiff to introduce, through a former claims executive and cross-examination of the defendant's employees, evidence

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101. *Id.* at 723-24, 761 N.W.2d at 457.

102. *Morales*, 279 Mich. App. at 723, 761 N.W.2d at 457.

103. *See id.* at 724, 761 N.W.2d at 457.

104. *See id.*

105. *See id.* at 721-22, 761 N.W.2d at 456. Pursuant to the no-fault act, "[u]nder personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter." MICH. COMP. LAWS ANN. § 500.3105(1) (West 2002).

106. *Morales*, 279 Mich. App. at 725, 761 N.W.2d at 458.

107. *See id.* at 726-28, 761 N.W.2d at 458-59.

108. *Id.* at 722, 761 N.W.2d at 456. Section 500.3142 provides that PIP benefits "are payable as loss accrues," MICH. COMP. LAWS ANN. § 500.3142(1) (West 2002), and that PIP benefits "are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained." MICH. COMP. LAWS ANN. § 500.3142(2). Overdue payments are charged simple interest at a yearly rate of twelve percent. *See* MICH. COMP. LAWS ANN. § 500.3142(3).

regarding the manner in which the defendant had processed the plaintiff's claim.[109] The trial court concluded that the evidence was relevant to whether the plaintiff had submitted reasonable proof of loss entitling him to statutory penalty interest under section 500.3142.[110] The court of appeals affirmed, rejecting the defendant's argument that the evidence was irrelevant because it was liable for penalty interest if it had failed to timely pay benefits, regardless of whether it acted in good or bad faith.[111] Although agreeing with the underlying premise of the defendant's argument, the court of appeals rejected the conclusion that this premise made the claims-handling evidence irrelevant.[112] The court explained that under section 500.3142, the plaintiff bore the burden of proving to the jury both that he had provided reasonable proof of loss and that the defendant had failed to pay within thirty days of receiving such proof of loss, and thus the claims handling evidence focusing on what information the plaintiff had provided to the defendant was relevant to an issue in the case.[113] Further, the court of appeals concluded that the evidence also was relevant to the causation issue.[114] Noting that "[a] material fact need not directly prove an element of a claim or defense provided it is within the range of litigated matters in controversy,"[115] the court reasoned that one fact at issue in the case was whether the defendant had fairly reviewed the plaintiff's claim.[116] The court explained that this issue was relevant because, if believed by the jury, plaintiff's theory of the case — that he had a valid claim for PIP benefits that was not properly handled, rather than an invalid claim for benefits — would be more likely to be true than without the evidence of the improper claims handling.[117] "The evidence," the court explained, "was a brick in the wall that was plaintiff's case."[118] Accordingly, the court of appeals found no abuse of discretion in the trial court's admission of this evidence.[119]

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109. *Morales*, 279 Mich. App. at 728-30, 761 N.W.2d at 460-61.

110. *Id.* at 729, 761 N.W.2d at 460.

111. *See id.* at 730, 761 N.W.2d at 460.

112. *Id.* at 730-31, 761 N.W.2d at 461.

113. *See id.*

114. *Id.* at 730-32, 761 N.W.2d at 461-62.

115. *Morales*, 279 Mich. App. at 731, 761 N.W.2d at 461.

116. *Id.*

117. *See id.* at 731-32, 761 N.W.2d at 461.

118. *Id.* at 732, 761 N.W.2d at 461.

119. *Id.* The court of appeals also briefly rejected the defendant's argument that this evidence was more prejudicial than probative and should have been excluded under Rule 403. The court reasoned that this argument was joined with the defendant's argument that plaintiff's counsel had made improper argument, but defendant had not properly preserved this challenge. The court also concluded that even if the evidence was

The court of appeals next considered issues of general relevance in *Sherman-Nadiv v. Farm Bureau General Insurance Co.*[120] In that case, the plaintiffs owned several rental properties, including a house in Hazel Park that was insured by the defendant.[121] The property became vacant in the fall of 2003, and the plaintiffs commenced renovation work in order to obtain relicensure by the city.[122] They were issued a landlord license by the city on April 29, 2004, and two days later rented the house to a new tenant.[123] That tenant failed to pay the balance of the first month's rent, and one of the plaintiffs saw that the house was unoccupied when he went to collect the balance. Although some of the lessee's belongings were apparently in the house during May 2004, there was evidence that the house was unoccupied during that month.[124] Late in May, a neighbor reported to one of the plaintiffs that there was damage to the ceiling in the living room and dining room of the house.[125] When one of the plaintiffs entered, she discovered extensive water damage caused by a water-line break.[126] The plaintiffs filed a claim for loss, stating May 29, 2004, as the date of loss. The defendant denied the claim, and the plaintiffs filed an action to recover under the insurance contract.[127]

The insurance contract at issue contained a clause covering accidental discharge of water, however this clause excluded loss "'if the dwelling has been vacant for more than thirty consecutive days immediately before the loss. A dwelling being constructed is not considered vacant.'"[128] At trial, the defendant asserted that the plaintiffs had engaged in fraud or misrepresentation in presenting their claim.[129] The jury rejected this defense, but determined that the house was vacant for more than thirty consecutive days preceding the date of loss.[130] The plaintiffs appealed, arguing inter alia that the trial court had erred in granting the defendant's motion to exclude evidence that the house was being "constructed," and thus was not "vacant" under the terms of the policy.[131] The court of appeals rejected this argument, for two reasons.

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improperly admitted, the error did not require reversal. *See id.* at 732, 761 N.W.2d at 461-62.

120. Mich. App. 75, 761 N.W.2d 872 (2008) (per curiam).

121. *Id.* at 76, 761 N.W.2d at 874.

122. *Id.*

123. *Id.*

124. *Id.* at 76-77, 761 N.W.2d at 874.

125. *Id.*

126. *Sherman-Nadiv*, 282 Mich. App. at 76-77, 761 N.W.2d 874.

127. *See id.*

128. *Id.* at 79, 761 N.W.2d at 875 (quoting policy language).

129. *Id.* at 77, 761 N.W.2d at 874.

130. *See id.*

131. *See id.*

First, the court explained that the policy language "being constructed" suggested that the contract contemplated "that a house being erected (that is, built from the ground up) is not considered vacant pursuant to the policy exclusion."[132] The court found that this language was unambiguous and that, had the parties intended to include renovation or repair work, they would have used that language in the contract.[133] Thus, the renovation evidence was irrelevant to the issues in the case.[134] Second, the court concluded that the renovation work was irrelevant even accepting the plaintiff's broader construction of the term "being constructed."[135] The court explained that "there was no indication that any construction or repair work had been performed at the house in the thirty days preceding the loss,"[136] which was the relevant time period under the insurance contract.[137] Thus, evidence of repair work prior to the 30 days preceding the loss was simply irrelevant.

In *Lanigan v. Huron Valley Hospital*,[138] the court considered the relevance of statistical evidence in a medical malpractice case. The plaintiff in *Lanigan* collapsed while jogging, and an ambulance called by a bystander transported her to the defendant Huron Valley Hospital.[139] In the emergency room, the plaintiff was seen by defendant Dr. Belen, who ordered an echocardiogram.[140] The echocardiogram suggested that the plaintiff had suffered a heart attack, and Dr. Belen administered dopamine.[141] However, no arrangements were made to transfer the plaintiff to a hospital capable of performing bypass surgery.[142] Prior to administering treatment to reduce blood clots, Dr. Belen ordered a CAT scan of plaintiff's head to rule out an aneurysm.[143] When the results came back negative, Dr. Belen administered an anti-clotting drug.[144] By this point, the plaintiff had been in the hospital for over six hours.[145] Because the plaintiff's condition failed to stabilize, Dr. Belen eventually decided to transfer her to a hospital capable of performing a bypass.[146] The

132. *Sherman-Nadiv*, 282 Mich. App. at 79, 761 N.W.2d at 875.
133. *See id.*
134. *Id.* at 79-80, 761 N.W.2d at 875-76.
135. *Id.*
136. *Id.* at 80, 761 N.W.2d at 876.
137. *Id.*
138. 282 Mich. App. 558, 766 N.W.2d 896 (2009).
139. *Id.* at 560, 766 N.W.2d at 897.
140. *Id.* at 560-61, 766 N.W.2d at 897-98.
141. *Id.*
142. *Id.* at 561, 766 N.W.2d at 898.
143. *Id.*
144. *Lanigan*, 282 Mich. App. at 561, 766 N.W.2d at 898.
145. *Id.*
146. *Id.*

plaintiff was transferred to Beaumont Hospital, where she arrived nearly twelve hours after first arriving at Huron Valley Hospital.[147] The Beaumont doctors determined that a bypass could not be performed because there had been irreparable damage to the plaintiff's heart tissue.[148] The plaintiff was eventually transferred to the University of Michigan Hospital, where she received a heart transplant.[149]

The plaintiff brought a medical malpractice action against Huron Valley Hospital and Dr. Belen, alleging both a traditional medical malpractice claim that the defendants had breached the appropriate standard of care, and a lost opportunity claim that the defendants caused her to lose a greater than 50-percent chance of achieving a better result, that is, bypass surgery and a longer life expectancy, rather than heart transplant and a shorter life expectancy.[150] The defendant moved for summary disposition, arguing that there was no issue of fact with respect to whether the plaintiff suffered a greater than 50-percent lost opportunity to achieve a better result.[151] On the contrary, the defendants argued, plaintiff's opportunity to survive actually increased because heart transplant recipients have a 65-percent ten-year survival rate, while patients (such as plaintiff) suffering from cardiogenic shock have only a 30-percent survival rate.[152] The trial court granted the defendants' motion for summary disposition, and the plaintiff appealed.[153]

Most of the court of appeal's opinion discusses the sufficiency of the plaintiff's evidence regarding her lost opportunity and traditional medical malpractice claims, and is beyond the scope of this Article.[154] The court

147. *Id.*

148. *Id.*

149. *See id.* at 560-61, 766 N.W.2d at 897-98.

150. *See Lanigan*, 282 Mich. App. at 562, 766 N.W.2d at 898. Under the lost opportunity doctrine, a plaintiff may recover for malpractice even where the malpractice did not cause the plaintiff's injuries, but merely prevented the plaintiff from achieving a result better than she would have had in the absence of negligence. *See id.* at 565, 766 N.W.2d at 900. By statute, however, a plaintiff may recover only if the chance of a greater result exceeds 50%. *See* MICH. COMP. LAWS ANN. § 600.2912a(2) (West 2000).

151. *See Lanigan*, 282 Mich. App. at 562, 766 N.W.2d at 898-99. As the court of appeals noted, the defendants' motion for summary disposition attacked only the lost opportunity claim, and did not address the plaintiff's traditional medical malpractice claim. *See id.* at 562-63 n.4, 766 N.W.2d at 899 n.4.

152. *See id.* at 562-63, 766 N.W.2d at 899.

153. *Id.*

154. With respect to these issues, the court of appeals determined that the plaintiff's expert's opinion that the plaintiff would have suffered no functional deficit if she had received a bypass was sufficient to show that she had a greater than fifty percent chance of a better result, and that the trial court erred in granting summary disposition on the traditional negligence claim because the defendants' motion did not argue for summary judgment on this claim. *See id.* at 567-70, 766 N.W.2d at 901-02.

did, however, briefly consider an evidentiary issue arising in the context of the defendants' motion for summary disposition. The defendants argued that the plaintiff's opportunity to survive increased because heart transplant recipients have a 65-percent ten-year survival rate, while patients with cardiogenic shock have only a 30-percent survival rate, and the trial court relied on these statistics in granting summary disposition to the defendants.[155] The court of appeals found that the trial court had erred in relying in this evidence, because it was irrelevant.[156] The court explained that the plaintiff's expert testified that the 70-percent mortality rate applied to all patients, including those in otherwise poor health.[157] Thus, the mortality rate for those suffering from cardiogenic shock "was not limited to those similarly situated to plaintiff."[158] The court concluded that "[w]ithout some connection to the plaintiff, the statistical evidence was, in the context offered and standing alone, only marginally relevant and was an improper basis upon which to grant summary disposition."[159]

In *Shaw v. City of Ecorse*,[160] the court of appeals considered consolidated actions brought by a City of Ecorse fire captain and the former police chief. The plaintiff John Bedo was a fire captain and temporary fire chief with the city.[161] On June 9, 2006, Chief Ronald French issued an order reducing the number of on-duty firefighters, and Bedo issued a department report objecting to the order.[162] Four days later, Bedo testified in a case brought by former chief Ronald Lammers against the city alleging racial discrimination.[163] After a jury returned a verdict in favor of Lammers, French warned Bedo that the city would "go after" him.[164] Ten days later, Mayor Larry Salisbury brought several disciplinary charges against Bedo.[165] Bedo retired in July 2006, and in the same month brought a whistleblowers action against the city, alleging that he was disciplined and forced to retire because of his testimony at the Lammers trial.[166]

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155. *See id.* at 563-64, 766 N.W.2d at 899.
156. *Lanigan*, 282 Mich. App.at 564, 766 N.W.2d at 900.
157. *Id.* at 564-65, 776 N.W.2d at 899.
158. *Id.* at 564, 766 N.W.2d at 899.
159. *Id.* at 564, 766 N.W.2d at 899-900 (footnote omitted).
160. 283 Mich. App. 1, 770 N.W.2d 31 (2009).
161. *Id.* at 3, 770 N.W.2d at 34.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.* at 4, 770 N.W.2d at 34-35.
166. *Shaw*, 283 Mich. App. at 2-4, 770 N.W.2d at 34-35.

The second plaintiff, Robert Shaw, was appointed deputy chief in 1999.[167] He was appointed police chief in 2001, when he was sixty years old.[168] In June 2004, a city attorney sent a letter to Mayor Salisbury interpreting the city charter as requiring the retirement of any firefighter or police officer at age sixty, and advising the mayor that continued employment of Shaw as police chief would violate the city charter.[169] On August 2, 2004, the city counsel voted to end Shaw's employment.[170] Shaw sent a letter to the mayor and council objecting to his removal, but requesting back pay, compensation for accrued leave, and a pension plan transfer.[171] The city initially denied all of his requests, but subsequently granted him fifty percent of his pension.[172] Shaw filed a suit against the city, alleging breach of contract and age discrimination.[173] The trial court granted summary disposition to the city on Bedo's whistleblower claim, but denied summary disposition on Shaw's claims.[174] After a trial, the jury returned a verdict in favor of Shaw, and the trial court denied the city's postjudgment motions.[175]

On appeal the city argued that the trial court erred in admitting irrelevant evidence regarding the July 2004 filling of the deputy chief position in the Ecorse Police Department.[176] James Francisco, who was sixty years old at the time of the vacancy, testified that he applied for the position and, prior to an interview, was asked by Councilwoman Julie Cox how old he was. When he gave his age, he was told by Councilman Nathaniel Elem that he was too old for the position.[177] Willie Tolbert, who was sixty-three years old at the time, similarly testified that he applied for the deputy chief position but was never interviewed.[178] When he asked Elem about the position, Elem told him that he was too old and gave him a copy of the city charter.[179] The court of appeals rejected the city's argument, concluding that "Elem's statements about Francisco and Tolbert's ages were relevant to establishing that age was a determining factor in Shaw's removal as police chief."[180]

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167. *Id.* at 5, 770 N.W.2d at 35.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* at 5-6, 770 N.W.2d at 35-36.
172. *Shaw*, 283 Mich. App. at 6, 770 N.W.2d at 36.
173. *See id.* at 5-6, 770 N.W.2d at 35-36.
174. *Id.* at 6-7, 770 N.W.2d at 36.
175. *See id.* at 6-7, 770 N.W.2d at 36.
176. *Id.* at 24, 770 N.W.2d at 45.
177. *Id.*
178. *Shaw*, 283 Mich. App. at 24, 770 N.W.2d at 45.
179. *See id.* at 24, 770 N.W.2d at 45.
180. *Id.* at 25, 770 N.W.2d at 46.

The court reasoned that, as part of his age discrimination claim, Shaw was required to prove that his removal was motivated by his age.[181] Because Elem was a city council member, he was an active decision-maker, and thus his reasons for voting to remove Shaw were relevant.[182] Further, his statements were relevant because they conflicted with his trial testimony: at trial he testified that he was not motivated by Shaw's age in voting to remove Shaw, but he "unambiguously informed both Francisco and Tolbert, on separate occasions, that they did not qualify for the deputy chief position because of their ages and used the city charter as a justification."[183] The court also rejected the city's argument that the evidence was irrelevant because it related to the deputy chief position whereas Shaw was the chief, reasoning that both positions were senior level positions in the police department and involved the same decision makers.[184] Finally, the court rejected the city's argument that the evidence was unfairly prejudicial under Rule 403.[185] The court reasoned that the evidence was highly relevant, and there was no indication that the jury gave the evidence any undue weight or was misled by the evidence.[186]

In *People v. Blackston*,[187] the supreme court considered whether the trial court erred in excluding, under Rule 403, evidence that two witnesses in a criminal case had recanted their prior testimony. The defendant was charged with the first degree murder of Charles Miller in 1988.[188] The murder had remained unsolved until 2000, when Charles Lamp led police to the victim's body.[189] At the defendant's first trial in 2001, Lamp and Guy Simpson both testified against the defendant, Lamp in exchange for a plea of guilty to manslaughter and Simpson in exchange for immunity.[190] Lamp and Simpson each testified that they helped the defendant kill Miller and cut off Miller's ear to show to Benny Williams, a local drug dealer whom Miller had planned to rob.[191] The defendant testified on his own behalf at his first trial, asserting that he was with Miller, Lamp, and Simpson on the night of the murder, but

181. *Id.*
182. *Id.*
183. *Id.* at 26, 770 N.W.2d at 46.
184. *See Shaw,* 283 Mich. App. at 26, 770 N.W.2d at 46.
185. *Id.*
186. *See id.* at 26-27, 770 N.W.2d at 46-47.
187. 481 Mich. 451, 751 N.W.2d 408 (2008).
188. *Id.* at 454-55, 751 N.W.2d at 409-10.
189. *Id.*
190. *Id.* at 455, 751 N.W.2d at 410.
191. *See id.* at 454-55, 751 N.W.2d at 409-10.

that he did not leave the house with them.[192] The defendant's girlfriend, Darlene Zantello, testified that when she returned home that night, the defendant was not present, but later returned with Simpson.[193] Two other witnesses testified that the defendant had confessed his involvement to them, while the defendant's three sisters testified in support of his alibi defense.[194]

Although the defendant was convicted, he was granted a new trial.[195] Prior to the start of the second trial in 2002, Simpson and Zantello gave written statements recanting their testimony in the first trial.[196] Simpson stated that he and Lamp alone committed the murder, and that he had lied to receive favor from the prosecutor, and Zantello claimed that she lied to gain favor with the prosecutor in a separate case brought against her abusive boyfriend.[197] At the second trial, Simpson refused to testify, and Zantello claimed to have no memory of the night of the murder.[198] The trial court ruled that both witnesses were unavailable, and admitted their testimony from the first trial under the former testimony exception to the hearsay rule.[199] The trial court rejected the defendant's request to admit the recanting statements of Simpson and Zantello, concluding that they were not admissible for impeachment purposes and that the prosecutor would be prejudiced by not being able to cross-examine the witness regarding their recantations.[200] Following his conviction at the second trial, the defendant argued that the recanting statements should have been admitted under Rule 806, which allows for impeachment of hearsay declarants.[201] The trial court denied the motion, however, concluding that the evidence nonetheless would have been inadmissible under rule 403.[202]

On appeal, the court of appeals initially reversed, concluding that the evidence was admissible under Rule 806 and any prejudice could have been ameliorated by redacting the statements and giving an appropriate limiting instruction, but the supreme court vacated the court of appeal's decision and remanded for a determination of whether the error was

192. *Id.*
193. *Blackston,* 481 Mich. at 454-55, 751 N.W.2d at 409-10.
194. *See id.* at 455-56, 751 N.W.2d at 410.
195. *Id.*
196. *Id.*
197. *See id.* at 456, 751 N.W.2d at 410.
198. *Id.* at 456-57, 751 N.W.2d at 411.
199. *See Blackston,* 481 Mich. at 456-57, 751 N.W.2d at 411; *see also* MICH. R. EVID. 804(b)(1).
200. *See Blackston,* 481 Mich. at 457, 751 N.W.2d at 411.
201. *See id.*; *see also* MICH. R. EVID. 806.
202. *See Blackston,* 481 Mich. at 457-58, 751 N.W.2d at 411.

harmless.[203] The court of appeals on remand determined that the error was not harmless, and again reversed the defendant's conviction.[204] The prosecutor appealed to the supreme court, which reversed the court of appeal's decision and affirmed the defendant's conviction.[205]

Beginning with the well established principle that Rule 403 balancing determinations are best committed to the discretion of the trial judge,[206] the court explained that the trial judge had found the evidence to have limited probative value because both Zantello and Simpson had been impeached at the first trial and had changed their stories throughout the case.[207] The trial court also found that the statements were highly prejudicial because "Zantello and Simpson did not merely recant their former accusations, but provided lengthy explanations for why they had lied,"[208] which were not subject to cross-examination because the witnesses had rendered themselves unavailable at the second trial. The supreme court found this decision to be reasonable in light of the highly prejudicial nature of the recanting statements and in light of the fact that redaction of the irrelevant or unfairly prejudicial content, which the court of appeals viewed as the proper solution, would have left only evidence which was cumulative.[209]

With respect to Simpson's recanting statement, the court noted that the statement was unsworn, recounted a number of hearsay statements, and accused the prosecutor of forcing him to commit perjury.[210] Simpson's statements thus would have "inject[ed] the specter or prosecutorial corruption into the trial in a manner that the prosecutor could not directly challenge given that Simpson refused to take the stand," and therefore the statements' "potential for misleading or confusing the jury–and, thus, their potential for unfair prejudice–was great."[211] Similarly, with respect to Zantello's statement, she testified that she had perjured herself at petitioner's first trial at the insistence of her abusive boyfriend, but neither she nor the boyfriend were available to testify.[212] Since both Simpson and Zantello were "unwilling or unable to testify regarding the contents of the statements," and because "[t]hey

203. *See id.* at 458, 751 N.W.2d at 411-12 (discussing People v. Blackston, 474 Mich. 915, 705 N.W.2d 343 (2005)).
204. *Id.* at 459, 751 N.W.2d at 412.
205. *Id.* at 473-74, 751 N.W.2d at 420.
206. *See id.* at 462, 751 N.W.2d at 413-14.
207. *See id.*, 751 N.W.2d at 414.
208. *Blackston*, 481 Mich. at 463, 751 N.W.2d at 414.
209. *See id.* at 463, 751 N.W.2d at 414.
210. *Id.* at 463-64, 751 N.W.2d at 414-15.
211. *Id.* at 464, 751 N.W.2d at 415.
212. *See id.*

largely contained unduly prejudicial hearsay and accusations regarding collateral matters,"[213] the evidence was properly excluded under Rule 403.

The court also rejected the court of appeals's suggestion that the recanting statements could have been redacted to remove irrelevant or unduly prejudicial material, because anything left over after such redactions would have been cumulative, as impeachment evidence, to the impeachment evidence already before the jury.[214] For example, the court noted, Simpson's statement included information that he had given inconsistent statements to the police, had been threatened by Lamp if he implicated Lamp, and that he had testified in exchange for immunity.[215] However, each of these facts was brought forth in the cross-examination of Simpson from the first trial, which was read to the jury at the second trial as part of Simpson's former testimony.[216] Similarly, Zantello's statement included information that she had initially told the police that she knew nothing about the murder and that the defendant was home when she got home, but each of these facts was brought out during the first trial on cross-examination, which was read to the jury at the second trial.[217]

In light of these facts, the court concluded that "the admissible portions of both statements were largely cumulative to the remaining evidence relevant to Simpson's and Zantello's credibility, which was presented at both trials," and thus that the "trial judge, who had become familiar with the witnesses over the course of two trials–did not abuse his discretion" when he concluded that the evidence was inadmissible under Rule 403.[218] The court also concluded that any error was harmless.[219] The court noted that the recanting statements could not have been admitted under Rule 806 as substantive evidence, but only for impeachment purposes.[220] This being the case, the most effect that the statements could have had would have been to completely discredit Simpson's and Zantello's inculpatory testimony at the first trial.[221] However, even without this evidence, there was more than sufficient evidence to find

213. *Id.* at 464-65, 751 N.W.2d at 415.
214. *See Blackston*, 481 Mich. at 465, 751 N.W.2d at 415.
215. *Id.* at 465, 751 N.W.2d at 415.
216. *See id.* at 465-66, 751 N.W.2d at 415.
217. *See id.* at 466, 751 N.W.2d at 416.
218. *Id.*, 751 N.W.2d at 416.
219. *Id.*
220. *See Blackston*, 481 Mich. at 469-70, 751 N.W.2d at 417-18.
221. *Id.* at 469-70, 751 N.W.2d at 417-18.

beyond a reasonable doubt that the defendant was guilty of first degree murder as an accomplice.[222]

Justice Markman's dissenting opinion was joined by Justices Kelly and Cavanagh. In Justice Markman's view, the evidence was admissible impeachment of a hearsay declarant under Rule 806 which was not unfairly prejudicial. He reasoned that "[t]he probative value of these statements is evinced by the fact that there is a specific rule of evidence, MRE 806, that provides that this kind of evidence . . . is admissible."[223] Further, the impeachment value of these recanting statements was significantly probative in light of the damaging nature of the prior testimony given by Simpson and Zantello.[224] Justice Markman reasoned that any unfair prejudice was caused by excluding the evidence, because it presented a false picture to the jury by telling the jury that "one witness previously testified that defendant was the shooter and the other one testified that she overheard defendant and a co-defendant talking about blowing somebody's head off" but failing to inform the jury "that the first witness subsequently stated that defendant was not even present when the victim was killed and that the second witness subsequently stated that she never heard defendant talking about the murder."[225] Finally, Justice Markman concluded that the exclusion of the evidence was not harmless, because the remaining evidence against the defendant was not overwhelming and had been impeached, and because of the highly probative nature of the excluded evidence.[226]

In *People v. Murphy*,[227] the defendant was charged with armed robbery and possession of a firearm during the commission of a felony in connection with the Thanksgiving 2003 robbery of Christopher Holman and Tammy Isaac. At the preliminary examination, Holman testified that his car was bumped by a black Dodge Ram pickup truck, and that when he got out to inspect the damage to his car, someone yelled at him to get down and he saw defendant pointing a shotgun at him from the passenger side of the truck.[228] The driver and defendant robbed him and Isaac, and drove away.[229] At trial, the prosecutor sought to introduce evidence relating to a separate carjacking case against the defendant that arose from a carjacking on the day following the robberies at issue in the

222. *See id.* at 470-73, 751 N.W.2d at 418-19.

223. *Id.* at 488, 751 N.W.2d at 427 (Markman, J., dissenting).

224. *See id.*

225. *Id.* at 488-89, 751 N.W.2d at 427.

226. *See Blackston*, 481 Mich. at 489-93, 751 N.W.2d at 428-29.

227. 282 Mich. App. 571, 766 N.W.2d 303 (2009), *leave to appeal denied*, 484 Mich. 869, 769 N.W.2d 688 (2009).

228. *Id.* at 573-74, 766 N.W.2d 306.

229. *See id.* at 573-74, 766 N.W.2d at 306.

case.[230] At the preliminary examination in the carjacking case, Sergeant Ramon Childs testified that he received a report regarding the carjacking and subsequently followed a black Dodge Ram pickup to a gas station.[231] After the pickup had parked at the gas station, one passenger went inside the station, another walked to the rear of the station, and two others remained outside with the vehicle. After the vehicle left, the police stopped the vehicle and arrested the passengers.[232] The police found a shotgun shell in the pickup truck, additional shells in trash cans near the gas pumps at the station, and a sawed-off shotgun in the dumpster behind the station.[233] The prosecutor sought admission of this evidence at the defendant's armed robbery trial, and the defendant objected arguing that there was no evidence to establish that any of the men in the truck had possessed and disposed of the shotgun.[234] The trial court ruled that the prosecutor could present evidence regarding the shotgun shells, but not the shotgun, because no one had testified that they saw any of the men with the shotgun found in the dumpster.[235]

The prosecutor filed an interlocutory appeal, and the court of appeals reversed the trial court's exclusion of the shotgun evidence.[236] The defendant's case then proceeded to trial, and the defendant was found guilty.[237] The defendant appealed, and the court of appeals reversed his conviction, concluding that he had been denied the "assistance of counsel during the prosecutor's interlocutory appeal."[238] However, the supreme court reversed the court of appeal's grant of a new trial, concluding that the defendant was only entitled to a new appeal regarding the evidentiary issue.[239] On remand, the court of appeals concluded that the shotgun evidence was properly admitted.[240]

The court began its discussion by noting that the shotgun evidence was not impermissible other acts evidence under Rule 404(b).[241] Relying on the supreme court's decision in *People v. Hall*,[242] the court of appeals explained that Rule 404(b) is inapplicable because "evidence of the

230. *Id.* at 574-75, 766 N.W.2d at 306.
231. *Id.* at 575-76, 766 N.W.2d at 306-07.
232. *Id.* at 576, 766 N.W.2d at 307.
233. *See Murphy*, 282 Mich. App. at 575-76, 766 N.W.2d at 307.
234. *Id.* at 576-77, 766 N.W.2d at 307.
235. *See id.*
236. *Id.* at 577, 766 N.W.2d at 307.
237. *Id.*
238. *Id.*
239. *See Murphy*, 282 Mich. App. at 577, 766 N.W.2d at 307-08.
240. *Id.* at 583, 766 N.W.2d at 310-11.
241. *Id.* at 578-80, 766 N.W.2d at 308-09.
242. 433 Mich. 573, 447 N.W.2d 580 (1989).

defendant's 'possession of a weapon of the kind used in the offense with which he is charged is routinely determined by courts to be direct, relevant evidence of his commission of that offense.'"[243] Thus, the question before the court was whether the evidence was relevant in light of the lack of direct evidence tying the defendant to the shotgun found in the dumpster.[244] Turning to this question, the court of appeals noted that the test for relevance was not demanding, and requires only a logical connection between the evidence and a fact at issue in the trial.[245] Because the principal issue at trial was the defendant's identity as the man who had exited the black pickup truck and held a shotgun on the victims while he robbed them, "[e]vidence that defendant drove a black Dodge Ram pickup the next day and parked it in proximity to a discarded sawed-off shotgun and with consistent caliber shells tended to prove defendant's identity as one of the assailants who had robbed Holman and Isaac on Thanksgiving Day."[246] This was so, the court reasoned, even in the absence of any direct evidence tying the defendant or the other passengers in the truck to the discarded shotgun.[247] Circumstantial evidence arising from the carjacking and the behavior of the occupants of the truck at the gas station "tended to show that defendant and his fellow passengers participated in a joint enterprise designed to dispose of the contraband," which in turn "logically linked defendant to a sawed-off shotgun."[248] The court of appeals rejected the trial judge's conclusion that direct evidence, rather than circumstantial evidence, linking the defendant to the gun was necessary.[249] The court explained that circumstantial evidence is treated in the same manner as direct evidence,[250] and that a "'logically relevant act is admissible even when the finding of logical relevance requires a long chain of intervening inferences.'"[251]

The court of appeals also rejected the defendant's argument that, even if relevant, the probative value of the shotgun evidence was substantially outweighed by its prejudicial effect under Rule 403.[252] The

243. *Murphy*, 282 Mich. App. at 579, 766 N.W.2d at 309 (quoting *Hall*, 433 Mich. at 580-81, 447 N.W.2d at 583).

244. *Id.* at 580-82, 766 N.W.2d at 309-10.

245. *See id.* at 580, 766 N.W.2d at 309.

246. *Id.*

247. *Id.* at 581, 766 N.W.2d at 309-10.

248. *Id.*

249. *Murphy*, 282 Mich. App. at 581-82, 766 N.W.2d at 310.

250. *See id.* at 582, 766 N.W.2d at 310.

251. *Id.* at 581, 766 N.W.2d at 310 (quoting People v. VanderVliet, 444 Mich. 52, 61, 508 N.W.2d 114, 120 (1993) (internal quotation omitted)).

252. *Id.* at 582-83, 766 N.W.2d at 310-11.

court reasoned that although the shotgun evidence involved a separate carjacking crime, the prosecutor did not present evidence of the carjacking itself to the jury and did not argue to the jury that the defendant should be convicted based on his alleged participation in the carjacking. Further, the trial court gave a limiting instruction regarding the evidence.[253] In light of these factors, the prejudicial effect of the evidence did not substantially outweigh its probative force in tying the defendant to the robbery of Holman and Isaac.[254]

Finally, the court of appeals considered issues of general relevance in *People v. Hill*.[255] In *Hill*, the defendant was convicted of armed robbery and carjacking following a jury trial.[256] At the trial, the victim, who had known the defendant for several months, identified him as the man who had stolen her car and money while threatening her with a gun.[257] Amongst other claims on appeal, the defendant argued that his constitutional right to confront the victim was violated when he was precluded from questioning the victim regarding her drug use, more specifically regarding the particular drugs she used.[258] The court of appeals rejected this claim, concluding that the issues that defendant sought to explore on cross-examination were irrelevant.[259] The court explained that "the victim's drug use was relevant to her ability to perceive and to recall the events that transpired and, therefore, was relevant to her credibility."[260] However, the court noted that the victim had admitted to having a drug habit, and denied using drugs on the day of the crime.[261] The defendant, the court explained, "failed to explain how the victim's drug of choice . . . ha[d] any further bearing on her credibility."[262] In the absence of some evidence that the victim used a particular drug "that had some lingering effects on the victim's perception and memory,"[263] her choice of drug was simply irrelevant and the defendant was therefore not denied his right to confront the witness

253. *See id.* at 583, 766 N.W.2d at 310-11.
254. *See id.*, 766 N.W.2d at 311.
255. 282 Mich. App. 538, 766 N.W.2d 17 (2009). *Hill* also involved a Confrontation Clause issue. This aspect of the case is discussed *infra* notes 706-09 and accompanying text.
256. *Hill*, 282 Mich. App. at 540, 766 N.W. 2d at 21.
257. *See id.*
258. *See id.*
259. *Id.* at 541, 766 N.W.2d at 22.
260. *Id.*
261. *Id.*
262. *Hill*, 282 Mich. App. at 541, 766 N.W.2d at 22.
263. *Id.*

when the trial court precluded cross-examination regarding the victim's drug of choice.[264]

*B. Other Acts Evidence*

*1. Other Acts Evidence Under Rule 404(b)*

After Rule 403, the second significant rule of limited admissibility is reflected in Rule 404(b), which prohibits the introduction of other bad acts evidence.[265] Specifically, the Rule provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.[266]

Unlike the other rules of limited admissibility, however, Rule 404(b) is not primarily grounded in concerns about the low probative value of other acts evidence. On the contrary, such evidence "is objectionable not because it has no appreciable probative value, but because it has too much. The natural and inevitable tendency of the tribunal–whether judge or jury–is to give excessive weight to the [evidence]".[267] It is also thought unfair to make a party refute charges long since grown stale.[268]

The Michigan Supreme Court has established a four-part test for determining the admissibility of other acts evidence. In order to be admissible under this test: (1) the evidence must be relevant for a purpose other than the defendant's propensity to commit the charged crime — *i.e.*, it must be admitted for one of the permissible purposes listed in Rule 404(b)(1); (2) the evidence must be relevant under Rule 401; (3) the danger of unfair prejudice must not substantially outweigh

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264. *See id.*

265. MICH. R. EVID. 404(b).

266. MICH. R. EVID. 404(b)(1). The rule also provides that, in a criminal case, the prosecution must provide notice to the defendant of its intent to introduce other acts evidence. *See* MICH. R. EVID. 404(b)(2).

267. 1A WIGMORE, *supra* note 22, § 58.2, at 1212 (Peter Tillers rev. ed. 1983); *see also* Michelson v. United States, 335 U.S. 469, 475-76 (1948).

268. *See* People v. Zackowitz, 172 N.E. 466, 468-69 (N.Y. 1930) (Cardozo, J.); *see also* 1A WIGMORE, *supra* note 22, § 58.2, at 1212-13.

the probative value of the evidence under Rule 403; and (4) the trial court must give a limiting instruction upon the request of the party against whom the evidence is offered.[269] Although developed in the context of a criminal case, the *VanderVliet* test applies equally to other acts evidence offered in civil trials.[270]

Further, while the exclusionary principle established by Rule 404(b) is important, often more important are the rule's enumerated exceptions. "While the general rule of exclusion is often applauded–and occasionally enforced–it is the exceptions that are of most practical significance."[271] This is particularly true under the view, adopted by the Michigan Supreme Court, that Rule 404(b) reflects a doctrine of inclusion, rather than exclusion.[272] Under this view, Rule 404(b) generally *permits* the introduction of other acts evidence, unless it is offered solely for the impermissible purpose identified in the first sentence of Rule 404(b). In other words, "the first sentence of Rule 404(b) bars not evidence as such, but a theory of admissibility."[273] During the *Survey* period, the Michigan Court of Appeals issued three published decisions involving Rule 404(b) evidence.

In *People v. Steele*,[274] the defendant was convicted of multiple counts of criminal sexual conduct involving sexual activity with minors under thirteen years old, arising from the sexual assaults of three grandchildren of the defendant's girlfriend.[275] The prosecutor presented significant

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269. *See* People v. Vandervliet, 444 Mich. 52, 74-75, 508 N.W.2d 114, 126 (1993). This test is similar to the test employed by federal courts under Federal Rule of Evidence 404(b). *See* United States v. Trujillo, 376 F.3d 593, 605 (6th Cir. 2004).

270. *See* Elezovic v. Ford Motor Co., 259 Mich. App. 187, 206, 673 N.W.2d 776, 788 (2004), *aff'd in part and rev'd in part on other grounds*, 472 Mich. 408, 697 N.W.2d 851 (2005); Lewis v. LeGrow, 258 Mich. App. 175, 208, 670 N.W.2d 675, 694-95 (2003).

271. 22 WRIGHT & GRAHAM, *supra* note 18, § 5232, at 429-31 (footnotes omitted).

272. *See* People v. Engelman, 434 Mich. 204, 213, 453 N.W.2d 656, 661 (1990).

273. United States v. Crowder, 141 F.3d 1202, 1206 (D.C. Cir. 1998); *see also* 1A WIGMORE, *supra* note 22, § 215, at 1868-69 (noting that otherwise impermissible character evidence is not excluded where admissible for another purpose because "[t]he well-established principle of multiple admissibility . . . declares that the inadmissibility of an evidential fact for one purpose does not prevent the admissibility for any other purpose otherwise proper"). For a more complete discussion of the conflicting exclusionary and inclusionary views of Rule 404(b), *see* 22 WRIGHT & GRAHAM, *supra* note 18, § 5239; Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 BYU L. REV. 1547, 1557-64 (1998); Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938).

274. 283 Mich. App. 472, 769 N.W.2d 256 (2009) (per curiam). *Steele* also discusses an issue involving expert testimony. This aspect of the case is discussed *infra* notes 453-63 and accompanying text.

275. *See Steele*, 283 Mich. App. at 475-76, 769 N.W.2d at 261.

other acts evidence at trial.[276] First, the victims testified regarding the defendant's sexual conduct, and their testimony included some acts which had not been charged against the defendant.[277] Second, the victims' aunt and mother both testified to acts of sexual misconduct committed against them by the defendant.[278] Specifically, the aunt testified that when she was young the defendant had squeezed water out of her bathing suit top while she was wearing it, had put his hand up her shirt and down her pants while she was in the bathroom, and had placed his hands on her thighs near her genitalia while they were riding a dirt bike.[279] The mother testified that one time when she was ill, the defendant had rubbed her arms and legs and attempted to put his hands up her shirt.[280] Third, in rebuttal, the victims' mother testified that the defendant had previously gained a reputation in his church for having inappropriate sexual contact with young girls in the church.[281]

On appeal, the defendant argued that this evidence was impermissible other acts evidence barred by Rule 404(b).[282] The court of appeals disagreed, and affirmed his convictions.[283] The court began its analysis by noting that, when other acts evidence is offered to show a common scheme or plan, all that is required is logical relevance.[284] That is, "[t]he evidence of uncharged acts 'need only to support the inference that the defendant employed the common plan in committing the charged offense,'"[285] and need not be particularly distinctive.[286] Turning to the evidence before it, the court of appeals concluded that the other acts evidence introduced at the defendant's trial was logically relevant to show a common scheme or plan, and thus was admissible under Rule 404(b).[287] The court explained that the defendant's common scheme included less extensive forms of sexual contact in public settings, and "[s]ome of the other acts evidence consisted of other sexual acts in these kinds of public areas, including in the living room, the bathroom, or the bedroom, where there were spaces in the door through which others

276. *Id.* at 475, 769 N.W.2d at 261.
277. *Id.*
278. *Id.*
279. *Id.* at 477, 769 N.W.2d at 262.
280. *Id.*
281. *See Steele*, 283 Mich. App. at 477-78, 769 N.W.2d at 262.
282. *Id.* at 493, 769 N.W.2d at 270.
283. *Id.* at 480, 769 N.W.2d at 264.
284. *Id.*
285. *Id.* at 479, 769 N.W.2d at 263 (quoting People v. Hine, 467 Mich. 242, 253, 650 N.W.2d 659, 665 (2002)).
286. *See id.*
287. *Steele,* 283 Mich. App. at 479-80, 766 N.W.2d 263.

might see."[288] Although there were some dissimilarities between the other acts and the crimes for which the defendant was on trial, the court explained that "a high degree of similarity is not required, nor are distinctive or unusual features required to be present in both the charged and the uncharged acts."[289] Accordingly, the trial court did not err in allowing the evidence under Rule 404(b).

The court of appeals considered a similar issue in *People v. Smith*.[290] In that case, the defendant was convicted of three counts of criminal sexual conduct arising from the sexual assault of his ten to eleven year old daughter.[291] The victim testified that, while she was in the fourth grade, the defendant twice came into her room, pulled down her pants, and penetrated her vagina with his penis, and once put his hand under her shirt and touched her chest.[292] The victim's stepsister, "LL," also testified that while she was living in the same home as the defendant when she was eleven to fifteen years old he exposed his penis to her on three occasions.[293] The court of appeals initially denied the defendant's delayed application for leave to appeal, but the supreme court remanded the case to the court of appeals for consideration as on leave granted, specifically directing the court of appeals to consider whether LL's testimony was admissible either under Rule 404(b) or the prior sexual conduct statute.[294] With respect to the Rule 404(b) issue, the court of appeals rejected the defendant's claim and concluded that LL's testimony was properly admitted.[295]

The court noted that there were a number of similarities between the charged conduct and the uncharged acts testified to by LL.[296] Specifically, in both cases the victims were about the same age and both had a father-daughter relationship with the defendant.[297] Thus, the evidence supported "a finding that the charged and uncharged acts were part of defendant's common plan or system to act out sexually with preteen girls living in the same household, over whom he had parental

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288. *Id.* at 480, 769 N.W.2d at 263.

289. *Id.*

290. 282 Mich. App. 191, 772 N.W.2d 428 (2009). *Smith* also considered a question relating to the prior sexual conduct statute. This aspect of the case is discussed *infra* notes 335-59 and accompanying text.

291. *Smith*, 282 Mich. App. at 193-94, 772 N.W.2d at 431-32.

292. *Id.*

293. *See id.*

294. *See id.* at 193, 772 N.W.2d at 428 (discussing *People v. Smith*, 480 Mich. 1059, 743 N.W.2d 914 (2008)).

295. *Id.* at 197-98, 772 N.W.2d at 433-34.

296. *Id.*

297. *See Smith*, 282 Mich. App. at 197, 772 N.W.2d at 428.

authority."[298] The court noted that there were differences between the acts — the charged acts involved penetration and the victim was told not to tell anyone about the acts, whereas LL's testimony involved only indecent exposure and no evidence that she had been told to keep the matter secret; however, the court concluded that "these differences do not compel the conclusion that the charged and uncharged acts were so dissimilar to preclude admission for purposes of showing a common plan or system."[299] Rather, these differences merely showed that the evidentiary issue was a close one on which reasonable people could disagree, and in light of the closeness of the question it could not be said that the trial court had abused its discretion in admitting the evidence.[300]

The court of appeals also considered other acts evidence in *Guerrero v. Smith*.[301] In that case, the plaintiff alleged that he suffered a closed head injury and back and neck problems as a result of being struck from behind in chain-reaction accident caused by defendant Glen Smith's car, which was being driven by defendant Derek Smith.[302] He brought a third-party action under the no-fault act, alleging negligence on the part of Derek Smith.[303] A jury returned a verdict in favor of the defendants, and the plaintiff appealed.[304] The plaintiff argued on appeal that defense counsel improperly cross-examined him regarding his past marijuana use.[305] The court of appeals rejected this claim, concluding that defense counsel had not acted improperly.[306] The court noted that a party may not, under Rule 404(b), use specific instances of conduct to prove bad character and action in conformity therewith.[307] However, consistent with the inclusionary approach to Rule 404(b) evidence, the court found that the evidence of the plaintiff's past marijuana use was not barred by Rule 404(b) because it was not offered to show the plaintiff's character.[308] Rather, "defense counsel's questions were designed to determine

298. *Id.*

299. *Id.*

300. *See id.* at 197-98, 772 N.W.2d at 433-34.

301. 280 Mich. App. 647, 761 N.W.2d 723 (2008) (per curiam). *Guerrero* also discussed issues of character evidence of a witness and hearsay. These aspects of the case are discussed *infra* notes 415-24 and accompanying text (character evidence) and *infra* notes 605-14 and accompanying text (hearsay).

302. *See* Guerrero v. Smith, No. 268477, 2006 WL 2419178 at *1 (Mich. Ct. App., Aug. 22, 2006).

303. *See id.* at *1. The facts are not set forth in the opinion under discussion here, and are taken from this prior appeal in the case.

304. *See Guerrero*, 280 Mich. App. at 651, 761 N.W.2d at 729.

305. *See id.* at 652, 761 N.W.2d at 729.

306. *Id.* at 651-52, 761 N.W.2d at 729.

307. *See id.* at 653, 761 N.W.2d at 730.

308. *Id.*

whether plaintiff's past marijuana use had in any way affected his cognitive abilities and mental acuity independent of the . . . automobile accident."[309] This evidence, the court explained, "tended to aid the jury in determining whether plaintiff's cognitive and mental deficiencies were attributable to the accident or to some other cause," a principle issue in the case.[310] Thus, because the evidence was not elicited for an improper character purpose, and because the evidence was otherwise relevant and not unfairly prejudicial, it was admissible under Rule 404(b).[311]

*2. Prior Domestic Abuse and Sexual Assault Evidence Statutes*

Notwithstanding Rule 404(b), two statutory provisions provide for admissibility of other acts evidence in certain circumstances. First, the prior sexual assault evidence statute provides, in relevant part, that "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant."[312] Similarly, the prior domestic abuse statute provides, in relevant part, that "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403."[313]

During the prior *Survey* period, the Michigan Court of Appeals issued several decisions upholding the validity of these statutes. In *People v. Pattison*,[314] the court considered both statutes, and rejected constitutional ex post facto and separation of powers challenges to the

309. *Id.*

310. *Guerrero*, 280 Mich. App. at 653, 761 N.W.2d at 730.

311. *See id.*

312. MICH. COMP. LAWS ANN. § 768.27a(1) (West 2000 & Supp. 2007). The statute also requires the prosecutor to give notice prior to trial of his intention to present evidence pursuant to the statute. *See id.* Under the statute, a "listed offense" is any offense listed in the sex offender registry statute. *See* MICH. COMP. LAWS ANN. § 768.27a(2) (citing MICH. COMP. LAWS ANN. § 28.722(e) (West 2004 & Supp. 2007)).

313. MICH. COMP. LAWS ANN. § 768.27b(1) (West 2000 & Supp. 2007). As with the prior sexual assault statute, this statute requires the prosecutor to provide notice prior to trial. *See* MICH. COMP. LAWS ANN. § 768.27b(2). However, unlike the prior sexual assault evidence statute, the domestic abuse evidence statute provides that a prior act which is more than ten years old is presumptively inadmissible. *See* MICH. COMP. LAWS ANN. § 768.27b(4).

314. 276 Mich. App. 613, 741 N.W.2d 558 (2007).

statutes.[315] In *People v. Watkins*,[316] the court held that section 768.27a conflicts with Rule 404(b) and, relying on *Pattison*, that section 768.27a is valid and controls over Rule 404(b).[317] The court explained that because this evidence would be excluded under Rule 404(b), the rule and the statute conflicted, and concluded that the statute controlled over the court rule.[318] The court of appeals reached the same conclusion with respect to the prior domestic assault statute, again relying on *Pattison*, in *People v. Schultz*.[319] Finally, in *People v. Petri*[320] the court concluded that the defendant's attorney did not render ineffective assistance at trial by failing to object to the introduction of two prior criminal sexual conduct convictions, because the evidence was admissible under section 768.27a.[321] The Michigan Court of Appeals continued this trend during the *Survey* period. In *People v. Wilcox*,[322] the court again relied on *Pattison* to reject ex post facto and separation of powers challenges to section 768.27a(1).[323]

Most notable during the *Survey* period, however, was the Michigan Supreme Court's failure to address these issues, despite having several opportunities to do so. In *Watkins*, the court initially granted leave to appeal, directing the parties to specifically address five issues relating to section 768.27a:

> (1) whether MCL 768.27a conflicts with MRE 404(b) and, if it does, (2) whether the statute prevails over the court rule . . . ; (3) whether the omission of any reference to MRE 403 in MCL 768.27a (as compared to MCL 768.27b(1)), while mandating that propensity evidence "is admissible for any purpose for which it is relevant," violated defendant's due process right to a fair trial; (4) whether the Court should rule that propensity evidence described in MCL 768.27a is admissible only if it is not otherwise excluded under MRE 403; and (5) whether MCL

315. *See id.* at 619-20, 741 N.W.2d at 561-62.

316. 277 Mich. App. 358, 745 N.W.2d 149 (2007), *leave to appeal granted*, 480 Mich. 1167, 747 N.W.2d 226 (2008), *order granting leave to appeal vacated and leave to appeal denied*, 482 Mich. 1114, 758 N.W.2d 267 (2008).

317. *See id.* at 364-65, 745 N.W.2d at 153.

318. *See id.* at 365, 745 N.W.2d at 153.

319. 278 Mich. App. 776, 778-89, 754 N.W.2d 925, 926-27 (2008), *leave to appeal denied*, 482 Mich. 1078, 758 N.W.2d 256 (2008).

320. 279 Mich. App. 407, 760 N.W.2d 882 (2008), *leave to appeal denied*, 482 Mich. 1186, 758 N.W.2d 562 (2008).

321. *See id.* at 411-12, 760 N.W.2d at 885-86.

322. 280 Mich. App. 53, 761 N.W.2d 466 (2008) (per curiam), *leave to appeal granted in part on other grounds*, 483 Mich. 1094, 766 N.W.2d 845 (2009).

323. *See id.* at 55-56, 761 N.W.2d at 468-69.

> 768.27a interferes with the judicial power to ensure that a criminal defendant receives a fair trial . . . .[324]

However, during the *Survey* period the supreme court vacated its prior grant of leave to appeal and denied the defendant's application for leave to appeal.[325] Justice Cavanagh, joined by Justice Kelly, dissented from the court's order. In his view, the case called into question significant separation of powers issues which were worthy of consideration by the court.[326] Subsequently, the court denied leave to appeal in *People v. Kou Xiong*,[327] which the court had held in abeyance pending its decision in *Watkins*. Again Justices Kelly and Cavanagh dissented, this time in an opinion by Justice Kelly. In her view, the five issues set forth in the initial *Watkins* order granting leave to appeal represented "key issues" for the supreme court's review of the statutes,[328] and "[w]hatever the merits of the Court of Appeals holdings in *Pattison* and *Watkins*, this Court needs to provide guidance to the lower courts on the issues raised in this case."[329] The supreme court also denied leave to appeal with respect to these issues in *Schultz*, *Petri*, and *Wilcox*.[330]

Despite the supreme court's failure to take the opportunity to clarify these matters during the *Survey* period, the Michigan Court of Appeals provided some guidance regarding the interpretation of the prior sexual conduct statute in *People v. Smith*.[331] In that case, the defendant was convicted of three counts of criminal sexual conduct arising from the sexual assault of his ten to eleven year old daughter. The victim testified that, while she was in the fourth grade, the defendant twice came into her room, pulled down her pants, and penetrated her vagina with his penis, and once put his hand under her shirt and touched her chest. The victim's stepsister, "LL," also testified that while she was living in the same home as the defendant when she was eleven to fifteen years old he exposed his penis to her on three occasions.[332] The court of appeals initially denied

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324. *Watkins*, 480 Mich. at 1167, 747 N.W.2d at 226-27.

325. *See Watkins*, 482 Mich. at 1114, 758 N.W.2d at 267.

326. *See id.* at 1167, 758 N.W.2d at 269-70 (Cavanagh, J., dissenting).

327. 483 Mich. 951, 764 N.W.2d 15 (2009).

328. *Id.* at 953, 764 N.W.2d at 16 (Kelly, J., dissenting).

329. *Id.* at 954, 764 N.W.2d at 17.

330. *See* People v. Schultz, 482 Mich. 1078, 758 N.W.2d 256 (2008); People v. Petri, 482 Mich. 1186, 758 N.W.2d 562 (2008); People v. Wilcox, 483 Mich. 1094, 766 N.W.2d 845 (2009).

331. People v. Smith, 282 Mich. App. 191, 772 N.W.2d 431 (2009). *Smith* also considered a question relating to Rule 404(b) evidence in general. This aspect of the case is discussed *supra* notes 294-303 and accompanying text.

332. *See Smith*, 282 Mich. App. at 193-94, 772 N.W.2d at 431.

the defendant's delayed application for leave to appeal, but the supreme court remanded the case to the court of appeals for consideration as on leave granted, specifically directing the court of appeals to consider whether LL's testimony was admissible either under Rule 404(b) or the prior sexual conduct statute.[333] With respect to the Rule 404(b) issue, the court of appeals rejected the defendant's claim and concluded that LL's testimony was properly admitted, thus rendering it unnecessary for the court to consider whether the evidence was also admissible under section 768.27. The court did consider the issue, however, in light of the supreme court's remand order,[334] providing guidance on two aspects of the statute.

First, the court provided guidance on the prior conduct which was admissible under the statute. Under the statute, in a case in which a defendant is "accused of committing a listed offense against a minor," the prosecution may introduce "evidence that the defendant committed another listed offense against a minor."[335] Under the statute, a "listed offense" is any offense listed in the sex offender registry statute.[336] Thus, the court of appeals considered whether the three instances of indecent exposure testified to by LL constituted "listed offenses" under the statute.[337] The court concluded that none of the individual instances of conduct identified by LL were admissible by themselves, but that the third instance was admissible.[338] The court began its analysis by noting that the conduct described by LL violated the indecent exposure statute, which makes it a misdemeanor for a person to "knowingly make any open or indecent exposure of his or her person or of the person of another."[339] Further, because LL testified that on one occasion the defendant "wagged" his genitals at her, the conduct from that incident constituted an enhanced misdemeanor under subsection (2)(b) of the indecent exposure statute.[340] Turning to the listed offense under the sex offender registry act, the court noted two possible relevant listed offenses. First, the statute defines a listed offense to include "[a]

333. *See id.* at 193, 772 N.W.2d at 431 (discussing People v. Smith, 480 Mich. App. 1059, 743 N.W.2d 914 (2008)).

334. *See id.* at 198, 772 N.W.2d at 434.

335. MICH. COMP. LAWS ANN. § 768.27a(1) (West 2000 & Supp. 2008).

336. *See* MICH. COMP. LAWS ANN. § 768.27a(2) (citing MICH. COMP. LAWS ANN. § 28.722(e) (West 2004 & Supp. 2007)).

337. *Smith*, 282 Mich. App. at 199, 772 N.W.2d at 434-35.

338. *Id.* at 202, 772 N.W.2d at 436.

339. MICH. COMP. LAWS ANN. § 750.335a(1) (West 2004 & Supp. 2008); *see Smith*, 282 Mich. App. at 200-01, 772 N.W.2d at 435.

340. *See Smith*, 282 Mich. App. at 201, 772 N.W.2d at 435-36 (discussing MICH. COMP. LAWS ANN. § 750.335a(2)(b) (West 2004 & Supp. 2008)).

violation of section 335a(2)(b) of the Michigan penal code . . . if that individual was previously convicted of violation section 335a of that act."[341] Second, the statute defines a listed offense to include "[a] third or subsequent violation of . . . [s]ection 335a(2)(a) of the Michigan penal code."[342]

Applying these provisions, the court first explained that the instance of the defendant "wagging" his penis at LL was not a listed offense under section 28.722(e)(iii) because that provision explicitly requires that an individual have been previously convicted of violating the indecent exposure statute.[343] Because the record failed to establish that the defendant had previously been convicted of any indecent exposure offense prior to the conduct described by LL, the incident was not a listed offense under section 28.722(e)(iii).[344] However, this incident was a listed offense under section 28.722(e)(iv)(B) because it constituted the third violation of the indecent exposure statute.[345] The court explained that unlike section 28.722(e)(iii), which expressly refers to a prior conviction, section 28.722(e)(iv)(B) refers only to a third violation.[346] Giving the term "violation" its ordinary meaning, the court concluded that because LL's testimony reflected "three distinct violations of MCL 750.335a(2)(a), pursuant to the plain language of MCL 28.722(e)(iv)(B), evidence regarding the third violation of MCL 750.335a(2)(a) would have been admissible at trial[,] [b]ut evidence of the first two violations would not have been admissible."[347]

Second, the court also explained that even though the first two instances of indecent exposure were not admissible under section 768.27a, this did not preclude their admission under Rule 404(b).[348] The

341. MICH. COMP. LAWS ANN. § 28.722(e)(iii) (West 2004 & Supp. 2008).

342. MICH. COMP. LAWS ANN. § 28.722(e)(iv)(B).

343. *See Smith*, 282 Mich. App. at 202-03, 772 N.W.2d at 437.

344. *Id.* at 201-04, 772 N.W.2d at 436-37.

345. *Id.* at 199, 772 N.W.2d at 434-35.

346. *See id.* at 202, 772 N.W.2d at 436.

347. *Id.* at 202-03, 772 N.W.2d at 437. The court rejected the prosecutor's alternative argument that the incidents identified by LL were listed offenses under the catch-all provision of the sex offender registry act, which defines a listed offense to include "[a]ny other violation of a law . . . that by its nature constitutes a sexual offense." MICH. COMP. LAWS ANN. § 28.722(e)(xi) (West 2004 & Supp. 2008). The court concluded that "[b]ecause there is a specific provision of the SORA that particularly addresses indecent exposure, defendant's acts of indecent exposure cannot qualify as '[a]ny *other* violation of a law,' under the general provisions of MCL 28.722(e)(xi) and thus are not admissible under the catch-all exception." *Smith*, 282 Mich. App. at 203, 772 N.W.2d at 437 (quoting MICH. COMP. LAWS ANN. § 28.722(e)(xi) (West 2004 & Supp. 2008)) (emphasis by quoting court).

348. *Smith*, 282 Mich. App. at 203-04, 772 N.W.2d at 437.

court explained that nothing in the statutory language compels the conclusion that "if past sex offenses against children do not qualify as 'listed offenses' under MCL 768.27a the evidence is inadmissible where the evidence could be properly introduced pursuant to MRE 404(b)."[349] On the contrary, the language of the statute and its legislative history make it "quite evident that the Legislature's intent in enacting MCL 768.27a was to broaden the range of acts that could be admitted into evidence, going beyond the evidence admissible under MRE 404(b)," and not to restrict the evidence admissible under Rule 404(b).[350] Much like Rule 404(b), the court explained, section 768.27a is a rule of inclusion rather than one of exclusion.[351] The court explained that, where other acts evidence potentially involving a listed offense are at issue, a court should first consider the admissibility of the evidence under section 768.27a.[352] If the evidence is admissible under the statute, the court's inquiry is at an end.[353] If, however, the evidence is not admissible under section 768.27a, the court should still consider whether the evidence is independently admissible under Rule 404(b).[354] Under the inclusionary view of the statute and rule, other acts evidence is inadmissible only where it does not satisfy both section 768.27a and Rule 404(b).[355]

### *C. Offers of Settlement*

Another rule of limited admissibility renders inadmissible evidence of settlements and offers to compromise. Rule 408 prohibits the introduction of settlements and offers to compromise as to a claim "to prove liability for or invalidity of the claim or its amount."[356] Two distinct polices underlie this rule. First, evidence of settlement or attempts to settle are not necessarily probative of a claim's validity; often such an offer "implies merely a desire for peace, not a concession of wrong done."[357] Second, the rule fosters settlement of disputes, a socially beneficial outcome.[358] This second policy consideration supports a view

349. *Id.* at 204, 772 N.W.2d at 437.

350. *Id.*

351. *See id.*at 205, 772 N.W.2d at 437-38.

352. *Id.* at 205-06, 772 N.W.2d at 437-38.

353. *Id.*

354. *See Smith*, 282 Mich. App. at 205-06, 772 N.W.2d at 437-38.

355. *See id.* at 206, 772 N.W.2d at 438.

356. MICH. R. EVID. 408. Such evidence may be admitted for another purpose, "such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." *Id.*

357. 4 WIGMORE, *supra* note 22, § 1061, at 36 (James H. Chadbourne rev. ed. 1972).

358. *See* FED. R. EVID. 408 advisory committee note; WEISSENBERGER, *supra* note 79, § 408.2, at 149.

of Rule 408 in the nature of a privilege, and for this reason the rule departs from the common law and explicitly prohibits introduction not only of settlements and offers, but of statements made in settlement negotiations.[359] The Michigan Court of Appeals considered Rule 408 evidence in one case decided during the *Survey* period.

In *Zaremba Equipment, Inc. v. Harco National Insurance Co.*,[360] the plaintiff brought suit against the defendant insurance company to recover under an insurance policy following a fire that destroyed the plaintiff's premises.[361] The full facts need not be recounted for purposes of this Article. It is sufficient to note that, amongst its claims, the plaintiff sought penalty interest under section 500.2006[362] based on the defendant's failure to timely pay the claim.[363] The jury ultimately found in favor of the plaintiff.[364] Amongst other claims on appeal, the defendant argued that the trial court erred in permitting the plaintiff to introduce letters written by plaintiff's counsel to defendant's claims adjuster.[365] These letters contained information regarding settlement negotiations and offers.[366] The court of appeals rejected the defendant's argument that these letters were barred by Rule 408.[367]

The court explained that the letters were used by plaintiff's counsel to show that the defendant delayed paying claims that were not reasonably in dispute, and thus that plaintiff was entitled to statutory penalty interest under section 500.2006(1).[368] The court explained that because Rule 408 expressly provides that evidence of settlement may be admissible for a purpose other than showing fault, including "negativing a contention of undue delay,"[369] "it logically follows that evidence of settlement discussions may also qualify as admissible to *prove* undue

359. *See* FED. R. EVID. 408; 23 WRIGHT & GRAHAM, *supra* note 18, § 5302, at 170, 173-76.

360. 280 Mich. App. 16, 761 N.W.2d 151 (2008), *leave to appeal denied*, 483 Mich. 912, 762 N.W.2d 506 (2009).

361. *See id.* at 19, 761 N.W.2d at 155.

362. MICH. COMP. LAWS ANN. § 500.2006(1) (West 2002 & Supp. 2008). This provision requires an insurer to timely pay a claim unless the claim is reasonably in dispute, or pay penalty interest of 12 percent. *See id.*

363. *See Zaremba Equipment*, 280 Mich. App. at 20, 761 N.W.2d at 155.

364. *Id.*

365. *Id.* at 21, 761 N.W.2d at 156.

366. *See id.* at 47, 761 N.W.2d at 169.

367. *Id.*

368. *See id.* at 48, 761 N.W.2d at 170.

369. MICH. R. EVID. 408.

delay."[370] Accordingly, the court of appeals held that the evidence was not barred by Rule 408.[371]

## VI. WITNESSES

### *A. Oath (Rule 603)*

Rule 603 provides that "[b]efore testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so."[372] Although Rule 603 is vague regarding the requirements of an oath, various provisions of the Revised Judicature Act provide further details. For instance, section 1432 of the Act provides that:

> [t]he usual mode of administering oaths now practiced in this state, by the person who swears holding up the right hand, shall be observed in all cases in which an oath may be administered by law except as otherwise provided by law. The oath shall commence, "You do solemnly swear or affirm."[373]

Further, section 1434 of the Act provides that "[e]very person conscientiously opposed to taking an oath may, instead of swearing, solemnly and sincerely affirm, under the pains and penalty of perjury."[374] The Michigan Supreme Court passed on an opportunity to consider these rules governing oaths in one case during the *Survey* period.

*Donkers v. Kovach*,[375] decided in the prior *Survey* period, involved a legal malpractice action brought by the plaintiffs against their former attorneys. During the discovery phase of the case, the defendants sought to take the deposition of plaintiff Donkers.[376] However, she refused to

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370. *Zaremba Equipment*, 280 Mich. App. at 48, 761 N.W.2d at 170; *cf.* Rhoades v. Aron Prods., Inc., 504 F.3d 1151, 1161 n.9 (9th Cir. 2007) (explaining that examples of permissible purposes listed in Rule 408 are illustrative, not exhaustive).

371. *Zaremba Equipment*, 280 Mich. App. at 49, 761 N.W.2d at 170. The court did hold, however, that the letters reflecting the settlement negotiations would likely be inadmissible at the retrial it ordered on the basis of the defendant's other appellate claims, because much of the information was hearsay and the non-hearsay information would likely not contain any relevant information.

372. MICH. R. EVID. 603.

373. MICH. COMP. LAWS ANN. § 600.1432(1) (West 1996).

374. MICH. COMP. LAWS ANN. § 600.1434 (West 1996).

375. 277 Mich. App. 366, 745 N.W.2d 154 (2007), *leave to appeal denied*, 481 Mich. 897, 749 N.W.2d 744 (2008).

376. *Id.* at 367-68, 745 N.W.2d at 155-56.

raise her right hand and be sworn under oath, claiming that such would violate her religious beliefs.[377] Plaintiff Donkers again refused to raise her hand or be sworn at a subsequent hearing in court, offering instead to affirm that she would tell the truth.[378] The trial court then dismissed the plaintiffs' action with prejudice.[379]

On appeal, the Michigan Court of Appeals reversed, concluding that the plaintiff was not required to raise her right hand to adequately affirm the truthfulness of her testimony.[380] The court began its analysis by noting that section 1432 of the Revised Judicature Act requires that the oath be administered by the witness holding up his or her right hand, but also provides that this form of the oath is not required where "otherwise provided by law."[381] The court further noted, however, that section 1434 provides that a witness conscientiously opposed to an oath may, instead, affirm to tell the truth.[382] "It is therefore 'otherwise provided by law' that in lieu of swearing an oath under MCL 600.1432, a person may 'solemnly and sincerely affirm' to testify truthfully."[383] However, the court observed, it was not clear "whether a witness who elects to affirm to testify truthfully must also raise his or her right hand when doing so."[384]

Turning to this question, the court of appeals noted that the two statutes govern the same subject matter and thus must be read together.[385] The court also explained that the general rule is that when two statutes governing the same subject matter conflict, the more specific statute controls.[386] Thus section 1434, which provides a specific exception to the general rule of oaths provided in section 1432, controls whether a raising of the right hand is required.[387] Further, the court explained, section 1434 does not require a person affirming to tell the truth to raise the right hand, while section 1432 does include such a requirement.[388] Because "[t]he omission of a provision in one statute that is included in another statute should be construed as intentional... ."[389] the court concluded that

377. *Id.*
378. *Id.*
379. *See id.* at 367-68, 745 N.W.2d at 155-56.
380. *Id.*
381. *See Donkers*, 277 Mich. App. at 370, 745 N.W.2d at 157 (discussing MICH. COMP. LAWS ANN. § 600.1432(1) (West 1996)).
382. *Id.* (quoting MICH. COMP. LAWS ANN. § 600.1432(1) (West 1996)).
383. *Id.* (quoting MICH. COMP. LAWS ANN. §§ 600.1432(1), .1434 (West 1996)).
384. *Id.*
385. *Id.*
386. *Id.*
387. *See Donkers*, 277 Mich. App. at 370-71, 745 N.W.2d at 157.
388. *Id.*
389. *Id.* at 371, 745 N.W.2d at 157.

"the act of raising one's right hand is not required to effectuate a valid affirmation under MCL 600.1434."[390] The court explained that this conclusion was also supported by Rule 603.[391] As observed by the court, federal courts interpreting the identical federal rule have explained that Rule 603 requires no particular form, and that at least one court has held that witnesses need not raise their hands to affirm or swear in the context of the federal discovery rules.[392] The court of appeals found no reason to depart from these federal decisions in interpreting the Michigan version of Rule 603.[393] The court therefore concluded that the trial court erred in concluding that the plaintiff was required to raise her right hand before affirming to tell the truth.[394]

Judge Markey dissented.[395] In her view, section 1432 applies by its terms to all cases, and this includes cases in which an oath is not actually administered.[396] This conclusion is required by reading the statutes together, as suggested by the majority.[397] In Judge Markey's view, however, reading the statutes together required a finding that raising the hand is required for an affirmation.[398] She noted that the Michigan Supreme Court has held that the mode of the oath applies in all cases, "and that the upraised right hand was an integral and required formality for a valid oath that is subject to the pains of perjury."[399] Further, Judge Markey explained, section 1432 by its terms applies to all cases, even when an oath is not actually administered.[400] This is suggested by the fact that section 1432 explicitly provides that the oath must begin "You do solemnly swear or affirm,"[401] suggesting that an affirmation is also covered by the hand-raising requirement of the statute. Judge Markey also concluded that the hand-raising requirement did not raise any constitutional problems under the First Amendment.[402]

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390. *Id.* at 372, 745 N.W.2d at 158.

391. *Id.*

392. *See id.* at 372-73, 745 N.W.2d at 158 (discussing Gordon v. Idaho, 778 F.2d 1397, 1400-01 (9th Cir. 1985)).

393. *See Donkers*, 277 Mich. App. at 373, 745 N.W.2d at 158.

394. *See id.* at 374, 745 N.W.2d at 159.

395. *Id.* at 375-77, 745 N.W.2d at 159-61 (Markey, J., dissenting).

396. *See id.* at 375-77, 745 N.W.2d at 159-61.

397. *Id.*

398. *Id.*

399. *Donkers*, 277 Mich. App. at 376, 745 N.W.2d at 160 (discussing People v. Ramos, 430 Mich. 544, 424 N.W.2d 509 (1988)).

400. *Id.*, 745 N.W.2d at 161.

401. *Id.* at 376, 745 N.W.2d at 161 (quoting MICH. COMP. LAWS ANN. § 600.1432(1) (West 1996)).

402. *See id.* at 383-88, 745 N.W.2d at 164-66.

During the *Survey* period, the Michigan Supreme Court passed on the opportunity to clarify the oath requirements under Michigan law, denying leave to appeal in *Donkers*.[403] Justice Markman, joined by Justices Taylor and Corrigan, dissented from the court's denial of leave to appeal, agreeing with Judge Markey that the statutory alternative given to a witness to "affirm" to tell the truth does not "vitiate[] the requirement of an upraised right hand."[404] Justice Markman further added that, in his view, the case did not implicate the plaintiff's First Amendment right to the free exercise of religion because the plaintiff had failed to establish any showing that raising her hand implicated a sincerely held religious belief,[405] and because the requirement of raising the right hand is secular in origin.[406] Given the historical pedigree of the hand-raising requirement, Justice Markman thought that the matter required "significantly more careful consideration."[407]

*B. Character of a Witness Under Rule 608*

Rule 608 governs the admissibility of evidence of the character and conduct of witness.[408] Under the rule, "[t]he credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation," provided that "(1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise."[409] The rule goes on to provide that extrinsic evidence may not be admitted to show specific instances of conduct of the witness, but that specific instances of conduct which are probative of truthfulness may "be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified."[410] The

403. *See* Donkers v. Kovach, 481 Mich. App. 897, 749 N.W.2d 744 (2008).

404. *See id.* at 897, 749 N.W.2d at 745 (Markman, J., dissenting).

405. *See id.* at 898, 749 N.W.2d at 745. As Justice Markman correctly noted, under the Supreme Court's free exercise jurisprudence, a court may not question the nature or consistency of a person's religious belief, but a person claiming a free exercise violation must show that the belief is both religious in nature and sincerely held. *See id.* (citing Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531 (1993)).

406. *See id.* at 898, 749 N.W.2d at 745.

407. *Id.* at 899, 749 N.W.2d at 746.

408. MICH. R. EVID. 608(a).

409. *Id.*

410. MICH. R. EVID. 608(b).

court of appeals considered this rule in one case decided during the survey period.

In *Guerrero v. Smith*,[411] the plaintiff alleged that he suffered a closed head injury and back and neck problems as a result of being struck from behind in a chain-reaction accident caused by defendant Glen Smith's car, which was being driven by defendant Derek Smith.[412] He brought a third-party action under the no-fault act, alleging negligence on the part of Derek Smith.[413] A jury returned a verdict in favor of the defendants, and the plaintiff appealed.[414] The plaintiff argued on appeal that defense counsel improperly cross-examined both him and plaintiff's witness Steve Porterfield regarding the plaintiff's past marijuana use.[415] The court concluded that questions put to the plaintiff during cross-examination regarding his marijuana use were properly admitted under Rule 404(b),[416] but reached the opposite conclusion with respect to Porterfield's testimony under Rule 608.

The court reasoned that although defense counsel's questioning of Porterfield was designed to test the veracity of the plaintiff's testimony regarding his marijuana use, it nonetheless failed to comply with Rule 608(b)(2).[417] The court noted that, under Rule 608(b)(2), specific instances of conduct of a witness may be inquired into on cross-examination of another witness only if that other witness has testified as to the character for truthfulness or untruthfulness of the witness to whom the specific instance of conduct relates.[418] In this case, however, "Porterfield had not been called as a character witness and did not testify concerning plaintiff's character for truthfulness or untruthfulness on direct examination."[419] Because Porterfield had not testified on direct examination regarding the plaintiff's character for truthfulness, the precondition to cross-examination regarding specific instances of

411. *Guerrero*, 280 Mich. 647, 761 N.W.2d 723. *Guerrero* also discussed issues of Rule 404(b) evidence and hearsay. These aspects of the case are discussed *supra* notes 305-15 and accompanying text (Rule 404(b)) and *infra* notes 605-14 and accompanying text (discussing hearsay).

412. *Guerrero*, 2006 WL 2419178, at *1.

413. *See id.* The facts are not set forth in the opinion under discussion here, and are taken from this prior appeal in the case.

414. *See Guerrero*, 280 Mich. App. at 651, 761 N.W.2d at 729.

415. *See id.* at 652, 761 N.W.2d at 729.

416. *See supra* notes 305-15 and accompanying text.

417. *Guerrero*, 280 Mich. App. at 654, 761 N.W.2d at 730.

418. *See id.*; *see also* MICH. R. EVID. 608(b)(2) (holding that specific instances of conduct may be inquired into on cross-examination "concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified").

419. *Guerrero*, 280 Mich. App. at 654, 761 N.W.2d at 731.

conduct set forth in Rule 608(b)(2) was not satisfied, and the trial court therefore erred in allowing this cross-examination.[420]

## VII. EXPERT, SCIENTIFIC & OPINION TESTIMONY

Article VII of the Michigan Rules of Evidence governs expert, technical, and opinion testimony. The Michigan courts considered several cases raising issues under these rules.

### *A. Admissibility, Reliability, Scope, and Bases of Expert Opinions*

For most of the twentieth century, the admissibility of expert and scientific testimony in courts throughout the country was governed by the standard announced in *Frye v. United States*.[421] The *Frye* court established what came to be known as the "general acceptance" test, under which a novel scientific technique is admissible in evidence only when it becomes "sufficiently established to have gained general acceptance in the particular field in which it belongs."[422] The Michigan Supreme Court adopted the *Frye* standard in *People v. Davis*.[423] In 1993, however, the United States Supreme Court held that the adoption of Federal Rule of Evidence 702 abrogated the *Frye* rule.[424] In *Daubert*, the Court concluded that Rule 702 sets forth a standard of both scientific reliability[425] and relevance.[426] These standards require a trial court to perform a "gatekeeping function," determining at the outset "whether the expert is proposing to testify (1) to scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue."[427] Subsequent to the Court's decision, Federal Rule 702 was amended to explicitly incorporate the *Daubert* standard, and now provides:

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420. *See id.* at 655, 761 N.W.2d at 731. The court of appeals nevertheless concluded that this error did not require reversal because it was harmless in light of the evidence at trial and the jury's verdict as reflected on the special verdict form. *See id.* at 655-56, 761 N.W.2d at 731.

421. 293 F. 1013 (D.C. Cir. 1923).

422. *Id.* at 1014.

423. 343 Mich. 348, 370-72, 72 N.W.2d 269, 281-82 (1955); *see also*, People v. Young, 418 Mich. 1, 17-20, 340 N.W.2d 805, 812-13 (1983); People v. Haywood, 209 Mich. App. 217, 221, 530 N.W.2d 497, 499-500 (1995).

424. *See* Daubert v. Merrell Dow Pharms., 509 U.S. 579, 587-89 (1993).

425. *See id.* at 589-90.

426. *See id.* at 591-92.

427. *Id.* at 592. Although *Daubert* specifically addresses scientific testimony, the Court has subsequently made clear that the *Daubert* standard governs all expert testimony propounded under Rule 702. *See* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147-49 (1999).

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[428]

Notwithstanding the abrogation of the *Frye* standard by Rule 702 and *Daubert*, the Michigan courts continued to apply the *Frye* rule.[429] This changed when the Michigan Supreme Court adopted an amendment to Michigan Rule of Evidence which, with a minor non-substantive exception, mirrors Federal Rule 702.[430] During a prior *Survey* period, the Michigan Supreme Court issued a decision adopting the *Daubert* analysis under Rule 702. In *Gilbert v. DaimlerChrysler Corp.*,[431] the supreme court clarified the standards governing expert testimony under Rule 702.[432] The court explained that Rule 702 does not alter the *Frye* test's requirement that a court ensure that expert testimony is reliable.[433] Rather, Rule 702 "changes only the factors that a court may consider in determining whether expert opinion evidence is admissible."[434] The court explained that the *Daubert* standard "simply allows courts to consider more than just 'general acceptance' in determining whether expert testimony must be excluded."[435] The supreme court also admonished the trial courts to vigorously enforce this gatekeeping requirement.[436] The court noted that Rule 702 "mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data."[437] The court further

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428. FED. R. EVID. 702; *see also*, Nelson v. Tenn. Gas Pipeline Co., 243 F.3d 244, 250 n.4 (6th Cir. 2001) (explaining that post-*Daubert* amendment to Rule 702 was intended to incorporate, not alter, *Daubert* analysis). For further interest, an excellent discussion of the criticisms of the *Frye* rule and its abrogation in the federal courts is set forth in Major Victor Hansen, *Rule of Evidence 702: The Supreme Court Provides a Framework for Reliability Determinations*, 162 MIL. L. REV. 1 (1999).

429. *See* People v. McMillan, 213 Mich. App. 134, 137 n.2, 539 N.W.2d 553, 555 n.2 (1995).

430. *See* MICH. R. EVID. 702.

431. 470 Mich. 749, 685 N.W.2d 391 (2004).

432. *Id.* at 780, 685 N.W.2d at 408.

433. *Id.*

434. *Id.* at 781, 685 N.W.2d at 408.

435. *Id.* at 782, 685 N.W.2d at 409.

436. *Id.*

437. *Gilbert*, 470 Mich. at 782, 685 N.W.2d at 409.

explained that Rule 702 requires that expert testimony be based on specialized knowledge.[438] Thus, "[w]here the subject of the proffered testimony is far beyond the scope of an individual's expertise–for example, where a party offers an expert in economics to testify about biochemistry–that testimony is *inadmissible* under MRE 702."[439] In the court's view, "[u]nless the information requiring expert interpretation actually goes through the crucible of analysis by a qualified expert, it is of little assistance to the jury and therefore inadmissible under MRE 702."[440] During the current *Survey* period, the Michigan courts have continued to expound on the requirements of the *Daubert* test, as well as on the trial court's duties in performing its gatekeeping function and the appropriate bases and scope of an expert's testimony.[441]

In *Department of Environmental Quality v. Waterous Co.*,[442] the Department of Environmental Quality (DEQ) brought an action seeking to hold the defendant liable for remediation of pollution caused by the defendant.[443] Among other issues on appeal, the defendant challenged the admissibility of expert testimony presented by the DEQ regarding contamination of sediments at the site, because this testimony was based on nonbinding agency guidelines rather than on reliable scientific methods.[444] Specifically, as explained by the court of appeals, "the DEQ's expert relied on two exhibits — unpromulgated quality screening guidelines and a draft memorandum — in support of establishing the criteria against which the presence of certain contaminants should be measured to determine whether remediation is necessary."[445] The court of appeals found no error in the admission of this evidence.[446] Relying on the trial court's stated reasons for allowing the evidence, the court

438. *Id.* at 789, 685 N.W.2d at 413.

439. *Id.*

440. *Id.*

441. In addition to the cases discussed here, in *Wolford v. Duncan*, 279 Mich. App. 631, 760 N.W.2d 253 (2008), *leave to app. denied*, 482 Mich. 1068, 757 N.W.2d 481 (2008), the plaintiff in a medical malpractice action challenged the court's admission of various expert testimony regarding the cause of the decedent's death. Because the plaintiff had cross-examined the experts and had not properly objected to their testimony, the court of appeals concluded that the challenges were waived. *See id.* at 637-41, 760 N.W.2d 257-58. The case therefore did not address any substantive issues relating to the reliability and scope of expert testimony.

442. 279 Mich. App. 346, 760 N.W.2d 856 (2008) (per curiam), *leave to appeal denied*, 483 Mich. 890, 759 N.W.2d 888 (2009).

443. *See id.* at 349-64, 760 N.W.2d at 859-66. The factual background and procedural history of the case are complex and detailed, and unnecessary to understand the evidentiary issue addressed by the court of appeals.

444. *See id.* at 380, 760 N.W.2d at 876.

445. *Id.* at 381, 760 N.W.2d at 875.

446. *Id.*

explained that there was no challenge to either the process of collecting the sediment samples or the data upon which the expert relied.[447] Further, "the point of [the] case was to show that remedial action was warranted, not to absolutely prove the extent of contamination,"[448] and thus the fact that the data relied upon by the expert amounted to only guidelines to show impact on the environment did not call into question the expert's testimony regarding the need for remediation.[449]

In *People v. Steele*,[450] the defendant was convicted of multiple counts of criminal sexual conduct involving sexual activity with minors under thirteen years old, arising from the sexual assaults of three grandchildren of the defendant's girlfriend.[451] The defendant argued that he was denied his constitutional right to present a defense when the trial court excluded expert evidence that he did not fit the psychological profile of a sex offender, offered through Dr. Barclay.[452] In *People v. Dobek*,[453] the court had rejected an identical claim involving Dr. Barclay's sex-offender profile testimony.[454] The court in that case concluded, based on the testimony of the expert at an evidentiary hearing in the trial court, that the testimony was not sufficiently reliable under Rule 702.[455] The court noted that the defendant's expert testified that although the results of his testing are useful for establishing predisposition, they cannot establish whether someone is a sex offender with any degree of certainty, that there is continued debate in the psychological community regarding this type of testing and the research is ongoing, and that the test results can be skewed by circumstances in the subject's life or by deliberate deception.[456] Although recognizing that "100 percent scientific certainty" is not required, the problems identified by the defendants' expert rendered the sex offender profiling evidence insufficiently reliable to satisfy Rule 702.[457] Further, the court explained, this evidence would not assist the trier of fact, but would likely confuse the jury. The court analogized the profiling evidence to polygraph evidence, which is not

447. *See id.* at 382, 760 N.W.2d at 875.

448. *Waterous*, 279 Mich. App. at 383, 760 N.W.2d at 876.

449. *See id.* at 382, 760 N.W.2d at 875.

450. *Steele*, 283 Mich. App. 472, 769 N.W.2d 256. *Steele* also discusses an issue involving Rule 404(b) evidence. This aspect of the case is discussed *supra* notes 278-93 and accompanying text.

451. *See Steele*, 283 Mich. App. at 475-76, 769 N.W.2d at 261.

452. *See id.* at 480, 481-82, 769 N.W.2d at 263, 264.

453. 274 Mich. App. 58, 732 N.W.2d 546 (2007).

454. See *id.* at 95-96, 732 N.W.2d at 571-72.

455. *Id.*

456. *See id.*

457. *Id.* at 96, 732 N.W.2d at 572.

admissible because it detracts from the jury's truth finding function.[458] Relying on *Dobek*, the *Steele* court likewise found that Dr. Barclay's testimony was inadmissible under Rule 702, concluded that "*Dobek* is on point and indistinguishable."[459]

The Michigan Court of Appeals also considered the rules of expert evidence in *Morales v. State Farm Mutual Automobile Insurance Co.*[460] In that case, the plaintiff was injured on June 12, 2002, when the truck he was driving as part of his business rolled over.[461] He was diagnosed with a closed head injury, but returned to work in a supervisory capacity in November 2002.[462] The defendant insurance company initially paid the plaintiff three months' of work-loss benefits, but paid no other no-fault insurance benefits.[463] The plaintiff subsequently suffered angina and a transient ischemic attack.[464] In November 2003, the plaintiff sought pension benefits from the Department of Veterans Affairs (VA).[465] The initial letter prepared by the plaintiff's treating physician claimed that the plaintiff suffered from a number of medical problems, but did not mention the vehicle accident or the plaintiff's closed head injury.[466] In a December 14, 2003, letter, the plaintiff's treating physician included his motor vehicle accident and resulting closed head injury as a basis of the plaintiff's disability.[467] The VA eventually awarded benefits to the plaintiff.[468]

In the meantime, the plaintiff brought an action against the defendant seeking personal protection insurance benefits ("PIP benefits") pursuant to his no-fault insurance policy and the no-fault statute.[469] As explained

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458. *See id.* at 97, 732 N.W.2d at 572. *See generally*, *Steele*, 283 Mich. App. at 481-82, 769 N.W.2d at 264 (discussing *Dobek*).

459. *Steele*, 283 Mich. App. at 482, 769 N.W.2d at 264.

460. *Morales*, 279 Mich. App. 720, 761 N.W.2d 454 (2008) (per curiam), *leave to appeal denied*, 483 Mich. 877, 759 N.W.2d 211 (2009). *Morales* was decided four days prior to this *Survey* period, but was not released for publication until July of this *Survey* period and was not discussed in last year's *Survey*. Accordingly, it is discussed in this Article. *Morales* also considered an issue regarding relevance, which is addressed *supra* notes 99-122 and accompanying text.

461. *Morales*, 279 Mich. App. at 722, 761 N.W.2d at 456-57.

462. *Id.*

463. *See id.* at 721-22, 761 N.W.2d at 456-57.

464. *Id.*

465. *Id.*

466. *See id.* at 723, 761 N.W.2d at 457.

467. *See Morales*, 279 Mich. App. at 724, 761 N.W.2d at 457.

468. *See id.*

469. *See id.* at 721-22, 761 N.W.2d at 456. Pursuant to the no-fault act, "[u]nder personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a

by the court of appeals, the principle issue at trial was whether "plaintiff's inability to work and his need for attended care [were] causally related to injuries he received in the June 12, 2002, rollover accident . . ." as the plaintiff argued, or whether he had "recovered from any auto-accident injuries by November 2002 and subsequently become disabled by his preexisting diabetes-related diseases that gave rise to the 100 percent VA disability rating . . ." as defendant argued.[470] The plaintiff presented a number of medical witnesses who testified as to his closed head injury and its disabling effect and the defendant presented some conflicting medical evidence.[471] The jury returned a verdict in favor of the plaintiff, finding that he had suffered an injury in the rollover accident and awarding over $300,000 in compensatory damages, and an additional $62,786 in penalty interest under section 500.3142.[472]

Amongst other issues, on appeal the defendant argued that the trial court erred in allowing Laura Kling, a registered nurse, to testify regarding the cost of attendant care in support of the plaintiff's damages claim.[473] The defendant argued that Kling's testimony was based on inadmissible hearsay and thus was barred by Rule 703,[474] which provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence."[475] The court of appeals rejected this claim.[476] The court began by noting that Kling testified that she had twenty years' experience and had personally reviewed the plaintiff's attendant care needs.[477] On the basis of this experience and review of the plaintiff's needs, Kling testified regarding the hourly rates charged by attendant care nurses.[478] In light of this testimony, "the trial court did not err in inferring that Kling had personal, nonhearsay knowledge on which to base her testimony."[479] Because Rule 703 "does

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motor vehicle, subject to the provisions of this chapter." MICH. COMP. LAWS ANN. § 500.3105(1) (West 2002).

470. *Morales*, 279 Mich. App. at 725, 761 N.W.2d at 458.

471. *See id.* at 726-28, 761 N.W.2d at 458-59.

472. *See id.* at 722, 761 N.W.2d at 456. Section 500.3142 provides that PIP benefits "are payable as loss accrues," MICH. COMP. LAWS ANN. § 500.3142(1) (West 2002), and that PIP benefits "are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained." MICH. COMP. LAWS ANN. § 500.3142(2). Overdue payments are charged simple interest at a yearly rate of twelve percent. *See* MICH. COMP. LAWS ANN. § 500.3142(3).

473. *Morales*, 279 Mich. App. at 732, 761 N.W.2d at 462.

474. *See id.*

475. MICH. R. EVID. 703.

476. *See Morales*, 279 Mich. App. at 733, 761 N.W.2d at 462.

477. *See id.* at 734, 761 N.W.2d at 462.

478. *Id.*

479. *Id.* at 735, 761 N.W.2d at 463.

not preclude an expert from basing an opinion on the expert's personal knowledge,"[480] the trial court did not abuse its discretion in permitting this testimony.[481] Further, the court explained, Kling's testimony was corroborated by the plaintiff's economic expert, who provided testimony regarding the market rate for attendant care nurses based on surveys conducted by his company and statistics compiled by the state.[482] For these reasons, the defendant was not entitled to a new trial on the basis of Kling's testimony.

Finally, in *Anglers of the AuSable, Inc. v. Department of Environmental Quality*,[483] the defendants, Merit Energy and DEQ, entered into a settlement agreement requiring Merit to treat a plume of contaminated groundwater at a production facility located in Hayes Township.[484] Merit determined that the best option for treating the groundwater was through air stripping, which forces a stream of air through the water to remove contaminates.[485] Merit proposed to discharge the treated water into Kolke Creek, which flows into Lynn Lake and forms part of the headwater system for the AuSable River.[486] The DEQ approved the plan and issued a permit permitting the discharge of treated water into Kolke Creek.[487] The plaintiffs, a riparian landowner on Lynn Lake and persons who use the lake for recreational purposes, brought an administrative challenge to the plan, which was denied.[488] The plaintiffs then sought review of that decision in the circuit court.[489] The circuit court held a bench trial and concluded that the planned discharge would both violate the Michigan Environmental Protection Act and constitute an unreasonable use of riparian rights.[490] The circuit court issued an order enjoining Merit from discharging treated water into Kolke Creek, and awarded costs and expert witness fees to the

480. *Id.*

481. *Id.*

482. *See Morales*, 279 Mich. App. at 735-36, 761 N.W.2d at 463. The court rejected the defendant's argument that the economics expert also relied on hearsay, concluding that any hearsay relied upon by the expert was admissible under the exception for "[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations." MICH. R. EVID. 803(17); *see Morales*, 279 Mich. App. at 736, 761 N.W.2d at 463.

483. 283 Mich. App. 115, 770 N.W.2d 359 (2009).

484. *Id.* at 120, 770 N.W.2d at 368.

485. *Id.*

486. *Id.* at 120-21, 770 N.W.2d at 368.

487. *See id.* at 121-22, 770 N.W.2d at 368-69.

488. *Id.* at 122-23, 770 N.W.2d at 369.

489. *Anglers*, 283 Mich. App. at 122-23, 770 N.W.2d at 369.

490. *Id.*

plaintiffs.[491] Amongst other claims, the defendants on appeal argued that the trial court erred in finding that the proposed discharge would pollute, impair, or destroy natural resources because that finding was based on various items of improperly admitted expert evidence, and on the trial court's erroneous exclusion of the defendant's expert evidence.[492]

The defendants first challenged the admissibility of exhibit 83, which "consisted of article abstracts pertaining to the effects of chlorides on water systems . . ."[493] and the testimony relating to these abstracts provided by plaintiff's expert Dr. Mark Luttenton.[494] The court agreed with the defendants that this exhibit was inadmissible hearsay, rejecting the plaintiff's argument that the abstracts were admissible under Rule 707 because they were not offered for impeachment.[495] Nevertheless, the court concluded that this error was harmless because "the inadmissibility of exhibit 83 did not preclude Luttenton's testimony concerning the effects of chlorides on aquatic invertebrates."[496] The court noted that although Rule 703 requires that the facts or evidence upon which an expert bases his opinion by placed in evidence, this rule relates to "the facts of the case that would support the expert's opinion and do[es] not include information or documentation pertaining to the expert's education concerning the topic."[497] In the court's view, the abstracts reflected in exhibit 83 related solely to Luttenton's education regarding the effects of chlorides on aquatic invertebrates, whereas "the facts that support Luttenton's opinion are the data concerning the actual chorides the proposed discharge would add to Kolke Creek and Lynn Lake."[498] Because this underlying data was properly admitted at trial, Luttenton's opinion was also properly admitted notwithstanding the inadmissibility of the article abstracts contained in exhibit 83, and thus the court concluded that the admission of the exhibit was harmless.[499]

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491. *See id.*

492. *See id.* at 144, 770 N.W.2d at 381.

493. *Id.* at 145, 770 N.W.2d at 381.

494. *Id.*

495. *See Anglers*, 283 Mich. App. at 145 n.22, 770 N.W.2d at 381 n.22. Rule 707 provides that "statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony" are admissible for impeachment purposes when called to the attention of the testifying expert. MICH. R. EVID. 707. The rule further provides that "[i]f admitted, the statements may be read into evidence but may not be received as exhibits." *Id.*

496. *Anglers*, 283 Mich. App. at 145, 770 N.W.2d at 381.

497. *Id.*

498. *Id.* at 145-46, 770 N.W.2d at 381.

499. *See id.* at 146, 770 N.W.2d at 381.

The defendants next challenged the testimony of plaintiff's expert David Hyndman and the admission of exhibits 67 and 135.[500] Hyndman testified regarding a stage discharge analysis, concluding that the discharge would increase the level and flow in Kolke Creek and Lynn Lake.[501] His analysis was based on water flow measurements taken by himself, plaintiff's expert Christopher Grobbel, and Robert Workman.[502] The measurements were reflected in exhibits 67 and 135.[503] The defendants argued that the trial court had erred in its gatekeeping role with respect to these exhibits because they were based on unreliable data.[504] Noting that the trial court's gatekeeping role does not include a resolution of scientific disputes or a search for scientific truth but is limited to determining "whether the expert based his conclusions on a sound foundation,"[505] the court of appeals rejected the defendants' argument.

With respect to exhibit 67, consisting of measurements made by Hyndman, the defendants argued that the flow measurements reflected in the exhibit were not reliable because Hyndman had principally relied on Grobbel's measurements even though Hyndman questioned the reliability of Grobbel's procedure, and because both Grobbel's and Hyndman's measurements were taken inside culverts.[506] The court of appeals agreed with the trial court that these supposed defects in exhibit 67 went to the weight of the evidence, rather than its admissibility.[507] The court explained that although Hyndman used a different procedure in computing his measurements, he never challenged the reliability of Grobbel's measurements, and both Hyndman and Grobbel testified that the upstream side of culverts was the best location for taking measurements in this system.[508] Thus, the court concluded that "the stage discharge analysis was not based on unreliable data" within the meaning of Rule 702.[509]

With respect to exhibit 135, the defendants argued that this exhibit was unreliable because it was identical to exhibit 67 but with various data points added or removed.[510] The court of appeals disagreed, noting

500. *Id.* at 146, 770 N.W.2d at 382.
501. *Id.*
502. *Anglers*, 283 Mich. App. at 146, 770 N.W.2d at 382.
503. *Id.*
504. *See id.*
505. *Id.*
506. *See id.* at 147, 770 N.W.2d at 382.
507. *See id.*
508. *See Anglers*, 283 Mich. App. at 147, 770 N.W.2d at 382.
509. *Id.*
510. *See id.*

that Hyndman testified that he had removed only one "outlier" data point from exhibit 67, and any disagreement between Hyndman and other experts regarding the measurements went to the weight and credibility of the evidence rather than to its admissibility.[511] Further, the court concluded that any error with respect to the admission of Hyndman's stage discharge analysis was harmless because "Hyndman's conclusion and the court's ruling were not solely based on the stage discharge analysis, but focused on additional factors that included the effect of the proposed discharge on wildlife and water quality."[512]

The defendant next claimed that the trial court improperly excluded, in connection with the testimony of defense expert Susan Baker, exhibit EE and portions of exhibit XX, as well as the related testimony offered by Baker.[513] Exhibit XX was a North Carolina storm manual, and exhibit EE consisted of drawings made by Baker reflecting the evolutionary stages of the Kolke Creek system.[514] The court of appeals rejected these claims. With respect to exhibit XX, the court explained that the only part of that exhibit which was excluded "was the portion that Baker admitted she did not use in her analysis."[515] Because Baker had not relied on this portion of the exhibit, it was irrelevant and therefore inadmissible.[516] With respect to exhibit EE, the court found that any error in the exclusion of this exhibit and related testimony was harmless because Baker's testimony regarding "whether the system was no longer in an eroding state was not dispositive with regard to Baker's ultimate conclusion that the proposed discharge would not cause erosion,"[517] which was based on a number of existing factors.

Finally, the court of appeals rejected the defendants' claim that the trial court had erred in excluding Workman's rebuttal testimony regarding Grobbel's measurements which were part of exhibit 135.[518] The court of appeals concluded that Workman was not qualified to offer this testimony because it related to hydrology or hydrogeology, while Workman's "expertise was in aquatic biology and his analysis of the flow measurements pertained to aquatic wildlife and habitat."[519]

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511. *See id.* at 147-48, 770 N.W.2d at 382-83.
512. *Id.* at 148, 770 N.W.2d at 383.
513. *Id.*
514. *See Anglers*, 283 Mich. App. at 148, 770 N.W.2d at 383.
515. *Id.*
516. *See id.* at 148-49, 770 N.W.2d at 383.
517. *Id.* at 149, 770 N.W.2d at 383.
518. *Id.*
519. *Id.*

*B. Qualifications of Experts*

Of course, a question preliminary to the introduction of expert or scientific evidence is whether the proposed witness is qualified to give such testimony. Generally, under Rule 702 an expert is qualified to give specialized scientific or technical testimony when he or she is qualified by his or her "knowledge, skill, experience, training, or education."[520] While the Michigan courts did not issue any published decisions addressing expert qualification under Rule 702 during the *Survey* period, the court of appeals did issue two decisions addressing expert qualification in medical malpractice cases. Although Rule 702 governs expert qualification in the general run of cases, in medical malpractice cases special rules of qualification for experts are applicable. Specifically:

> In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> > (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.
> >
> > (b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:
> >
> > (i) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.

520. MICH. R. EVID. 702.

> (ii) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.
>
> (c) If the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:
>
> (i) Active clinical practice as a general practitioner.
>
> (ii) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed.[521]

This rule comes into play at two stages. First, prior to commencing a medical malpractice suit a plaintiff must file an affidavit of merit from an expert witness attesting to the basis for the plaintiff's claim.[522] The expert witness need not actually be qualified under section 600.2169, but the attorney filing the affidavit must have a reasonable, good faith belief that the expert can satisfy the requirements of the statute.[523] At the trial stage,

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521. MICH. COMP. LAWS ANN. § 600.2169(1) (West 2000). Although the Michigan Constitution vests the supreme court with the exclusive power to promulgate rules of practice and procedure, *see* MICH. CONST. 1963, art. VI, § 5, the supreme court has determined that section 600.2169 is a rule of substantive law, and thus governs the admissibility of experts in medical malpractice actions over Rule 702. *See* McDougall v. Schanz, 461 Mich. 15, 37, 597 N.W.2d 148, 159 (1999).

522. *See* MICH. COMP. LAWS ANN. § 600.2912 (West 2000). Beyond the expert qualification issue, the Michigan courts issues several significant decisions regarding affidavits of merit during the *Survey* period. These cases involve substantive issues of medical malpractice law beyond the scope of this Article.

523. *See* Grossman v. Brown, 470 Mich. 593, 599, 685 N.W.2d 198, 201 (2004); MICH. COMP. LAWS ANN. § 600.2912d(1) (West 2000). A defendant in a malpractice action must file an affidavit of meritorious defense, which is generally subject to the same requirements as an affidavit of merit, including the requirement that the affiant be

however, the expert must be qualified in accordance with section 600.2169.[524]

In *Woodard v. Custer*,[525] decided in a prior *Survey* period, the Michigan Supreme Court provided a detailed analysis of the requirements for medical experts. Briefly summarized, in *Woodard* the court held that "[a]lthough specialties and board certificates must match, not *all* specialties and board certificates must match."[526] Rather, because the statute speaks of an expert's testimony on the *appropriate* standard of care, the statute "should not be understood to require such witness to specialize in specialties . . . that are not relevant to the standard of medical practice or care about which the witness is to testify."[527] With respect to the same specialty requirement, the court concluded that the plain language of the statute does not require board certification.[528] Rather, "a 'specialty' is a particular branch of medicine...in which one can potentially become board certified . . ."[529] and thus, if the defendant practices such a branch of medicine, the expert must likewise do so.[530] Finally, under the statute, a subspecialty is merely a type of specialty which falls within a broader specialty.[531] "Therefore, if a defendant physician specializes in a subspecialty, the plaintiff's expert witness must have specialized in the same subspecialty . . . ."[532] The Michigan Court of Appeals applied these principles in two cases decided during the *Survey* period.

In *Wolford v. Duncan*,[533] the plaintiff personal representative brought a wrongful death action against the Fenton Medical Center, physician's assistant Deborah Wilson, and Dr. Deborah Duncan.[534] The plaintiff's decedent was treated by the defendants after complaining of pain on the left side of his body.[535] After plaintiff was examined and both a chest x-ray and electrocardiogram performed, Wilson diagnosed pneumonia and

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qualified to give expert testimony under section 600.2169. *See* MICH. COMP. LAWS ANN. § 600.2912e (West 2000).

524. *See Grossman*, 470 Mich. at 599, 685 N.W.2d at 201.

525. 476 Mich. 545, 719 N.W.2d 842 (2006).

526. *Id.* at 558, 719 N.W.2d at 849.

527. *Id.* at 559, 719 N.W.2d at 850.

528. *Id.* at 563, 719 N.W.2d at 852.

529. *Id.*

530. *Id.* at 561-62, 719 N.W.2d at 851.

531. *See Woodard*, 476 Mich. at 562, 719 N.W.2d at 851.

532. *Id.*

533. 279 Mich. App. 631, 760 N.W.2d 253 (2008) (per curiam), *leave to appeal denied*, 482 Mich. 1068, 757 N.W.2d 481 (2008).

534. *Id.* at 632-33, 760 N.W.2d at 254.

535. *Id.*

prescribed an antibiotic.[536] Two days later, the decedent called an ambulance because of a severe headache.[537] The decedent died while being transported to the hospital.[538] The decedent's remains were exhumed a year later, and the pathologist performing the autopsy found blood clots in the decedent's lungs.[539] A primary issue at trial, contested by the parties' experts, was whether the clots were pre- or post-mortem.[540] The plaintiff brought a wrongful death action, alleging that the defendants should have suspected a pulmonary embolism or cardiac problem based on the decedent's recent diagnosis of deep vein thrombosis, and therefore should have immediately hospitalized the decedent.[541] The defendants disputed both that they breached the standard of care, and that the decedent died as a result of a blood clot induced cardiac or pulmonary problem.[542] The jury returned a verdict in favor of the defendants, and the plaintiff appealed.[543]

On appeal the plaintiff argued that the trial court had erred in failing to strike the testimony of defense expert Ronald Nelson, who testified regarding the appropriate standard of care for a physician's assistant.[544] The plaintiff argued that Nelson was not properly qualified under section 600.2169(1) "because his supervising physician specialized in internal medicine and Wilson's supervising physician, Dr. Duncan, specialized in family practice."[545] The court of appeals rejected this claim, concluding that the "specialist" language of the statute does not apply to physician's assistants.[546]

The court of appeals relied on the supreme court's decisions in *Woodard v. Custer* and *Cox v. Flint Board of Hospital Managers*,[547] and the court of appeal's prior decision in *Brown v. Hayes*.[548] The court of appeals explained that, in *Woodard*, the supreme court "construed the term 'speciality' to mean 'a particular branch of medicine or surgery in

536. *Id.* at 633, 760 N.W.2d at 254.
537. *Id.*
538. *Id.*
539. *Wolford*, 279 Mich. App. at 633, 760 N.W.2d at 254.
540. *See id.*
541. *Id.*
542. *See id.*
543. *Id.* at 632, 760 N.W.2d at 254.
544. *Id.* at 634, 760 N.W.2d at 254.
545. *Wolford*, 279 Mich. App. at 634, 760 N.W.2d at 254.
546. *Id.* at 636, 760 N.W.2d at 256.
547. 467 Mich. 1, 651 N.W.2d 356 (2002).
548. 270 Mich. App. 491, 716 N.W.2d 13 (2006), *rev'd in part on other grounds*, 477 Mich. 966, 724 N.W.2d 470 (2006).

which one can potentially become board certified.'"[549] In *Cox*, the supreme court explained that the statutory standard of care applicable to general practitioners and specialists only apply to physicians, and thus that nurses are subject to a common law standard of care.[550] Finally, in *Brown*, the court of appeals extended *Cox* to the expert witness statute, concluding that the terms "general practitioner" and "specialist" in the statute refer only to physicians.[551]

With these decisions in mind, the court of appeals concluded that "[s]ection 2169(1)(a) and (c) apply, respectively, to specialists and general practitioners, but these terms refer only to physicians, not other health professionals."[552] Because a physician's assistant is not a physician, the court held, the same specialty requirements of section 2169(1)(a) and (c) are not applicable.[553] The court reasoned that this conclusion was buttressed by the fact that the licensing statutes regarding physician's assistants "do not recognize board certification in any specialty," and thus, "[a] physician's assistant cannot be a specialist in accordance with the Supreme Court's construction of that term in *Woodard*."[554] The court found it "significant that a physician's assistant need have no special certification to work under a physician who is a specialist."[555] The court also rejected the plaintiff's argument that the statute setting forth the standard of care applicable to physician's assistants altered this conclusion.[556] Although that statute requires that a physician's assistant "conform to the minimal standards of acceptable and prevailing practice for the supervising physician,"[557] the court of appeals explained that "it does not follow that physician's assistants are specialists under section 2169(1)(a)."[558] Because the same speciality requirement was inapplicable, and because Nelson had devoted a majority of his time in the proceeding year to practice as a physician's assistant as required by section 2169(1)(b), Nelson was qualified as an expert to opine on the standard of care governing Wilson's conduct.[559]

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549. *Wolford*, 279 Mich. App. at 635, 760 N.W.2d at 255 (quoting *Woodard*, 476 Mich. at 561, 719 N.W.2d at 851).

550. *See id.* (discussing *Cox*, 467 Mich. at 18-20, 651 N.W.2d at 365-66).

551. *See id.* at 635-36, 760 N.W.2d at 255-56 (discussing *Brown*, 270 Mich. App. at 499-500, 716 N.W.2d at 18-19).

552. *Id.* at 636, 760 N.W.2d at 256.

553. *See id.*

554. *Id.*

555. *Wolford*, 279 Mich. App. at 636, 760 N.W.2d at 256.

556. *Id.*

557. MICH. COMP. LAWS ANN. § 333.17078(2) (West 2001).

558. *Wolford*, 279 Mich. App. at 637, 760 N.W.2d at 256.

559. *See id.*

In *Kiefer v. Markley*,[560] the court of appeals considered what constitutes a "majority" of an expert's time under section 2169(1)(b). In that case, the question was whether the plaintiff's proposed expert, Dr. Frederick A. Valauri, had "devoted a majority of his time" in the proceeding year to the practice of hand surgery, the relevant speciality at issue in the case.[561] Dr. Valauri's time was spent practicing three specialities — hand surgery, reconstructive surgery, and cosmetic surgery — of which hand surgery constituted the largest share, constituting about 30- to 40- percent of his time.[562] The trial court struck Dr. Valauri as a witness, and the court of appeals affirmed.[563]

The court found that the statute was unambiguous in requiring that a plaintiff's expert have devoted over 50% of his time in the proceeding year to the practice of the relevant specialty.[564] The court explained that "[t]he statute states that the expert must have spent the *majority* of his or her time the year preceding the alleged malpractice practicing or teaching the specialty . . . "and that "'[t]o the extent the word 'majority' needs explanation, it is defined as, the greater part or larger number; more than half of a total.'"[565] Thus, an expert who spends "a plurality rather than a majority of his time" practicing the relevant specialty is not qualified as an expert under section 2169(1)(b).[566] The court of appeals was itself troubled by this result, noting that the defendant, like the plaintiff's expert, was board certified in plastic surgery with an added qualification in hand surgery, and that Dr. Valauri's practice of reconstructive surgery of the extremities was closely related to hand surgery.[567] Thus, the court thought that this was not a result likely intended by the Legislature, but felt itself "constrained to affirm the trial court's decision" in light of "the unambiguous language of the statute."[568]

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560. 283 Mich. App. 555, 769 N.W.2d 271 (2009).
561. *Id.* at 557, 769 N.W.2d at 272.
562. *See id.*
563. *Id.*
564. *Id.* at 559, 769 N.W.2d at 273.
565. *Id.* (quoting WEBSTER'S NEW WORLD DICTIONARY (2d College ed. 1980)).
566. *See Kiefer*, 283 Mich. App. at 559, 769 N.W.2d at 274.
567. *See id.* at 560, 769 N.W.2d at 274.
568. *Id.* at 559, 769 N.W.2d at 274. Judge O'Connell dissented, concluding that the term "majority" has multiple meanings, one of which is synonymous with the term plurality. Given this ambiguity, Judge O'Connell concluded that the court should have attempted to ascertain the Legislature's intent, and concluded that a plurality of time is sufficient to satisfy section 2169(1)(b). *See id.* at 563-66, 769 N.W.2d at 275-76 (O'Connell, J., dissenting).

## VIII. HEARSAY

"The theory of the hearsay rule is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of cross-examination."[569] The prohibition on hearsay evidence is deeply rooted in the common law, and is "a rule which may be esteemed, next to jury trial, the greatest contribution of [the common law] system to the world's methods of procedure."[570] The admissibility of hearsay evidence is governed by Article VIII of the Michigan Rules of Evidence. Under the rules, hearsay evidence is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[571] Rule 801 also defines two categories of statements as "non-hearsay" notwithstanding the Rule's definition of hearsay: prior inconsistent statements of a witness and admissions of a party-opponent.[572] Rule 802 provides simply that "[h]earsay is not admissible except as provided by these rules."[573] Rules 803, 803A, and 804 provide exceptions to the hearsay rules.

### *A. Hearsay and Non-Hearsay*

As noted above, hearsay generally is an out-of-court statement offered to prove the truth of the matter asserted. Thus, a statement may be non-hearsay if it is offered for a reason other than to prove the truth of the matter asserted in the statement. Further, notwithstanding the general definition of hearsay, certain statements are considered nonhearsay by operation of Rule 801.[574] The Michigan Court of Appeals issued two decisions addressing these issues during the *Survey* period.

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569. 5 WIGMORE, *supra* note 22, § 1362, at 3 (James H. Chadbourne rev. ed. 1974).

570. *Id.* § 1364, at 28.

571. MICH. R. EVID. 801(c). The rule defines a "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." MICH. R. EVID. 801(a).

572. *See* MICH. R. EVID. 801(d).

573. MICH. R. EVID. 802.

574. MICH. R. EVID. 801.

*1. Hearsay Generally*

*In re Utrera*[575] involved an appeal by the respondent mother from an order terminating her parental rights. In 2002, Carolyn Roach was appointed as a limited guardian for the respondent's child at her request, and the child had lived with Roach since that time.[576] In June 2005, Roach suspended the respondent's parenting time, and respondent filed a petition to terminate the guardianship.[577] That petition was ultimately denied after the respondent failed to follow the court's plan requiring that she obtain a psychiatric evaluation.[578] On June 6, 2006, Karen Russell, the child's guardian ad litem, filed a petition to terminate the respondent's parental rights based on her failure to comply with the probate court's earlier transition plan and her history of mental health issues.[579] The trial court conducted a dispositional hearing, at which it took testimony from Elaine Ball-Tyler, a guardianship investigator with the probate court; Laura Henderson, the child's therapist; Sandra Fringer, respondent's therapist; and respondent's mother.[580] Following the hearing, the trial court terminated the respondent's parental rights, and the respondent appealed.[581]

On appeal the respondent argued that the trial court had erred in admitting repeated instances of hearsay testimony at the dispositional hearing.[582] The court of appeals concluded that much of the complained of evidence was inadmissible hearsay, but that the error in admission was harmless.[583] The court first considered the respondent's challenge to Ball-Tyler's testimony regarding police reports of domestic violence involving the respondent.[584] The court concluded that the information regarding these reports, which were not themselves introduced into evidence, was not hearsay because they were not offered to prove the truth of the matter asserted, that is, that domestic violence had actually occurred.[585] Rather, Ball-Tyler testified that during her investigation

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575. 281 Mich. App. 1, 761 N.W.2d 253 (2008). *Utrera* also discussed an issue relating to the state of mind exception to the hearsay rule. This aspect of the case is discussed *infra* notes 619-29 and accompanying text.

576. *Utrera*, 281 Mich. App. at 3-5, 761 N.W.2d at 57-58.

577. *Id.*

578. *Id.*

579. *See id.* at 2, 761 N.W.2d at 257-58.

580. *See id.* at 5-8, 761 N.W.2d at 258-59.

581. *Id.* at 8, 761 N.W.2d at 258-59.

582. *See Utrera*, 281 Mich. App. at 18, 761 N.W.2d at 265.

583. *Id.* at 21, 761 N.W.2d at 267.

584. *See id.* at 19, 761 N.W.2d at 266.

585. *Id.*

regarding the June 2005 petition to terminate Roach's guardianship, respondent had reported that she was living with the child's grandparents.[586] The reports contradicted this assertion, showing domestic violence incidents at other homes.[587] Because Ball-Tyler's testimony was not offered to prove the truth of the matter asserted in the police reports, but merely to show the respondent's lack of a consistent residence, they did not constitute hearsay.[588]

The court of appeals did conclude, however, that the trial court had erred in admitting Ball-Tyler's testimony concerning statements made by the child's grandparents, Roach, and Henderson.[589] For example, according to Ball-Tyler, the grandparents expressed concern over the respondent's ability to manage her affairs and the stability of her behavior.[590] Because these statements were offered to prove the truth of the matter asserted, namely, "that respondent was not able to manage her own residence or live on her own and that her behavior was not stable or consistent over time," they were hearsay under Rule 801(c).[591] Likewise, Ball-Tyler's testimony regarding statements made by Henderson and Roach that the respondent's visits with the child were counterproductive and causing the child stress were offered to prove these facts, and thus was impermissible hearsay,[592] as was Ball-Tyler's testimony regarding Roach's statement that the respondent was usually tardy for the scheduled visits.[593] Similarly, the court of appeals concluded that Ball-Tyler's testimony relating statements made by the child's grandparents and Henderson regarding instances in which the child was left in the care of the respondent's other minor children were offered to prove the fact of the matter asserted — that respondent had in fact left the child in the care of her older children — and thus was inadmissible hearsay.[594]

Nevertheless, despite the fact that "the trial court abused its discretion by allowing the admission of extensive hearsay statements,"[595] the court of appeals concluded that reversal was not warranted. After examining the extensive, properly admitted evidence showing that the respondent had failed to comply with the limited guardianship placement

586. *Id.*
587. *Id.*
588. *See Utrera*, 281 Mich. App. at 19, 761 N.W.2d at 266.
589. *Id.*
590. *Id.*
591. *Id.* at 20, 761 N.W.2d at 266.
592. *Id.*
593. *See id.*
594. *See Utrera*, 281 Mich. App. at 21, 761 N.W.2d at 267.
595. *Id.*

plan and that the child would be harmed if returned to the respondent,[596] the court concluded that reversal was not required because, "despite the hearsay erroneously received by the trial court, . . . the trial court's decision to terminate was supported by clear and convincing, legally admissible evidence."[597]

*2. Party Admissions*

Notwithstanding the ordinary definition of hearsay, Rule 801 defines as "non hearsay" any statement which:

> is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, except statements made in connection with a guilty plea to a misdemeanor motor vehicle violation or an admission of responsibility for a civil infraction under laws pertaining to motor vehicles, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy.[598]

The theory behind this rule is that, when offered against (rather than in support of) a party the purpose of the hearsay rule is not violated. The hearsay rule exists to provide cross-examination of testimonial statements so that their reliability may be tested before the jury. However, a party

> cannot complain of a lack of opportunity to cross-examine himself before his assertion is admitted against him. Such a request would be absurd. Hence, the objection of the hearsay rule falls away, because the very basis of the rule is lacking, viz., the

596. *See id.* at 22-25, 761 N.W.2d at 267-69.
597. *Id.* at 25-26, 761 N.W.2d at 269.
598. MICH. R. EVID. 801(d)(2).

> need and prudence of affording an opportunity of cross-examination.[599]

In other words, the hearsay rule is satisfied in the case of a statement of a party opponent because the party "has already had an opportunity to cross-examine himself; or (to put it another way) he now as opponent has the full opportunity to put himself on the stand and explain his former assertion."[600] The Michigan Court of Appeals considered this type of nonhearsay in one case decided during the *Survey* period.

In *Guerrero v. Smith*,[601] the plaintiff alleged that he suffered a closed head injury and back and neck problems as a result of being struck from behind in chain-reaction accident caused by defendant Glen Smith's car, which was being driven by defendant Derek Smith.[602] He brought a third-party action under the no-fault act, alleging negligence on the part of Derek Smith.[603] A jury returned a verdict in favor of the defendants, and the plaintiff appealed.[604] The plaintiff argued on appeal that the trial court erred in admitting a letter written by his attorney to Dr. Joel Saper. The letter requested that Dr. Saper perform an MRI study in order to provide objective evidence of the plaintiff's injuries which was necessary in order for the plaintiff to succeed in his lawsuit.[605] Defense counsel argued that this letter evidenced a plan by plaintiff to find objective evidence supporting his claims, suggesting that the plaintiff was "faking it."[606]

The court of appeals rejected the plaintiff's claim.[607] The court first concluded that the letter was not hearsay, because it was not offered to prove the truth of the matter asserted regarding the value of MRI evidence, but merely to show that plaintiff and his attorney had attempted to obtain such evidence.[608] In any event, the court concluded that the evidence was admissible as a nonhearsay statement of a party opponent under Rule 801(d)(2)(D), "because it was a vicarious

599. 4 WIGMORE, *supra* note 22, § 1048, at 4-5.

600. *Id.* at 5 (citation omitted).

601. *Guerrero*, 280 Mich. 647, 761 N.W.2d 723. *Guerrero* also discussed issues of Rule 404(b) evidence and character evidence of a witness. These aspects of the case are discussed *supra* notes 305-15 and accompanying text (Rule 404(b)) and *supra* notes 415-24 and accompanying text (discussing character evidence).

602. *Guerrero*, 2006 WL 2419178, at *1.

603. *See id.* The facts are not set forth in the opinion under discussion here, and are taken from this prior appeal in the case.

604. *See Guerrero*, 280 Mich. App. at 651, 761 N.W.2d at 729.

605. *See id.* at 656-57, 761 N.W.2d at 731-32.

606. *See id.* at 657, 761 N.W.2d at 732.

607. *Id.* at 660, 761 N.W.2d at 733.

608. *See id.*

admission to a third party, written by plaintiff's attorney during the course of and in furtherance of the attorney-client relationship."[609] Accordingly, the court found no error in the admission of the letter.[610]

*B. Exceptions to the Hearsay Rule — Availability of Declarant Immaterial (Rules 803 and 803A)*

Rule 803 provides twenty-three distinct exceptions to the hearsay rule for various categories of statements.[611] These rules are applicable regardless of whether or not the declarant is otherwise available to testify at trial.[612] These exceptions embody certain circumstances in which

> the probability of accuracy and trustworthiness of [a] statement is practically sufficient, if not quite equivalent to that of statements tested in the conventional manner [of cross-examination]. This circumstantial probability of trustworthiness is found in a variety of circumstances sanctioned by judicial practice; and it is usually from one of these salient circumstances that the exception takes its name. There is no comprehensive attempt to secure uniformity in the degree of trustworthiness which these circumstances presuppose. It is merely that common sense and experience have from time to time pointed them out as practically adequate substitutes for the ordinary test, at least, in view of the necessity of the situation.[613]

During the *Survey* period, the Michigan Court of Appeals issued two published decisions involving Rule 803 exceptions.

*1. State of Mind*

The state of mind exception to the hearsay rule provides that a statement is not hearsay if it is "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition . . . ."[614] The Michigan Court of Appeals considered this exception in *In re*

609. *Id.* at 661, 761 N.W.2d at 734.

610. *Guerreo*, 280 Mich. App. at 661, 761 N.W.2d at 734.

611. MICH. R. EVID. 803.

612. *See id.* The rule also contains a catch-all exception, governing statements not directly covered by the enumerated exceptions. *See* MICH. R. EVID. 803(24).

613. 5 WIGMORE, *supra* note 22, § 1422, at 253.

614. MICH. R. EVID. 803(3).

*Utrera*,[615] which involved an appeal by the respondent mother from an order terminating her parental rights.[616] In 2002, Carolyn Roach was appointed as a limited guardian for the respondent's child at her request, and the child live with Roach since that time.[617] In June 2005, Roach suspended the respondent's parenting time, and respondent filed a petition to terminate the guardianship.[618] That petition was ultimately denied after the respondent failed to follow the court's plan requiring that she obtain a psychiatric evaluation.[619] On June 6, 2006, Karen Russell, the child's guardian ad litem, filed a petition to terminate the respondent's parental rights based on her failure to comply with the probate court's earlier transition plan and her history of mental health issues.[620] The trial court conducted a dispositional hearing, at which it took testimony from Elaine Ball-Tyler, a guardianship investigator with the probate court; Laura Henderson, the child's therapist; Sandra Fringer, respondent's therapist; and the respondent mother.[621] Following the hearing, the trial court terminated the respondent's parental rights, and the respondent appealed.[622]

On appeal the respondent argued that the trial court had erred in admitting Henderson's testimony that the child was afraid of the respondent and Ball-Tyler's testimony that the child did not want to visit with the respondent because the respondent frightened her.[623] The court of appeals rejected this claim, explaining that even though the testimony was hearsay, it was admissible because they showed the child's then-existing state of mind.[624] In particular, the court noted, "[s]tatements that the declarant is afraid may be admissible pursuant to MRE 803(3) to prove the declarant's state of mind."[625] Accordingly, the court found no error in the admission of this testimony.[626]

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615. 281 Mich. App. 1, 761 N.W.2d 253. *Utrera* also involved issues relating to the definition of hearsay. This aspect of the case is discussed *supra* notes 579-601 and accompanying text.

616. *Utrera*, 281 Mich. App. at 2, 761 N.W.2d 557-58.

617. *Id.*

618. *Id.*

619. *Id.*

620. *See id.* at 3-5, 761 N.W.2d at 257-58.

621. *See id.* at 5-8, 761 N.W.2d at 258-59.

622. *Utrera*, 281 Mich. App. at 5-8, 761 N.W.2d at 258-59.

623. *See id.* at 18, 761 N.W.2d at 265.

624. *See id.*

625. *Id.* at 18-19, 761 N.W.2d at 265.

626. *Id.*

*2. Tender Years*

At common law, courts recognized the so-called tender years exception to the hearsay rule. Under this exception, hearsay evidence is admissible to corroborate the testimony of a young victim. As stated by the Michigan Supreme Court:

> The rule in this State is that where the victim is of tender years the testimony of the details of her complaint may be introduced in corroboration of her evidence, if her statement is shown to have been spontaneous and without indication of manufacture; and delay in making the complaint is excusable so far as it is caused by fear or other equally effective circumstance.[627]

Rule 803 as originally enacted, however, did not codify the tender years exception.[628] Thus, in *People v. Kreiner*,[629] the court held that "[t]he tender years exception, as restated in *Baker*, did not survive adoption of the Michigan Rules of Evidence."[630]

Subsequent to *Kreiner*, the Michigan Supreme Court adopted Rule 803A, establishing once again the applicability of the tender years exception in Michigan.[631] Rule 803A is intended to codify the common law rule;[632] however, unlike the generally vague common law rule, Rule 803 provides detailed guidelines for the application of the exception:

> A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:
>
> > (1) the declarant was under the age of ten when the statement was made;
> >
> > (2) the statement is shown to have been spontaneous and without indication of manufacture;

627. People v. Baker, 251 Mich. 322, 326, 232 N.W.2d 381, 383 (1930).
628. MICH. R. EVID. 803.
629. 415 Mich. 372, 329 N.W.2d 716 (1982) (per curiam).
630. *Id.* at 377, 329 N.W.2d at 719.
631. MICH. R. EVID. 803A.
632. *See* People v. Dunham, 220 Mich. App. 268, 271, 559 N.W.2d 360, 363 (1996); MICH. R. EVID. 803A, 1991 Note.

> (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
>
> (4) the statement is introduced through the testimony of someone other than the declarant.
>
> If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.[633]

During the *Survey* period, the Michigan Supreme Court granted leave to appeal in a case which, hopefully, will provide some guidance on the exception's requirement that the statement be shown to have been spontaneously made. In *People v. Dunham*,[634] the court of appeals held that answers to innocuous, open-ended questions in a child custody proceeding, where such questions are not specifically directed toward issues of sexual conduct, were spontaneous under Rule 803A.[635] In *People v. Gursky*,[636] an unpublished decision decided during the *Survey* period, the court of appeals extended *Dunham* and held that the victim's statement to a family friend was spontaneous where they were given in response to questions more specifically asking whether anyone had touched her in a sexual manner.[637] The court concluded that the question posed to the victim, even though asking about sexual contact, was open ended and the victim's response provided significant detail concerning the nature and temporal scope of the sexual conduct.[638] Thus, the court of appeals concluded, "[t]aken as a whole, the victim's statements were primarily spontaneous, despite being prompted by [the family friend's] questions."[639] The Michigan Supreme Court granted leave to appeal in *Gursky* to address whether the victim's statements were spontaneous within the meaning of Rule 803A(2).[640] The court's upcoming decision

633. MICH. R. EVID. 803A. The rule also requires the proponent of the evidence to provide notice of its intent to use such evidence in advance of trial, and limits the application of the rule to criminal and delinquency proceedings. *See id.*

634. 220 Mich. App. 268, 559 N.W.2d 360.

635. *See id.* at 272, 559 N.W.2d at 363.

636. No. 274945, 2008 WL 2780282 (Mich. Ct. App. July 17, 2008) (per curiam), *leave to appeal granted*, 483 Mich. 999, 764 N.W.2d 570 (2009).

637. *See id.* at *2.

638. *See id.*

639. *Id.*

640. *See id.* 483 Mich. at 999, 764 N.W.2d at 570.

in this case should provide some much needed guidance[641] for practitioners and the lower courts on the proper scope of this requirement of the tender years exception.

*C. Exceptions to the Hearsay Rule — Declarant Unavailable*

In addition to Rule 803, which provides exceptions applicable regardless of whether the declarant is available for trial, Rule 804 provides several additional exceptions applicable only in cases in which the declarant is "unavailable" to testify at trial.[642] Under the rule:

> "Unavailability as a witness" includes situations in which the declarant–
>
> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
>
> (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
>
> (3) has a lack of memory of the subject matter of the declarant's statement; or
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means, and in a criminal case, due diligence is shown.[643]

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641. *Compare Gursky*, 2008 WL 2780282, at *2 (statements made in response to open-ended question specifically directed toward sexual conduct are spontaneous), *with In re* Gossage, No. 247958, 2004 WL 2726044, at *3 (Mich. Ct. App. Nov. 30, 2004) (per curiam) (reaching opposite conclusion).

642. MICH. R. EVID. 804.

643. MICH. R. EVID. 804(a). The rule provides that a witness is not "unavailable" for purposes of the rule where the witness's unavailability "is due to the procurement or

*1. Former Testimony*

One of the exceptions to the hearsay rule applicable when the declarant is unavailable allows the admission of the former testimony of the declarant in an earlier proceeding.[644] Specifically, the rule provides that hearsay testimony is not excluded if the declarant is unavailable and the declaration consists of the

> [t]estimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.[645]

Although there are a significant number of unpublished court of appeals decisions discussing the similar motive requirement, the Michigan Supreme Court has only briefly touched on the similar motive provision in one case.[646] Unfortunately, during the *Survey* period the Michigan Supreme Court passed on an opportunity to clarify the "similar motive" requirement, denying leave to appeal in *People v. Sierra*.[647] In *Sierra*[648] the defendant, charged with drug offenses, sought to introduce the testimony of Lisa Vega, who had been called as a prosecution witness at the trial of the defendant's codefendant.[649] At the defendant's trial, Vega invoked her privilege against self-incrimination and refused to testify, and thus was unavailable.[650] The prosecutor filed a motion in limine seeking to exclude Vega's testimony from the codefendant's trial, arguing that it did not have a similar motive to develop Vega's testimony at the codefendant's trial.[651] The trial court agreed, and the defendant filed an interlocutory appeal.[652] The court of appeals affirmed, concluding that the prosecution did not have a similar motive to develop

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wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying." *Id.*

644. MICH. R. EVID. 804(b)(1).

645. *Id.*

646. *See* People v. Meredith, 459 Mich. 62, 586 N.W.2d 538 (1998).

647. People v. Sierra, 482 Mich. 1107, 758 N.W.2d 264 (2008).

648. People v. Sierra, No. 277838, 2008 WL 241200 (Mich. Ct. App. Jan 29, 2008) (per curiam), *oral argument on application for leave to appeal granted*, 482 Mich. 883, 752 N.W.2d 475 ("*Sierra II*"), *leave to appeal denied*, 482 Mich. 1107, 758 N.W.2d 264 (2008) ("*Sierra III*").

649. *Sierra*, 2008 WL 241200 at *1.

650. *Id.*

651. *Id.*

652. *See id.*

Vega's testimony because, at the codefendant's trial, the prosecutor was concerned only with showing the codefendant's guilt, and not the defendant's guilt.[653] Judge White dissented, reasoning that because the trials of both men involved the same overarching conspiracy and series of drug transactions, the prosecutor's motive to develop Vega's testimony at trial was sufficiently similar to the prosecutor's motives in the defendant's trial to allow the prior testimony.[654]

Although *Sierra* presents a difficult question, it appears at first blush to potentially conflict with the decisions of the Michigan Supreme Court and court of appeals "setting a low threshold for what constitutes a 'similar motive' for purposes of the admissibility of evidence under MRE 804(b)(1)."[655] It also conflicts with decisions of the federal courts interpreting the federal Rule 804(b)(1), which hold that the rule only requires a similar, not an identical, motive.[656] The Michigan Supreme Court initially granted oral argument on whether to grant the defendant's application for leave to appeal in *Sierra*, specifically directing the parties to address "what constitutes a 'similar motive' to develop testimony under MRE 804(b)(1) . . ."[657] However the court subsequently denied the defendant's application for leave to appeal, providing no further guidance on this question.[658]

*2. Statements Against Interest*

A second hearsay exception applicable when a witness is unavailable allows for the introduction of:

> [a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a

653. *See id.* at *2.

654. *Id.* at *3 (White, J., dissenting).

655. *Sierra III*, 482 Mich. at 1107, 758 N.W.2d at 265 (Kelly, J., dissenting) (citing People v. Meredith, 459 Mich. 62, 586 N.W.2d 538 (1998); People v. Adams, 233 Mich. App. 652, 592 N.W.2d 794 (1999)).

656. *See* United States v. Salerno, 505 U.S. 317, 326 (1992) (Blackmun, J., concurring); Battle *ex rel.* Battle v. Memorial Hosp. at Gulfport, 228 F.3d 544, 552 (5th Cir. 2000).

657. *Sierra II*, 482 Mich. at 883, 752 N.W.2d at 475.

658. *See Sierra III*, 482 Mich. at 1107, 758 N.W.2d at 264. Justice Kelly dissented from the denial of leave to appeal, noting that "[t]he Court of Appeals . . . framed the issue very narrowly," *id.* at 1107, 758 N.W.2d at 266 (Kelly, J., dissenting), in seeming contrast to existing law, and thus concluding that the "defendant's 'similar motive' argument warrants full briefing and oral argument." *Id.* at 1107, 758 N.W.2d at 266.

> reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the truthworthiness of the statement.[659]

This rule is premised on the notion that such statements are trustworthy "because human experience indicates that a statement asserting a fact distinctly against the declarant's interest is unlikely to be deliberately false or heedlessly incorrect."[660]

During the *Survey* period, the Michigan Supreme Court considered the statement against interest exception in *People v. Taylor*.[661] In that case, the defendants were convicted of a number of crimes arising from the kidnapping and murder of Fate Washington.[662] Amongst other claims raised in the defendants' applications for leave to appeal in the supreme court, defendant Robert King argued that the trial court erred in permitting, through the testimony of Troy Ervin, the hearsay statements of codefendant Marlon Scarber.[663] In these statements, Scarber told Ervin that he, King, and codefendant Eric Taylor had kidnapped the victim, and subsequently that King had shot the victim.[664] In lieu of granting leave to appeal, the supreme court summarily affirmed the court of appeal's rejection of this claim.[665]

With respect to the hearsay issue, the court concluded that Scarber's statements to Ervin implicating defendant King were properly admitted under the statement against interest exception.[666] In reaching this conclusion, the court relied on its prior decision in *People v. Dhue*,[667] in which the court held that

> [w]here . . . the declarant's inculpation of an accomplice is made in the context of a narrative of events, at the declarant's initiative without any prompting or inquiry, that as a whole is clearly against the declarant's penal interest and as such is reliable, the whole statement–including portions that inculpate another–is

659. MICH. R. EVID. 804(b)(3).
660. WEISSENBERGER, *supra* note 78, § 804.22, at 593.
661. 482 Mich. 368, 759 N.W.2d 361 (2008) (per curiam).
662. *Id.* at 368, 759 N.W.2d 361.
663. *Id.*
664. *See id.* at 374, 759 N.W.2d at 364.
665. *Id.* at 370, 759 N.W.2d at 362.
666. *Id.*
667. 444 Mich. 151, 506 N.W.2d 505 (1993).

admissible as substantive evidence at trial pursuant to MRE 804(b)(3).[668]

Relying on this language, the *Taylor* court found no error in the admission of Scarber's narrative implicating himself, King, and Taylor.[669] The court reasoned that both statements were volunteered by Scarber to a friend, and apparently with no motivation by Scarber to curry favor with Ervin or shift blame from himself.[670]

Although the question presented in *Taylor* is a difficult one, a troubling aspect of the court's decision is its failure to adequately address the United States Supreme Court's decision in *Williamson v. United States*,[671] and for this reason the court should have granted leave to appeal and considered the issue after full briefing and argument. As noted by Justice Cavanagh in his partial dissent in *Taylor*, the court's decision in *Poole* "was 'guided by the comment of the Advisory Committee for the Federal Rules of Evidence concerning FRE 804(b)(3), on which the Michigan rule is modeled.'"[672] In *Williamson*, however, the Supreme Court rejected the view of Rule 804(b)(3) adopted in *Poole*, holding that Rule 804(b)(3) does not permit introduction of statements which are not truly self-inculpatory, even if those statements are part of a broader self-inculpatory narrative.[673] The *Taylor* court did not address this development in the interpretation of federal Rule 804(b)(3), other than to note the *Williamson* decision and state, in conclusory fashion, that it "believe[d] that the portion of *Poole* pertaining to MRE 804(b)(3) was correctly decided."[674] As Justice Cavanagh rightly observed, although federal interpretations of the Federal Rules of Evidence are not binding on the Michigan courts, when the Michigan Supreme Court "bases its interpretation of an MRE on the federal commentary to the equivalent FRE, and the United States Supreme Court then soundly rejects that understanding of the FRE, it merits greater attention . . . than dismissal in a footnote."[675]

668. *Taylor*, 482 Mich. at 378, 759 N.W.2d at 367.

669. *Id.*

670. *See id.* at 380, 759 N.W.2d at 368.

671. 512 U.S. 594 (1994).

672. *Taylor*, 482 Mich. at 381, 759 N.W.2d at 369 (Cavanagh, J., concurring in part and dissenting in part)(quoting *Poole*, 444 Mich. at 161, 506 N.W.2d at 510).

673. *See Williamson*, 512 U.S. at 600-01.

674. *Taylor*, 482 Mich. at 379 n.6, 759 N.W.2d at 367 n.6.

675. *See id.* at 382-83, 759 N.W.2d at 369 (Cavanagh, J., concurring in part and dissenting in part).

*D. Confrontation Issues*

Although the admission of hearsay evidence is generally governed by the hearsay evidence rules discussed above, in criminal cases the use of hearsay evidence also raises issues under the Confrontation Clause of the Sixth Amendment.[676] Although a full treatment of the Confrontation Clause is more appropriately suited to another article in this *Survey,* given the Clause's relationship to the hearsay rules it is appropriate to briefly note here significant developments in this area of the law.[677]

In *Ohio v. Roberts*,[678] the United States Supreme Court held that hearsay evidence is admissible under the Confrontation Clause when it satisfies two requirements: necessity (that is, unavailability of the declarant) and reliability.[679] As to the reliability element of this test, the Court also held that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception."[680] If the evidence does not fall within such an exception, "the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."[681] The Court abrogated this rule in *Crawford v. Washington*,[682] establishing a dichotomy between "testimonial" and "nontestimonial" hearsay.[683] After surveying the historical development of the Confrontation Clause, the Court reasoned that "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."[684] Explaining that *Roberts* departed from this proper understanding of the Confrontation Clause,[685] the Court held that "[w]here testimonial statements are at issue, the only indicium of

676. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . "). The Confrontation Clause is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *See* Pointer v. Texas, 380 U.S. 400, 406 (1965).

677. Because these matters are treated elsewhere in this *Survey*, the discussion below primarily does nothing more than to note the holding of the courts' decisions, without a full discussion of the facts of the case or the reasoning of the deciding court.

678. 448 U.S. 56 (1980).

679. *See id.* at 65-66.

680. *Id.* at 66. The theory behind this rule is that certain firmly rooted exceptions represent judgments, based on historical experience, that statements made in certain circumstances are inherently trustworthy, such that "the adversarial testing [embodied in the Confrontation Clause] would add little to [their] reliability." Idaho v. Wright, 497 U.S. 805, 821 (1990).

681. 448 U.S. at 66.

682. 541 U.S. 36 (2004).

683. *Id.*

684. *Id.* at 59.

685. *See id.* at 60-68.

reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[686]

The Supreme Court further explicated the testimonial/non-testimonial distinction in *Davis v. Washington*.[687] As it had in *Crawford*, the Court in *Davis* found it unnecessary to "produce an exhaustive classification of all conceivable statements–or even all conceivable statements in response to police interrogation–as either testimonial or nontestimonial . . ."[688] Rather, the Court found it sufficient to simply hold that:

> [s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[689]

Further, the *Davis* Court explicitly addressed the question of "whether the Confrontation Clause applies only to testimonial hearsay ..."[690] which had been left open in *Crawford*. Explaining that the *Crawford* analysis focused on the meaning of "witnesses" who give "testimony" under the Confrontation Clause,[691] the *Davis* Court explained that "[a] limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its 'core,' but its perimeter."[692] Thus, where nontestimonial hearsay is at issue, the Confrontation Clause is not implicated at all, and need not be considered.[693] During the *Survey* period, the United States Supreme Court and the Michigan courts continued to develop the law under *Crawford*.

686. *Id.* at 68-69.
687. 547 U.S. 813 (2006).
688. *Id.* at 823.
689. *Id.* at 822.
690. *Id.* at 823.
691. *See id.* (discussing *Crawford*, 541 U.S. at 51).
692. *Id.*
693. *See* Hodges v. Commonwealth, 634 S.E.2d 680, 689 (Va. 2006).

*1. Testimonial and Nontestimonial Hearsay*

In *Melendez-Diaz v. Massachusetts*,[694] decided shortly after the close of the *Survey* period, the court held that *Crawford* bars the admission of forensic laboratory reports and certificates reflecting forensic results in the absence of an opportunity to cross-examine the analyst who prepared the reports.[695] The court reasoned that the analyst certificates where the functional equivalent of affidavits and were prepared solely for the purpose of providing evidence against the defendant, and thus that they were testimonial under a straightforward application of *Crawford*.[696]

In *People v. Bryant*,[697] another case decided shortly after the close *Survey* period, the court held that a shooting victim's statements to the police, made shortly after the shooting, identifying the defendant as the shooter were testimonial and thus barred in the absence of an opportunity to cross-examine the victim.[698] Relying on *Davis*, the court concluded that the statements were not made to respond to an ongoing emergency because they related to events that had already happened and because the police took no immediate action suggesting the need to meet an ongoing emergency.[699] The court explained that the victim "made these statements while he was surrounded by five police officers and knowing that emergency medical service (EMS) was on the way. Obviously, his primary purpose in making these statements to the police was not to enable the police to meet an ongoing emergency,"[700] particularly in light of the fact that the officers did not secure the scene or search for the defendant at the scene, and thus "acted in a manner entirely consonant with officers who knew that the crime had already been committed, that it had been committed at a different location, and that there was no present or imminent criminal threat."[701]

In *People v. Hill*,[702] the defendant was convicted of armed robbery and carjacking following a jury trial. At the trial, the victim, who had known the defendant for several months, identified him as the man who

694. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009).
695. *Id.* at 2532.
696. *See id.*
697. 483 Mich. 132, 768 N.W.2d 65 (2009).
698. *Id.* at 136, 768 N.W.2d 67.
699. *See id.* at 143-46, 768 N.W.2d at 71-73.
700. *Id.* at 144, 768 N.W.2d at 71.
701. *Id.* at 145-46, 768 N.W.2d at 72.
702. *Hill*, 282 Mich. App. at 538, 766 N.W.2d at 17 (2009). *Hill* also involved a relevance issue. This aspect of the case is discussed *supra* notes 258-67 and accompanying text.

had stolen her car and money while threatening her with a gun.[703] Amongst other claims on appeal, the defendant argued that his constitutional right to confront the victim was violated when the prosecutor used a medical report to refresh the victim's recollection concerning her injuries.[704] The court of appeals rejected this claim, explaining that the report itself was not offered into evidence, and was not used to establish the truth of the matter asserted but merely to refresh the witness's recollection.[705]

*2. Exceptions to the Cross-Examination Requirement*

At common law the forfeiture by wrongdoing doctrine "permitted the introduction of statements of a witness who was 'detained' or 'kept away' by the 'means or procurement' of the defendant."[706] As the Court explained in *Crawford* and *Davis*, this doctrine "'extinguishes confrontation claims on essentially equitable grounds'"[707] when the declarant's unavailability has been procured or caused by the defendant.[708] As the Supreme Court explained, "[w]hile defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system."[709] Although the Court did not itself rule on the standards applicable to finding a forfeiture by wrongdoing, the Court did note that, under the hearsay rule's codification of the standard,[710] the federal and state courts have generally applied a preponderance of the evidence standard.[711]

Following *Crawford* a number of courts, including the Michigan Court of Appeals, took an expansive view of the forfeiture by wrongdoing exception, holding that the exception is applicable whenever the defendant procured the witness's absence regardless of motive. Thus,

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703. *See id.* at 540, 766 N.W.2d at 21.

704. *See id.* at 547, 766 N.W.2d at 25.

705. *See id.*; *see also*, *Crawford*, 541 U.S. at 59 n.9 (2004) (citing Tennessee v. Street, 471 U.S. 409, 414 (1985))("[t]he Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."); Williams v. Wong, No. CV 06-04955, 2008 WL 4191632, at *5 (C.D. Cal. Sept. 11, 2008) (holding that use of a written report to refresh a witness's recollection does not implicate *Crawford* because a report used in such a fashion "does not constitute hearsay, testimonial or otherwise").

706. Giles v. California, 128 S. Ct. 2678, 2683 (2008).

707. *Davis*, 547 U.S. at 834 (quoting *Crawford*, 541 U.S. at 62).

708. *Id.*

709. *Id.*

710. *See* FED. R. EVID. 804(b)(6); MICH. R. EVID. 804(b)(6).

711. *See Davis*, 126 S. Ct. at 834.

in a murder case the victim's prior statements could be admitted, regardless of whether the defendant killed the victim for the purpose of preventing her from testifying.[712] In *Giles*, the Supreme Court rejected this expansive view of the forfeiture by wrongdoing exception. Rather, the Court explained, "[t]he terms used to define the scope of the forfeiture rule [at common law] suggest that the exception applied only when the defendant engaged in conduct *designed* to prevent the witness from testifying."[713] The court noted "[c]ases and treatises of the time indicate that a purpose-based definition of [the] terms [used to describe the doctrine] governed,"[714] and that the cases applying the rule at common law made "plain that unconfronted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying."[715] The Court further observed that, not only was the expansive view of the doctrine not the prevailing law at the time the Confrontation Clause was adopted, "it is not established in American jurisprudence *since* the founding. American courts never — prior to 1985 — invoked forfeiture outside the context of deliberate witness tampering."[716] Accordingly, under *Giles*, "the fact that a defendant causes a declarant to be unavailable to testify at trial operates as a waiver of the defendant's Sixth Amendment right to confrontation only if the defendant *intended* to make the declarant unable to testify."[717]

## IX. CONCLUSION

The Michigan courts were less active in issuing decisions on evidentiary decisions during the current *Survey* period than they have been in the last few *Survey* periods. Most notably, the supreme court passed on opportunities to clarify a number of evidentiary questions under Michigan law. The next *Survey* period will hopefully provide further guidance on issues of evidence law affecting Michigan practitioners.

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712. *See, e.g.*, United States v. Garcia-Meza, 403 F.3d 364, 370 (6th Cir. 2005); People v. Bauder, 269 Mich. App. 174, 183-87, 712 N.W.2d 506, 513-15 (2005).

713. *Giles*, 128 S. Ct. at 2683.

714. *Id.* at 2683-84.

715. *Id.* at 2684.

716. *Id.* at 2687. The court noted that both the Federal Rule of Evidence 804(b)(6) and most state analogues explicitly require the wrongdoing to have been for the purpose of preventing the witness from testifying, and that the commentators have uniformly adopted this view. *See id.* at 2687-88 & n.2.

717. Dednam v. Norris, No. 5:06CV00076, 2008 WL 4006997 *6 (E.D. Ark. Aug. 25, 2008).