EVIDENCE

M BRYAN SCHNEIDER†

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 To the extent that they discuss significant issues of Michigan evidence law, however, unpublished decisions and decisions by the federal courts are also discussed. This Article does not discuss evidentiary issues which are not questions of evidence law *per se* but are derivative of substantive legal principles treated elsewhere in this *Survey*, such as Fourth Amendment or parol evidence issues. The Michigan

† Law Clerk to the Honorable Paul J. Komives, United States Magistrate Judge, U.S. District Court for the Eastern District of Michigan. B.A., 1992, Michigan State University; J.D., 1995, Wayne State University Law School.

1. The *Survey* period covers cases decided between June 1, 2010 and May 31, 2011.

courts were once again relatively quiet during this *Survey* period on evidentiary issues, rendering several decisions addressing issues of relevance and other acts evidence, but few decisions addressing other areas of evidence law.

II. PRIVILEGES[2]

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.[3] 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.[4] 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.[5] 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;[6] and (2) must be narrowly construed.[7] The Michigan courts considered two privilege cases during the *Survey* period.

A. Deliberative Process Privilege

As developed by the federal courts, the deliberative process privilege protects from disclosure intra-government documents which reflect "advisory opinions, recommendations, and deliberations comprising part of the process by which governmental decisions and policies are

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2. Portions of this section quote an earlier *Survey* article. *See* M Bryan Schneider, *Evidence*, 56 WAYNE L. REV. 1123, 1147-59 (2010).

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

4. *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, i.e., privileges. *Id.* at 3-4. This part discusses only privileges.

5. *Id.*; *see also* JOHN W. STRONG, MCCORMICK ON EVIDENCE § 72, at 269 (5th ed. 1999) [hereinafter MCCORMICK] (Privilege rules are designed not to aid the search for truth but to protect "interests and relationships which, rightly or wrongly, are regarded as sufficient social importance to justify some incidental sacrifice of availability of evidence relevant to the administration of justice.").

6. 8 WIGMORE, *supra* note 3, § 2175, at 3.

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

formulated."[8] The purpose of this privilege is to "encourage candid communications between subordinates and superiors."[9] In *Ostoin v. Waterford Township Police Department*,[10] the Michigan Court of Appeals explicitly adopted the federal deliberative process privilege.[11] During the *Survey* period, the court of appeals considered the applicability of this privilege in *Truel v. City of Dearborn*.[12]

Truel involved a suit brought by a Dearborn Police Officer under the Whistleblowers' Protection Act (WPA).[13] The plaintiff alleged that he witnessed several other officers, as well as the chief of police, involved in a fight in a bar.[14] After the incident, the plaintiff alleged that he was harassed by other officers, denied promotions, and himself investigated for alleged improprieties on the job.[15] The plaintiff sought the investigative file prepared by the prosecutor regarding the bar incident from the Wayne County Prosecutor's Office pursuant to the Freedom of Information Act.[16] In responding to the plaintiff's request, the prosecutor's office withheld four statements given by Dearborn police officers pursuant to investigative subpoenas issued by the prosecutor, as well as the prosecutor's final report on the investigation, on the basis of the deliberative process privilege.[17] Thereafter, the defendants moved to compel discovery of the materials in plaintiff's civil suit.[18] The trial court granted the defendants' motion to compel, and the prosecutor appealed to the Michigan Court of Appeals.[19]

After first concluding that disclosure of the testimony of the four officers was barred by the investigative subpoena statute,[20] the court of appeals turned to the question of whether the final investigative report was protected by the deliberative process privilege.[21] The court began its analysis by noting that the deliberative process privilege protects only evaluative materials; it does not protect factual material that happens to

8. Dowd v. Calabrese, 101 F.R.D. 427, 430 (D.D.C. 1984).

9. Scell v. United States Dept. of Health & Human Servs., 843 F.2d 933, 939 (6th Cir. 1988).

10. 189 Mich. App. 334, 471 N.W.2d 666 (1991).

11. *Id.* at 337-38.

12. 291 Mich. App. 125, 127, 804 N.W.2d 744 (2010).

13. *Id.* at 127-28.

14. *Id.* at 128.

15. *Id.*

16. *Id.* at 129; MICH. COMP. LAWS ANN. §§ 15.231-.246 (West 2004).

17. *Truel*, 291 Mich. App. at 129.

18. *Id.*

19. *Id.*

20. *Id.* at 131-35 (discussing MICH. COMP. LAWS ANN. § 767A.8 (West 1995)).

21. *Id.* at 135.

be included in a document also containing deliberative materials.[22] Because of this, the deliberative process privilege protects only information that is both pre-decisional and deliberative.[23] In other words, the privilege "does not shield documents that simply state or explain a decision the government has already made or protect material that is purely factual . . . ."'"[24] The court of appeals also noted that the deliberative process privilege is not absolute, and "can be overcome by a sufficient showing of need,"[25] taking into account "the relevance of the evidence" and the potential harm disclosure could cause the government.[26]

Taking these factors into account, the court of appeals concluded that the trial court had erred in finding that the "defendants demonstrated a sufficient" need for the investigative report to overcome the privilege.[27] The defendants argued that they needed the report both to show that there was no evidence that they engaged in illegal activities and thus that the "plaintiff's report was false," and because it may contain evidence relevant to the plaintiff's credibility.[28] The court of appeals rejected these arguments.[29] The court explained that, under the particular whistleblower claim being advanced by the plaintiff (retaliation for statements made to a public body), which asked for the plaintiff's participation, the only relevant factor was whether the plaintiff's statements were made in good faith; truth or falsity of the plaintiff's statements was irrelevant.[30] This being the case, it follows that "[w]hatever plaintiff may have reported pursuant to the investigation and any evaluation of the truth and credibility of that testimony by the [prosecutor] is irrelevant to a determination [whether defendants were liable under the WPA.]"[31] Therefore, the court of appeals concluded, the trial court had erred in finding that the defendants' need for the report was sufficient "to overcome the deliberative process privilege."[32]

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22. *Id.* (discussing *Ostoin*, 189 Mich. App. at 338).

23. *Truel*, 291 Mich. App. at 136 (quoting *In re* Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997)).

24. *Id.* (quoting *Sealed Case*, 121 F.3d at 737).

25. *Id.* (citing *Ostoin*, 189 Mich. App. at 338).

26. *Id.*

27. *Id.* at 139.

28. *Id.* at 137.

29. *Truel*, 291 Mich. App. at 138-39.

30. *Id.* at 138.

31. *Id.* at 139.

32. *Id.*

B. Medical Guidelines and Procedures

In a second case decided during the *Survey* period, the court of appeals considered whether it should recognize a privilege for a hospital's medical guidelines and procedures. In *Jilek v. Stockson*, the plaintiff "brought a wrongful-death [action] against Dr. Carlin Stockson and . . . EPMG of Michigan," Dr. Stockson's employer.[33] The plaintiff alleged that the decedent died as a result of Dr. Stockson's negligent failure to diagnose his coronary artery disease following a visit to Maple Urgent Care.[34] More specifically, the plaintiff alleged that the decedent visited the urgent care center complaining of breathing trouble and chest tightness.[35] Dr. Stockson prescribed albuterol to help with breathing.[36] Five days later, the plaintiff's decedent died while exercising.[37] An autopsy showed that he died as a result of a blood clot secondary to acute coronary artery disease.[38] The plaintiff alleged that Dr. Stockson breached the standard of care by failing to take a detailed medical history, take an electrocardiogram (ECG), and refer the decedent to a cardiologist. The plaintiff further alleged that had Dr. Stockson complied with the standard of care, he would not have prescribed albuterol and would have instructed the decedent to refrain from exercising, both of which contributed to the decedent's death.[39] A jury returned a verdict in favor of the defendants, and the plaintiff appealed.[40]

The principle issue on appeal was whether the trial court erred in determining the relevant standard of care and in instructing the jury on that standard.[41] After finding in favor of the plaintiff on this issue and determining that a new trial was necessary,[42] the court of appeals turned its attention to a subsidiary evidence question raised by the plaintiff.[43] The plaintiff argued that the trial court erred in excluding internal guidelines and policies adopted by the defendants and by the American College of Emergency Physicians, which the plaintiff contended were

33. 289 Mich. App. 291, 293, 796 N.W.2d 267 (2010) *rev'd*, Estate of Jilek v. Stockson, 490 Mich. 961, 805 N.W.2d 852 (2011). *Jilek* also decided an issue relating to relevance. This aspect of the case is discussed *infra* notes 141-156 and accompanying text.

34. *Id.* at 293-95.

35. *Id.* at 294.

36. *Id.*

37. *Id.*

38. *Id.* at 294.

39. *Jilek*, 289 Mich. App. at 294-95.

40. *Id.* at 293, 295.

41. *Id.* at 295.

42. *Id.* at 295-305.

43. *Id.* at 305-14.

relevant to the standard of care.[44] In addressing this question, the court first concluded that no privilege protected these guidelines.[45] The court explained that although the legislature has enacted numerous statutory privileges, "it has not created such a privilege with respect to the guidelines or policies of medical providers in place at the time a case arises."[46] The court next rejected the defendants' argument that admission of the guidelines was barred by *Gallagher v. Detroit-Macomb Hospital Association*.[47] In *Gallagher*, the court of appeals held that the standard of care is set by the standard practiced in the community, and not by any internal policies adopted by the defendant.[48] Thus, the *Gallagher* court held that a hospital's internal policies governing day-to-day administration were not admissible in a medical malpractice action.[49]

The *Jilek* court rejected the defendants' reading of *Gallagher* as establishing an absolute bar to the admission of internal guidelines in medical malpractice cases.[50] Rather, the court noted that *Gallagher* itself recognized that a hospital's rules could be admissible as reflecting the community's standard where there is a causal relationship between the violation of the rule and the injury.[51] The court of appeals distinguished *Gallagher*, noting that the *Gallagher* court relied on prior Michigan Supreme Court cases in which the plaintiffs had argued that the internal policies actually created the duty of care, whereas in *Jilek* the plaintiff did not argue that the internal policies defined the standard of care but "only that they may be considered relevant to the jury's determination, in light of the expert testimony, of what that standard was."[52] The court of appeals further rejected the defendants' policy argument that allowing admission of such internal policies would discourage hospitals from creating internal policies, finding no empirical evidence that this was the case and explaining that, in any event, this "argument is better made to the Legislature, which, if it wishes, can adopt such a privilege."[53] Finally, the court noted that its rule was consistent with "[n]early all of the states that have published law on the subject[.]"[54] Under *Jilek*, therefore,

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44. *Id.* at 306.
45. *Jilek*, 289 Mich. App. at 306.
46. *Id.*
47. *Id.* at 306-07; Gallagher v. Detroit-Macomb Hosp. Ass'n, 171 Mich. App. 761, 431 N.W.2d 90 (1988).
48. *Gallagher*, 171 Mich. App. at 766.
49. *Id.* at 765-68.
50. *Jilek*, 289 Mich. App. at 306-07.
51. *Id.* (quoting *Gallagher*, 171 Mich. App. at 767).
52. *Id.* at 307.
53. *Id.* at 309.
54. *Id.*

internal policies and guidelines may be admitted where relevant to the standard of care issue, but do not themselves establish the standard of care.[55] In other words, the question is not one of privilege, but one of ordinary relevancy.[56]

III. RELEVANCE[57]

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.[58] Rules 401 and 402 provide the general rules of relevance for the admission of evidence.[59] 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."[60] Rule 402 provides that relevant evidence is admissible (unless otherwise prohibited by the United States or Michigan Constitutions, or other rules of evidence) and irrelevant evidence is not admissible.[61] The remainder of the rules in Article IV establish rules of limited relevance, prohibiting the introduction of evidence that is otherwise relevant under Rules 401 and 402 for various policy reasons.[62] Taken together, Rules 401 and 402 "constitute[] the cornerstone of the . . . evidentiary system."[63]

The threshold established by Rules 401 and 402 is not demanding. Under the rules, an item of evidence that has any probative value, no

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55. *Id.* at 308-10.

56. *Jilek*, 289 Mich. App. at 310.

57. Portions of this section quote an earlier *Survey* article. *See* M Bryan Schneider, *Evidence*, 56 WAYNE L. REV. 1123, 1147-59 (2010).

58. MICH. R. EVID. 401-411.

59. MICH. R. EVID. 401-402.

60. MICH. R. EVID. 401.

61. *See* MICH. R. EVID. 402.

62. MICH. R. EVID. 403-411.

63. GLEN WEISSENBERGER & JAMES J. DUANE, FEDERAL EVIDENCE § 401.1, at 97 (6th ed. 2009) [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 and the Michigan courts look to federal courts when analyzing these rules. *See* MICH. R. EVID. 401, 1978 Note; MICH. R. EVID. 402, 1978 Note; *see, e.g.*, People v. Hall, 433 Mich. 573, 581, 447 N.W.2d 580 (1989).

matter how slight, is relevant and presumptively admissible.[64] 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.[65]

In other words, under Rules 401 and 402 "[e]vidence is not subject to exclusion solely because its probative value is extremely low."[66] If evidence has any probative value whatsoever, it is relevant and admissible unless otherwise excludable for an affirmative reason.[67]

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.[68] 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."[69] "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 integrity of the fact finding process."[70] Because the question of undue prejudice under Rule 403 is inextricably bound to a determination of the

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64. WEISSENBERGER, *supra* note 63, § 401.1, at 97.

65. MCCORMICK, *supra* note 5, § 185, at 278. The Michigan Supreme Court has cited approvingly to Professor McCormick on this point. *See* People v. Brooks, 453 Mich. 511, 519, 557 N.W.2d 106 (1996).

66. WEISSENBERGER, *supra* note 63, § 401.3, at 99.

67. *Id.*; *see also* JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 17-18 (1827).

68. *See supra* notes 58-62 and accompanying text.

69. MICH. R. EVID. 403.

70. WEISSENBERGER, *supra* note 63, § 403.1, at 109. 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 relevance and countervailing adverse effects that have recurred with sufficient frequency to have resulted in a specific rule." *Id.* at 109; *see also* 22 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE, § 5232, at 340 (1978) (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.

probative value of the evidence, Rule 403 determinations, in large part, derive from general relevance determinations under Rules 401 and 402.[71] It is therefore appropriate to consider all three rules together. During the *Survey* period, the Michigan courts issued five published decisions addressing these general principles of relevance, two in criminal cases and three in civil cases.

Most significantly, the Michigan Supreme Court considered an interesting relevance question in *People v. Feezel*.[72] In *Feezel*, the defendant was convicted of failing to stop at the scene of an accident causing death, operating while intoxicated, and operating a vehicle with the presence of a controlled substance causing death, after he drove intoxicated and killed a pedestrian.[73] The evidence showed that, although there was a sidewalk adjacent to the road, the victim was walking in the road.[74] The victim was extremely intoxicated, having a blood alcohol content of 0.268.[75] At trial, the defendant's reconstruction expert testified that, based on the visibility at the time of the accident, the defendant could only have avoided the accident if he had been traveling under fifteen miles per hour, and the prosecution's expert concurred with this assessment.[76] Prior to trial, the prosecutor filed a motion in limine seeking to exclude evidence that the victim was intoxicated, arguing that the evidence was irrelevant.[77] The trial court granted the motion.[78] The court of appeals affirmed the defendant's convictions.[79] With respect to the evidentiary issue, the court of appeals reasoned that the proximate cause inquiry in a criminal case is whether the victim's death was a foreseeable consequence of the defendant's actions, and because it is foreseeable that a pedestrian may be walking in the roadway, the victim's intoxication was irrelevant.[80] The defendant appealed to the Michigan Supreme Court raising several claims, including the evidentiary issue.[81]

The supreme court reversed the court of appeals' decision, concluding that evidence of the victim's intoxication was relevant to the question of proximate cause.[82] The court began its analysis by noting that

71. MICH. R. EVID. 401-403.
72. 486 Mich. 184, 783 N.W.2d 67 (2010).
73. *Id.* at 187-88.
74. *Id.* at 188.
75. *Id.* at 188-89.
76. *Id.* at 190.
77. *Id.* at 189.
78. *Feezel*, 486 Mich. at 189.
79. *Id.* at 190.
80. *Id.* at 190-91.
81. *Id.* at 191-92.
82. *Id.* at 191-92.

causation was an element of each of the offenses for which the defendant was convicted.[83] The court then explained that, under the criminal law, "cause" is a term of art denoting both factual causation and proximate causation,[84] and both must be proven to hold a defendant criminally liable.[85] Proximate cause, in turn, requires that there be no intervening, unforeseeable act which breaks the causal chain between the victim's injury and the defendant's conduct.[86] Specifically, the court explained, while a victim's ordinary negligence is foreseeable and therefore insufficient to defeat a finding of proximate cause, "'gross negligence or intentional misconduct' on the part of a victim is considered sufficient to break the causal chain between the defendant and the victim because it is not reasonably foreseeable."[87] Thus, the court concluded, "while a victim's negligence is not a defense, it is an important factor to be considered by the trier of fact in determining whether proximate cause has been proved beyond a reasonable doubt."[88]

With this explication of the causation element in mind, the supreme court concluded that the victim's "blood alcohol content was a relevant and admissible fact for the jury's consideration when determining whether the prima facie element of proximate causation was proved beyond a reasonable doubt."[89] After explaining the general operation of Rules 401 through 403,[90] the court found that, under the facts of the case before it, the victim's blood alcohol content was admissible.[91] First, the court found that the evidence was relevant under Rule 401 because the prosecutor was required to establish causation, in particular proximate causation, beyond a reasonable doubt.[92] The court noted that intoxication alone is not evidence of gross negligence, and thus evidence of a victim's intoxication will not always be relevant.[93] In the case before the court, however, "the victim's extreme intoxication was highly probative of the issue of gross negligence, and therefore causation, because the victim's intoxication would have affected his ability to perceive the risks posed by his conduct and diminished his capacity to react to the world around

83. *Id.* at 193-94.
84. *Feezel*, 486 Mich. at 194.
85. *Id.* at 195.
86. *Id.*
87. *Id.* at 195 (internal quotations omitted).
88. *Id.* at 196.
89. *Id.*
90. *Feezel*, 486 Mich. at 197-98.
91. *Id.* at 198.
92. *Id.* at 198.
93. *Id.* at 198-99.

him."[94] Indeed, the court noted, the intervening cause evidence showed the victim was walking in the middle of the road during a rain storm at night, even though there was a sidewalk adjacent to the road.[95]

Turning to Rule 403, the court also found that "the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice . . . ."[96] The court explained that the probative value of the evidence was high, because "the victim's high level of intoxication went to the heart of whether the victim was grossly negligent[.]"[97] The court also rejected the prosecutor's argument that the evidence would confuse the jury by shifting responsibility from the defendant to the victim, reasoning that in this case the "victim's conduct directly related to the disputed element of proximate causation."[98] Noting that proximate causation is determined on a "case-by-case basis,"[99] the court concluded that

> [W]hile the victim's intoxication is not a defense, under the facts of this case it should have been a factor for the jury to consider when determining whether the prosecution proved beyond a reasonable doubt that defendant's conduct was a proximate cause of the accident or . . . of the victim's death.[100]

In reaching this conclusion, the court emphasized "that evidence of a victim's intoxication" is not always admissible in a criminal trial, and that a "trial court must make a threshold determination" under Rules 401 through 403 that both (a) the evidence is admissible to show the victim's gross negligence to defeat a finding of proximate cause, and (b) the evidence is sufficient to establish a question of fact for the jury on the proximate cause issue.[101]

The Michigan Court of Appeals considered the relevance of psychiatric evidence to a self-defense claim in *People v. Orlewicz*,[102]

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94. *Id.* at 199.
95. *Id.*
96. *Feezel*, 486 Mich. App. at 199.
97. *Id.* at 200.
98. *Id.*
99. *Id.* at 201.
100. *Id.* at 201-02 (citations omitted).
101. *Id.* at 202. Justice Young, joined by Justices Corrigan and Markman, dissented from the court's disposition on other issues in the case, but agreed with the majority's resolution of the evidentiary issue. *Id.* at 217 (Young, J., concurring in part and dissenting in part).
102. 293 Mich. App. 96, 809 N.W.2d 194 (2011). *Orlewicz* also considered an issue of character evidence. This aspect of the case is discussed *infra* notes 187-198 and accompanying text.

decided shortly after the *Survey* period. In *Orlewicz*, the defendant was convicted of first degree murder and mutilation of a body following a jury trial.[103] "There [was] no dispute that defendant [had] killed the victim" and attempted to dispose of the body by dismembering and burning it.[104] The only question was whether the defendant killed the victim in self-defense.[105] The prosecution's theory was that the defendant premeditated the killing of the victim because the victim refused to repay a debt, and attempted to dispose of the body to hide the crime.[106] The defendant, on the other hand, argued that the victim, who was significantly larger than him, and had a reputation for being aggressive, violent, and confrontational, had forced him to participate in a robbery and, "when the [robbery] failed, [he] threatened [the] defendant's life."[107] The defendant argued that he killed the victim in self-defense and attempted to conceal the body because he panicked.[108]

Following his conviction, the defendant filed a motion for a new trial arguing, inter alia, that the trial court had erred in excluding psychiatric testimony relevant to the defendant's mental condition.[109] A new judge granted the motion.[110] The defendant appealed his underlying convictions, and the prosecutor cross-appealed the trial court's grant of a new trial.[111]

The Michigan Court of Appeals reversed the trial court's grant of a new trial, concluding that the original trial judge did not err in excluding the psychiatric evidence because it was irrelevant.[112] The court began its analysis by noting that, to establish self-defense, a defendant must show that he had an honest and reasonable belief that he faced an imminent danger of death or bodily harm, and accepted, at least in theory, that "[a] defendant's history and psychological makeup may be relevant to explain the reasonableness of a defendant's belief that he or she was in inescapable danger."[113] The court concluded, however, that this was "not the situation in the case before use."[114] After quoting the relevance

103. *Id.* at 99.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Orlewicz*, 293 Mich. App. at 99.
109. *Id.* at 100.
110. *Id.*
111. *Id.*
112. *Id.* at 103.
113. *Id.* at 102 (citing People v. Wilson, 194 Mich. App. 599, 604, 487 N.W.2d 822 (1992)).
114. *Orlewicz*, 293 Mich. App. at 102.

standard of Rule 401, the court noted that the defendant's case "featured two starkly contrasting, and largely incompatible, narratives of what *factually* transpired just before the killing."[115] Under the prosecutor's version, the defendant had clearly premeditated the killing, while under the defendant's version, the defendant clearly acted in self-defense.[116] Because the defendant's self-defense argument depended solely on which version of facts the jury accepted, "the psychiatric testimony would only have been relevant if it had some bearing on which scenario occurred."[117] Being "unable to perceive how, under the circumstances of this case, the proposed psychiatric testimony would have assisted the jury in determining which version of events was more credible," and reasoning that "the psychiatric testimony would have cast no light whatsoever on which of the two versions of events was the more likely,"[118] the court of appeals concluded that the trial judge had not erred in excluding this irrelevant evidence.[119]

The court of appeals also considered issues of general relevance in several civil cases during the *Survey* period. In *Dawe v. Bar-Levav & Associates*,[120] the plaintiff brought suit against Dr. Reuven Bar-Levav and his psychiatric practice following a shooting by a former patient, Joseph Brooks.[121] Brooks came to Dr. Bar-Levav's office with a handgun and shot Dr. Bar-Levav, killing him.[122] Brooks then fired into a group therapy room, killing one patient and wounding the plaintiff.[123] The plaintiff alleged that Brooks had previously made threatening statements, fantasized about murder, brought a handgun to the office, and delivered a manuscript containing threatening statements.[124] Based on these facts, the plaintiff argued that the defendants were liable both under a statutory failure to warn theory and a common law malpractice theory.[125] After the jury returned a verdict in favor of the plaintiff, the defendants appealed, raising numerous claims.[126] The plaintiff cross-appealed arguing, inter

115. *Id.*
116. *Id.* at 102-03.
117. *Id.* at 103.
118. *Id.*
119. *Id.*
120. 289 Mich. App. 380, 808 N.W.2d 240 (2010) (per curiam).
121. *Id.* at 384. *Dawe* was a case on remand from the Michigan Supreme Court. The court of appeals's discussion of the facts block-quotes from its prior decision. *See* Dawe v. Bar-Levav & Assoc., P.C., 279 Mich. App. 552, 761 N.W.2d 318 (2008), *rev'd*, 485 Mich. 20, 780 N.W.2d 272 (2010).
122. *Dawe*, 289 Mich. App. at 384 (quoting *Dawe*, 279 Mich. App. at 554).
123. *Id.* (quoting *Dawe*, 279 Mich. App. at 554).
124. *Id.* (quoting *Dawe*, 279 Mich. App. at 554).
125. *See id.*
126. *Id.* at 386 (quoting *Dawe*, 279 Mich. App. at 557).

alia, that the trial court had erred in excluding the manuscript from evidence.[127] The court of appeals reversed, concluding that the trial court should have granted the defendants' motion for a directed verdict because there was no evidence that Brooks communicated to the defendants a threat against the plaintiff.[128] The Michigan Supreme Court reversed that decision, however, and remanded to the court of appeals for consideration of the other issues raised by the parties.[129]

Amongst those issues on remand, the court of appeals considered the plaintiff's argument that the trial court had erred in excluding from evidence Brooks's manuscript.[130] As the court of appeals explained, the manuscript, which was mailed to Dr. Bar-Levav the day before the shooting, consisted of "Brooks's ramblings about [Dr. Reuven Bar-Levav's] therapy techniques," in particular group therapy, and expressed Brooks's "desire to seek revenge, but did not directly threaten any one person or group."[131] Although the manuscript had been mentioned during the plaintiff's opening statement, the trial court granted the defendants' renewed motion to exclude the manuscript during trial, concluding that it was both irrelevant and unfairly prejudicial.[132] Despite this ruling, two other references to the manuscript were made at trial: the timing of receipt of the package was referenced in the deposition of a witness that was presented at trial and the plaintiff's counsel explained to the jury why the manuscript had not been introduced despite counsel's opening statement.[133]

Affirming the jury verdict in favor of the plaintiff, the court also rejected the plaintiff's argument that the trial court erred in excluding the manuscript.[134] After setting forth the general relevance rule of Rule 401, the court of appeals concluded that the trial court properly excluded the manuscript as irrelevant.[135] The court explained that because Dr. Bar-Levav did not receive the manuscript until several months after he had terminated his treatment of Brooks, "the manuscript could not serve as evidence that defendants breached the applicable standard of care by placing Brooks into Dawe's therapy group or permitting him to remain in

127. *Id.* at 387.

128. *Dawe*, 289 Mich. App. at 387-88.

129. *Id.* at 388-90.

130. *Id.* at 406.

131. *Id.* at 404 (alteration in original) (quoting *Dawe*, 279 Mich. App. at 592 (Smolenski, J., dissenting)).

132. *Id.* at 405 (quoting *Dawe*, 279 Mich. App. at 593 (Smolenski, J., dissenting)).

133. *Id.* at 406 (quoting *Dawe*, 279 Mich. App. at 594 (Smolenski, J., dissenting)).

134. *Dawe*, 289 Mich. App. at 407.

135. *Id.*

the group,"[136] nor could it show Brooks's mental condition at the time of his treatment because there was no evidence as to when the manuscript was drafted by Brooks.[137] Thus, the manuscript was "not relevant to defendants' decision to place Brooks in group therapy," the decision which formed the basis of the plaintiff's malpractice claim.[138] Despite this holding, the court of appeals also concluded that the defendants were not prejudiced by the references to the manuscript that occurred at trial.[139] The court explained that defense counsel "did not object to [the] opening [statement] or closing remarks," and that the trial court had properly instructed the jury that the arguments of counsel are not evidence.[140]

The court of appeals also considered a general relevance issue in *Jilek v. Stockson*.[141] The principle issue on appeal was whether the trial court had erred in determining the relevant standard of care and in instructing the jury on that standard.[142] After finding in favor of the plaintiff on this issue and determining that a new trial was necessary,[143] the court of appeals turned its attention to a subsidiary evidence question raised by the plaintiff. The plaintiff argued that the trial court had erred in excluding internal guidelines and policies adopted by the defendants and by the American College of Emergency Physicians, which the plaintiff contended were relevant to the standard of care.[144] After concluding that the guidelines were not protected by any privilege and that the sole "question is one of relevancy,"[145] the court turned to the relevance issue. The court first concluded that the trial court had erred in excluding the defendants' policy regarding transferring urgent care patients with chest pain, which required evaluation for transfer where an

136. *Id.* Based on the court of appeals' prior reasoning and the Michigan Supreme Court's decision in the case, only the common law malpractice claim was still at issue on remand. Thus, the court did not consider whether the manuscript would have been relevant on the statutory failure-to-warn claim.

137. *Id.*

138. *Id.*

139. *Id.* at 408 (quoting *Dawe*, 279 Mich. App. at 594-95 (Smolenski, J., dissenting)).

140. *Dawe*, 289 Mich. App. at 407-08 (quoting *Dawe*, 279 Mich. App. at 594-95 (Smolenski, J., dissenting)).

141. 289 Mich. App. 291, 796 N.W.2d 267 (2010) *rev'd*, Estate of Jilek v. Stockson, 490 Mich. 961, 805 N.W.2d 852 (2011). *Jilek* also decided an issue relating to privilege. For a discussion of this issue, and also a summary of the facts of the case, see *supra* notes 33-56 and accompanying text. After the *Survey* period ended, the Michigan Supreme Court reversed the court of appeal's decision as to the relevance issues. *Estate of Jilek*, 490 Mich. at 961.

142. *Jilek*, 289 Mich. App. at 295.

143. *Id.*

144. *Id.*

145. *Id.* at 310; *see also supra* notes 46-56 and accompanying text.

"[a]dult patient with chest pain arrives at Urgent Care; vital signs and ECG obtained."[146] The court reasoned that although this policy could be construed as only requiring patients who had received an ECG to be evaluated for transfer, in which case it would be irrelevant because the plaintiff's decedent had not been given an ECG, it could also be construed as requiring that "all adult patients with chest pain arriving at the urgent-care center . . . have their vitals taken and receive an ECG, in which case it was admissible to support plaintiff's claim that the standard of care required that all patients complaining of chest pain . . . should be given an ECG."[147] It was thus an appropriate subject for the parties' experts to consider in light of the standard of care.[148]

The court of appeals next concluded that the trial court also erred in excluding the American College of Emergency Physicians' guidelines for treating adults complaining of chest pain and EMPG's Chest Pain Guideline, which adopted the College's guidelines.[149] These guidelines require an ECG in many cases, and that a patient not be sent home unless other cardiac markers have been obtained to rule out a heart attack.[150] The court noted that "[s]uch external guidelines have been previously found to be admissible"[151] and explained that while the defendants were free to "argue that [the patient's] chest pain was not of the type to which this policy would be relevant," because the "plaintiff had presented evidence that [his] chest pain was of that type, the document was relevant to the standard of care and thus admissible."[152] The court also concluded, however, that the trial court did not err in excluding several SJMH policies governing urgent care.[153] In general, these policies governed the order in which patients are to be examined.[154] The court

146. *Id.* at 310, 312 (quoting proposed exhibit, "Process for Transfering Urgent Care Patients With Chest Pain to the SJMH").

147. *Id.* at 310.

148. *Jilek*, 289 Mich. App. at 311.

149. *Id.* at 311-12.

150. *Id.*

151. *Id.* at 311 (citing Zdrojewski v. Murphy, 254 Mich. App. 50, 62-63, 657 N.W.2d 721 (2002)). In *Zdrojewski*, the court of appeals found no error in the admission of "the rule of an external regulatory agency," explicitly noting that the court had distinguished, for purposes of relevance to the standard of care issue, "between internal policies and external rules promulgated pursuant to law." *Zdrojewski*, 254 Mich. App. at 62-63 (citing *Gallagher*, 171 Mich. App. at 765; Kakligian v. Henry Ford Hosp., 48 Mich. App. 325, 332, 210 N.W.2d 463 (1973)). The *Jilek* court did not explain why the College's guidelines should be considered equivalent to rules promulgated by a government agency pursuant to law, rather than to internal guidelines.

152. *Jilek*, 289 Mich. App. at 312.

153. *Id.*

154. *Id.* at 312-13.

reasoned that because the decedent did not complain of chest pain when he checked in at the center, but only did so when he was examined by Dr. Stockson, and because the plaintiff did not claim that the decedent should have been examined earlier, these guidelines were irrelevant to the standard of care issues arising from Dr. Stockson's treatment of the decedent.[155] However, the court noted, to the extent these policies suggested that chest tightness is indicative of a cardiac condition, they would be relevant to impeach any testimony from Dr. Stockson to the contrary.[156]

Finally, the court of appeals considered relevance in a condemnation action in *Department of Transportation v. Gilling*.[157] In *Gilling*, the Michigan Department of Transportation (MDOT) brought a condemnation proceeding to acquire a parcel of land adjacent to Lapeer Road for purposes of a road-widening project.[158] The defendants' retail nursery and landscaping business was situated on the parcel.[159] The defendants moved their business to an interim location which they deemed "unsuitable as a permanent location" and received administrative reimbursement from MDOT.[160] The defendants subsequently moved to a permanent site and sought compensation for the costs associated with relocation from the interim site to the permanent site, which they claimed constituted business-interruption damages.[161] MDOT argued that it had already paid relocation expenses, and that the additional costs sought by the defendants were actually further relocation expenses which were compensable in an administrative proceeding, not in a judicial condemnation action.[162] Ruling upon various motions filed by the parties, the trial court ultimately determined that moving and relocation expenses can be recovered as part of the compensation for business interruption, so long as the landowner did not receive a double recovery.[163] The trial court therefore denied MDOT's motion to exclude evidence of the expenses associated with the move from the interim to the permanent site.[164] "The parties agreed . . . to a compensation award" relating to the buildings and fixtures on the property, and the jury found a total compensation award of over one million dollars, $585,000 of which

155. *Id.* at 313.
156. *Id.*
157. 289 Mich. App. 219, 796 N.W.2d 476 (2010).
158. *Id.* at 221.
159. *See id.* at 222-23.
160. *Id.* at 223.
161. *Id.*
162. *Id.* at 224.
163. *Gilling*, 289 Mich. App. at 224.
164. *Id.* at 227.

was attributable to the value of the land and $519,550 of which consisted of compensation for various expenses, including moving and relocation expenses.[165] MDOT appealed.[166]

The bulk of the court's opinion is outside the scope of this Article, and concerned whether moving and relocation expenses are properly recoverable in a condemnation action as business interruption expenses.[167] After concluding that a business owner is entitled "to receive business-interruption damages, *including moving and relocation expenses*, as constitutional just compensation,"[168] the court turned to MDOT's argument that the trial court had erred in excluding evidence "that the permanent site to which [defendants] ultimately moved [their business] was available at the time that [the defendants] moved" to the interim site, making the expenses of the first move unnecessary.[169] Specifically, at trial, MDOT sought to introduce the testimony of Robert Bowman, a real estate broker, and related exhibits.[170] Bowman would have testified that the permanent site to which the defendants moved their business "was available for sale before, during, and after [the defendant's] move to its interim site."[171] The court of appeals agreed with MDOT that the trial court had erred in excluding this evidence.[172]

The court reasoned that "[t]he question whether the permanent site was available when Gilling moved to its interim site was central to the issue of just compensation."[173] The court explained that the availability of the permanent site "at the time [of the] move[] to the interim site [would cast serious doubt] on the reasonableness of Gilling's decision to temporarily relocate to the interim site before moving to the permanent site,"[174] and that MDOT therefore should "have [been given] the opportunity to show that at least some of [the defendant's] expense was unwarranted."[175] Further, the court observed, the exclusion of this evidence deprived MDOT of its ability to show that the defendants had failed to mitigate their damages.[176] The court rejected the defendants' argument that this evidence was inadmissible because, at the time of the

165. *Id.*
166. *Id.*
167. *See id.* at 228-42.
168. *Id.* at 242.
169. *Gilling*, 289 Mich. App. at 243.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 243-44.
175. *Gilling*, 289 Mich. App. at 244.
176. *Id.*

move to the interim site, the permanent site was not suitable because it needed to be renovated and rezoned.[177] The court explained that whether the site was less desirable because of these issues was a matter for "the jury to weigh . . . against Bowman's testimony to determine how to fairly compensate Gilling for the taking."[178] Finally, the court determined that the exclusion of Bowman's testimony was prejudicial and required a new trial, "because it unjustifiably robbed MDOT of its most pertinent evidence on a key question of the trial."[179]

B. Character and Other Acts Evidence[180]

After Rules 401-402, the remainder of the rules in Article IV set forth rules of limited admissibility, that is, rules excluding evidence that would otherwise be admissible under Rules 401-403. The first of these rules addresses evidence of character, reputation, and other acts.

1. Evidence of Character Under Rules 404(a) and 405

As a general matter, under Rule 404(a) "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion."[181] The rule establishes four exceptions, allowing for admission of:

> (1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same; or if evidence of a trait of character of the alleged victim of the crime is offered by the accused and admitted under subdivision (a)(2), evidence of a trait of character for aggression of the accused offered by the prosecution;
>
> (2) Character of alleged victim of homicide. When self-defense is an issue in a charge of homicide, evidence of a trait of character for aggression of the alleged victim of the crime offered by an accused, or evidence offered by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a charge of

177. *Id.*
178. *Id.*
179. *Id.*
180. Portions of this section quote an earlier *Survey* article. *See* M Bryan Schneider, *Evidence*, 56 WAYNE L. REV. 1123, 1147-59 (2010).
181. MICH. R. EVID. 404(a).

> homicide to rebut evidence that the alleged victim was the first aggressor;
>
> (3) Character of alleged victim of sexual conduct crime. In a prosecution for criminal sexual conduct, evidence of the alleged victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease;
>
> (4) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.[182]

Character evidence is generally excluded by Rule 404(a) based on the reasons underlying Rule 403, that is, the prejudicial effect of character evidence as a general matter substantially outweighs its probative force.[183] Rule 405 works in conjunction with Rule 404(a), providing the permissible means of proving character where character is admissible under Rule 404(a).[184] Specifically, Rule 405 provides that character may be proved "by testimony as to reputation or by testimony in the form of an opinion,"[185] and, where character "is an essential element of a charge, claim, or defense," character may be proved by specific instances of conduct.[186] The Michigan Court of Appeals considered these rules in one case during the *Survey* period.

In *People v. Orlewicz*,[187] the court of appeals considered an interesting issue relating to the admissibility of social networking sites under Rules 404 and 405,[188] one that appears to be an issue of first impression throughout the nation. On appeal, the defendant argued that he was denied a fair trial by the exclusion of personal protection orders (PPOs) issued against the victim and by exclusion of the victim's MySpace page.[189] Addressing the PPO issue first, the court noted that although a victim's aggressive character may be admitted under Rule 404(a)(2) to show that the victim was the aggressor for purposes of a

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182. *Id.*

183. *See* WEISSENBERGER, *supra* note 63, § 404.2, at 120.

184. MICH. R. EVID. 405.

185. MICH. R. EVID. 405(a). On cross-examination, specific instances of conduct relevant to character may be examined. *Id.*

186. MICH. R. EVID. 405(b).

187. 293 Mich. App. 96, 809 N.W.2d 194 (2011). *Orlewicz* also considered an issue of general relevance. For a discussion of this aspect of the case, as well as a summary of the facts, see *supra* notes 102-119 and accompanying text.

188. *Orlewicz*, 293 Mich. App. at 103-04.

189. *Id.* at 103.

self-defense claim, such evidence is limited to reputation testimony.[190] Specific instances of conduct, the court explained, are admissible only if "character is an essential element of a claim or defense."[191] Because "[t]he victim's character is not an essential element of [a] self-defense claim,"[192] and because "the PPOs [reflected] specific instances of conduct," they were not admissible under Rule 405.[193]

The court of appeals then turned to the victim's MySpace page, which "presented the victim consistently with his reputation for violence, including aggressive language, and references to guns, bullets, gang activities, drugs, and vengeance."[194] The court concluded that the MySpace page did not constitute "a specific instance of conduct," and thus was admissible character evidence under Rules 404(a)(2) and 405.[195] The court reasoned that while a social networking website might reflect specific instances of conduct, taken as a whole it is itself "more in the nature of a semipermanent yet fluid autobiography presented to the world," and thus is effectively "self-directed and self-controlled general character evidence."[196] The court explained that changes in a person's character over time or misrepresentations may weaken the relevance of such evidence, "[b]ut in the abstract, social-networking and personal websites constitute general reputational evidence rather than evidence concerning specific instances of conduct . . . ."[197] Although the trial court erred in excluding this evidence, the court of appeals found the error harmless, reasoning that the defendant himself testified about the contents of the victim's MySpace page.[198]

2. Other Acts Evidence Under Rule 404(b)

After Rule 403, the most significant rule of limited admissibility is Rule 404(b), which prohibits the introduction of other bad acts evidence.[199] Specifically, the rule provides:

190. *Id.* at 104 (citing MICH. R. EVID. 404(a)(2); People v. Harris, 458 Mich. 310, 315-16, 583 N.W.2d 680 (1998)).
191. *Id.*
192. *Id.*
193. *Id.*
194. *Orlewicz*, 293 Mich. App. at 103 n.1.
195. *Id.* at 104-05.
196. *Id.*
197. *Id.* at 105.
198. *Id.*
199. MICH. R. EVID. 404(b).

> 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, opportunity, 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.[200]

Unlike the other rules of limited admissibility, 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]."[201] It is also thought unfair to make a party refute charges long since grown stale.[202]

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);[203] (2) "the evidence must be relevant under Rule 402";[204] (3) the danger of unfair prejudice must not "[substantially] outweigh[] the probative value of the evidence . . . under Rule 403";[205] and (4) the trial court may give a limiting instruction upon the request of the party against whom the evidence is offered.[206] Although developed in the context of a criminal case, the *VanderVliet* test applies equally to other acts evidence offered in civil trials.[207]

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200. 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. MICH. R. EVID. 404(b)(2).

201. 1A WIGMORE, *supra* note 3, § 58.2, at 1212 (Peter Tillers rev. ed. 1983); *see also* Michelson v. United States, 335 U.S. 469, 475-76 (1948).

202. *See* People v. Zackowitz, 172 N.E. 466, 468-69 (N.Y. 1930); 1A WIGMORE, *supra* note 3, § 58.2, at 1212-13.

203. People v. VanderVliet, 444 Mich. 52, 74, 508 N.W.2d 114 (1993).

204. *Id.*

205. *Id.* at 75 (first alteration in original).

206. *Id.* 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).

207. *See e.g.*, 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 (2003).

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."[208] 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.[209] 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."[210] During the *Survey* period, the Michigan Supreme Court issued two published decisions involving Rule 404(b) evidence. As with the vast majority of Rule 404(b) cases, both involved criminal trials.

Most significantly, in *People v. Mardlin*[211] the Michigan Supreme Court considered the admissibility of other acts evidence "under the doctrine of chances."[212] In *Mardlin*, the defendant was charged with arson and burning insured property following a fire at his home.[213] The evidence showed that the defendant was the only one at home on the day of the fire, which was reported shortly after he left the home.[214] The evidence also showed that the fire was intentionally set, and that the defendant filed an insurance claim after the fire.[215] The prosecutor's theory was that the defendant intentionally set the fire to collect the insurance money.[216] To support this theory, the prosecution presented evidence that the defendant had been unable to pay his mortgage and utility bills, as well as evidence that the defendant had filed four previous

208. 22 WRIGHT & GRAHAM, *supra* note 70, §5232, at 429-31 (footnotes omitted).

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

210. United States v. Crowder, 141 F.3d 1202, 1206 (D.C. Cir. 1998); *see also* 1A WIGMORE, *supra* note 3, § 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 its 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 70, § 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).

211. 487 Mich. 609, 790 N.W.2d 607 (2010).

212. *Id.* at 630 (Kelly, C.J., dissenting).

213. *Id.* at 612.

214. *Id.*

215. *Id.*

216. *Id.* at 613.

insurance claims following fires to his home or automobiles.[217] The jury convicted the defendant, and he appealed.[218] The Michigan Court of Appeals reversed the defendant's conviction, concluding that the trial court had erred in admitting evidence of the other fires under Rule 404(b)(1).[219] The Michigan Supreme Court granted leave to appeal and reversed, concluding that the evidence of the other fires was appropriately admitted for a non-character purpose under Rule 404(b).[220]

In reaching this conclusion, the Michigan Supreme Court began its analysis by confirming that Rule 404(b), as applied in Michigan, reflects a view of inclusion, permitting introduction of evidence so long as it is probative of a fact other than character or propensity.[221] The court explained that, under Rule 404(b), in a criminal case, the prosecution bears the initial burden of establishing the logical relevance of the evidence under Rules 401 and 402 to an issue apart from the defendant's character or propensity to act in conformity with his character.[222] This does not mean, however, that any other acts evidence which bears on a defendant's character is inadmissible; rather, "[e]vidence is *inadmissible* under this rule *only* if it is relevant *solely* to the defendant's character or criminal propensity.[223] The court explained that where other acts evidence is relevant to a proper, non-character issue, "[a]ny undue prejudice that arises because the evidence also unavoidably reflects the defendant's character is then considered under the [Rule] 403 balancing test . . . ."[224]

The court then turned to a discussion of the doctrine of chances.[225] Generally, the doctrine of chances is a theory of admissibility that allows prior acts to be admitted to show that a particular act was done with intent, and not accidentally.[226] As the supreme court explained, the theory behind the doctrine is that "as the number of incidents of an out-of-the-ordinary event increases in relation to a particular defendant, the

217. *Mardlin*, 487 Mich. at 613.
218. *Id.*
219. *Id.* at 614.
220. *Id.* at 611-12, 614.
221. *Id.* at 616 (citing *VanderVliet*, 444 Mich. at 64-65, People v. Sabin, 463 Mich. 43, 56; 614 N.W.2d 888 (2000)). *See also supra* notes 209-210 and accompanying text.
222. *Mardlin*, 487 Mich. at 615.
223. *Id.* at 615-16 (citing People v. Crawford, 458 Mich. 376, 385, 582 N.W.2d 785 (1998)).
224. *Id.* at 616.
225. *Id.* at 616-19.
226. *See also* 2 WIGMORE, *supra* note 3, § 302 at 241.

objective probability increases that the charged act *and/or* the prior occurrences were not the result of natural causes."[227] In other words,

> If a type of event linked to the defendant occurs with unusual frequency, evidence of the occurrences may be probative, for example, of his criminal intent or of the absence of mistake or accident because it is objectively improbable that such events occur so often in relation to the same person due to mere happenstance.[228]

Evidence offered for this purpose is permissible under Rule 404(b) because it does not require a jury to consider the defendant's propensity to commit a crime or his general disposition; rather, the jury need only examine the objective probability of the coincidences to determine whether a particular act occurred or was done with a particular mental state.[229] In other words, instead of establishing a defendant's propensity or bad character, "[t]he improbability of a coincidence of acts creates an objective probability of an actus reus."[230] After discussing early English and American cases employing the doctrine, the court observed that it is "epitomized in arson cases in which apparently accidental fires befall property linked to the defendant with uncommon frequency."[231]

Applying the doctrine to the case before it, the supreme court concluded that the evidence of the prior fires was admissible under the doctrine of chances.[232] The court reasoned that evidence of the prior fires was "admissible precisely because they constituted a series of similar incidents . . . the frequency of which objectively suggested that one or more of the fires was not caused by accident."[233] Because the defendant had been associated with five fires to his property in a twelve year period, which is certainly unusual, his "association was . . . probative of the credibility of the [defense]" that the fire at issue was accidental or the result of natural causes, "because the unusually high occurrence of fires

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227. *Mardlin*, 487 Mich. at 616.

228. *Id.* at 617. Or, as Auric Goldfinger explained to James Bond more succinctly, "Once is happenstance. Twice is coincident. Three times is enemy action." IAN FLEMING, GOLDFINGER 222-23 (Penguin Books 2006) (1959).

229. *Mardlin*, 487 Mich. at 616-17. *See also* Edward J. Imwinkelried, *The Dispute over the Doctrine of Chances: Relying On The Concept Of Relative Frequency To Admit Uncharged Misconduct Evidence*, 7 CRIM. JUST. 16, 16, 20 (1992).

230. *Mardlin*, 487 Mich. at 619 (quoting 1 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 4:3, at 4-42, 4-43 (2008)).

231. *Id.* at 617-19.

232. *Id.* at 619.

233. *Id.* (footnote omitted).

in relation to defendant's property creates a permissible inference of human design."[234]

In reaching this conclusion, the supreme court rejected a number of arguments raised by the court of appeals, the dissent, and the defendant. First, the court rejected the argument that the prior fires were not admissible because they were not sufficiently similar to the fire at issue in the case against the defendant, and because there was no evidence that the prior fires were the result of arson.[235] Noting that application of the doctrine of chances is done on a case-by-case basis and that the method of analysis depends on the purpose for which the evidence is introduced, the court explained that "[t]he acts or events need not bear striking similarity to the offense charged if the theory of relevance does not itself center on similarity."[236] Thus, for example, a high degree of similarity may be necessary to admit other acts evidence to establish a common scheme, or to use a *modus operandi* to establish identity.[237] However, where evidence of prior acts is offered only to show innocent intent (or the lack thereof), a lesser degree of similarity is sufficient.[238] In such a case, "the past events need *only* be of the same general category as the charged offense."[239] Based on this reasoning, the court concluded that the court of appeals had erred in finding the evidence inadmissible because of the lack of a high similarity or proof that the defendant set the prior fires.[240] The court explained that "[b]ecause defendant owned or controlled all the burned property, the unusual number of past fires was classically relevant to defendant's claim that the November 2006 fire was an accident; the frequency of past fires so closely associated with defendant logically suggested a lack of coincidence."[241]

The supreme court also rejected the defendant's argument that the evidence was not admissible because he presented evidence which provided innocent explanations of the past fires. The court explained that "these explanations do not render evidence of the past fires

234. *Id.* at 619 n.23.

235. *Id.* at 619-20.

236. *Mardlin*, 487 Mich. at 620.

237. *Id.* at 620-21 (discussing *Sabin*, 463 Mich. at 50, 61, 63, 67-68; *Crawford*, 458 Mich. at 394-97; People v. Golochowicz, 413 Mich. 298, 307-09, 319 N.W.2d 518 (1982)).

238. *Id.* at 622. The court explained that "[p]ast events—such as fires in relation to an arson case—that suggest the absence of accident are offered on the basis of a theory of logical relevance that is a subset of innocent intent theories." *Id.*

239. *Id.* at 622-23.

240. *Id.* at 623.

241. *Id.* at 623-24 (footnote omitted).

inadmissible,"[242] but rather are matters for the jury to consider in weighing the probative value of the evidence.[243] Such evidence could also be considered by the trial court in balancing the probative value of the evidence against the danger of unfair prejudice under Rule 403.[244] Emphasizing the "inclusionary[,] rather than exclusionary," approach of Rule 404(b),[245] the court held that under the doctrine of chances "unusually frequent events—and *particularly* purported accidents—associated with the defendant and falling in to the same general category of incidents are admissible to disprove lack of accident or innocent intent with regard to the charged event."[246] Because the evidence of the prior fires was admitted for this purpose, the supreme court affirmed the trial court's ruling, reversed the court of appeals, and reinstated the defendant's conviction.[247]

The Michigan Supreme Court also briefly considered Rule 404(b) in *People v. Breidenbach*.[248] In that case, the defendant was charged with and convicted of "'indecent exposure as a sexually delinquent person.'"[249] To prove that the defendant was a sexually delinquent person at that time of the underlying crime, which subjected him to enhanced penalties, the prosecutor was required to show that the defendant had engaged in "repetitive or compulsive acts" of a sexual nature.[250] Overruling its prior decision in *People v. Helzer*,[251] the supreme court held that a defendant charged with a crime as a sexually delinquent person is not automatically entitled to a bifurcated trial in which sexual delinquency is proven only after the defendant has been convicted of the underlying offense.[252] In doing so, the supreme court rejected the *Helzer* court's concern that a defendant would be prejudiced by allowing that

242. *Mardlin*, 487 Mich. at 625.
243. *Id.* at 625-26.
244. *Id.* at 626-27.
245. *Id.* at 628.
246. *Id.* at 629.
247. *Id.* at 630. Chief Justice Kelly, joined by Justices Cavanagh and Hathaway, dissented. In Chief Justice Kelly's view, the evidence was not admissible because the prosecution failed to show "sufficient similarity between the prior fires and the charged fire." *Id.* at 641 (Kelly, C.J., dissenting). She noted that three of the prior four fires involved vehicles, not homes; that there was no proof that the defendant caused any of the prior fires; that none of the prior fires was considered suspicious at the times they occurred; and that there was no physical evidence linking the fires, such as the use of a common accelerant. *Id.* at 640-41.
248. 489 Mich. 1, 798 N.W.2d 738 (2011).
249. *Id.* at 3.
250. *Id.* at 4 n.2 (quoting MICH. COMP. LAWS ANN. § 750.10a (West 2004)).
251. 404 Mich. 410, 273 N.W.2d 44 (1978).
252. *Breidenbach*, 489 Mich. at 8.

same jury determining his guilt on the underlying crime to "hear evidence of [the] defendant's history of sexual misconduct," which was relevant only to the issue of sexual delinquency.[253] The *Breidenbach* court did not find this concern to be compelling in light of the fact that evidence of prior sexual misconduct "can be, and often is, admitted anyway under the Michigan Rules of Evidence or the doctrine of chances."[254] For example, the court noted, in the defendant's own case, evidence of the defendant's prior sexual misconduct was properly admitted for the non-character purpose of rebutting the defendant's claims that he had not exposed himself and could not have exposed himself because he had wrapped himself with a bandage due to pain he was experiencing.[255] Further, the court explained, evidence of prior misconduct will often be admissible under the doctrine of chances to rebut a defendant's claim that the conduct for which he is on trial "ha[s] an innocent explanation."[256] Based on this reasoning, the court concluded that "*Helzer*'s rule mandating separate juries, however well-intentioned, does not take into account the practical reality that evidence of a defendant's history of sexual misbehavior will often come before the jury even when the charges are severed."[257] In part because "[t]his reality undermines *Helzer*'s policy rationale,"[258] the court concluded that separate juries are not automatically required in a case charging sexual delinquency.[259]

3. 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."[260] Similarly, the prior

253. *Id.* at 11.
254. *Id.*
255. *Id.* at 11 & n.22.
256. *Id.* at 12 & n.23.
257. *Id.* at 12.
258. *Breidenbach*, 489 Mich. at 12-13.
259. *Id.* at 15.
260. MICH. COMP. LAWS ANN. § 768.27a(1) (West 2000 & Supp. 2011). The statute also requires the prosecutor to give notice prior to trial of his intention to present evidence pursuant to the statute. *Id.* Under the statute, a listed offense is any offense

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."[261]

During prior *Survey* periods, the Michigan Court of Appeals issued several decisions upholding the validity of these statutes against constitutional challenges, mostly on ex post facto and separation of powers grounds, and holding that where they lead to conflicting results, sections 768.27a and 768.27b control over Rule 404(b).[262] Notably, during prior *Survey* periods the Michigan Supreme Court failed to address these issues, despite several opportunities to do so. For example, in *Watkins* the court initially granted leave to appeal, directing the parties to specifically address five issues relating to MCL section 768.27a,[263] but subsequently vacated its grant of leave to appeal and denied the defendant's application for leave to appeal.[264] Subsequently, the court denied leave to appeal in *People v. Kou Xiong*,[265] which the court had held in abeyance pending its decision in *Watkins*.[266] The supreme court also denied leave to appeal with respect to these issues in *Schultz*,[267] *Petri*,[268] and *Wilcox*.[269] Similarly, in the prior *Survey* period, the Michigan Supreme Court declined to grant leave to appeal in *People v. Thompson*,[270] a case raising these issues.[271]

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listed in the sex offender registry statute. *Id.* § 768.27a(2) (citing MICH. COMP. LAWS ANN. § 28.722(e) (West 2004 & Supp. 2011)).

261. MICH. COMP. LAWS ANN. § 768.27b(1) (West 2000 & Supp. 2011). As with the prior sexual assault statute, this statute requires the prosecutor to provide notice prior to trial. *Id.* § 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. *Id.* § 768.27b(4).

262. *See* People v. Petri, 279 Mich. App. 407, 411-12, 760 N.W.2d 882 (2008), *leave to appeal denied*, 482 Mich. 1186, 758 N.W.2d 562 (2008); People v. Schultz, 278 Mich. App. 776, 778-89, 754 N.W.2d 925 (2008), *leave to appeal denied*, 482 Mich. 1078, 758 N.W.2d 256 (2008); People v. Watkins, 277 Mich. App. 358, 364-65, 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); People v. Pattison, 276 Mich. App. 613, 619-20, 741 N.W.2d 558 (2007).

263. *Watkins*, 480 Mich. at 1167.

264. *Watkins*, 482 Mich. at 1114.

265. 483 Mich. 951, 764 N.W.2d 15 (2009).

266. *Id.*

267. People v. Schultz, 482 Mich. 1078, 758 N.W.2d 256 (2008).

268. People v. Petri, 482 Mich. 1186, 758 N.W.2d 562 (2008).

269. People v. Wilcox, 483 Mich. 1094, 766 N.W.2d 845 (2009).

270. 485 Mich. 883, 772 N.W.2d 336 (2009).

Although neither the Michigan Supreme Court nor the Michigan Court of Appeals addressed these statutes during the current *Survey* period, it appears that the Michigan Supreme Court will now consider a number of issues relating to the prior sexual assault evidence statute. During the current *Survey* period, the court granted leave to appeal in *People v. Watkins*[272] and *People v. Pullen*.[273] In these cases, the court has instructed the parties to address "whether MCL 768.27a conflicts with [Rule] 404(b) and, if it does, whether the statute [or the rule] prevails," as well as whether evidence admissible under MCL section 768.27a may nonetheless be excluded under Rule 403.[274] It appears that the supreme court will, during the upcoming *Survey* period, finally provide some guidance to the lower courts and criminal practitioners with respect to these statutes.

IV. WITNESSES

Article VI of the Michigan Rules of Evidence governs the presentation and examination of witnesses.[275] During the *Survey* period, the Michigan courts issued only one published decision dealing with witnesses, addressing an issue concerning control of examination under Rule 611.

The conduct of trial and examination of witnesses is governed by Rule 611, which generally grants a trial court broad discretion to control the manner and order of proofs and defines the permissible use of cross-examination and leading questions.[276] More specifically, Rule 611(a) grants a trial court discretion to "exercise reasonable control over the mode and order of interrogating witnesses," directing the court to do so in a manner which aids the "ascertainment of the truth, [while] . . . avoid[ing] needless consumption of time, and . . . protect[ing] witnesses from harassment or undue embarrassment."[277] Although a trial court's discretion under Rule 611(a) is broad, in one case during the *Survey* period the Michigan Court of Appeals held that the trial court went too far in limiting a party's time for examination of witnesses.

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271. *See* People v. Thompson, No. 278243, 2008 WL 7488022, at *1-2 (Mich. Ct. App. Dec. 16, 2008) (per curiam).

272. 489 Mich. 863, 795 N.W.2d 147 (2011). This was the same case in which the court had granted leave to appeal, but then vacated the grant.

273. 489 Mich. 864, 795 N.W.2d 147 (2011).

274. *Watkins*, 489 Mich. at 863-64; *Pullen*, 489 Mich. at 864.

275. *See* MICH. R. EVID. 611.

276. *Id.*

277. MICH. R. EVID. 611(a); *see also*, WEISSENBERGER, *supra* note 63, § 611.2, at 341-44.

In *Barksdale v. Bert's Marketplace*,[278] the plaintiff brought a sexual harassment claim against her former employer, Bert's Marketplace.[279] At trial, the judge limited each side to thirty minutes of examination for each witness.[280] More specifically, during the examination of Bert Dearing, the defendant's owner, the trial court pretermitted the plaintiff's examination.[281] Counsel noted her objection for the record, indicating that she was not finished examining Dearing.[282] After defense counsel examined Dearing, the trial court precluded any redirect examination by the plaintiff's counsel because her time had expired.[283] The trial court also rejected counsel's request to make an offer of proof as to the remainder of Dearing's testimony.[284] At the conclusion of the trial, the jury found in favor of the defendant.[285]

On appeal, the plaintiff argued that the trial court had improperly limited her time for examining Dearing and had erred in not allowing her to make an offer of proof as to the substance of "the testimony that counsel would have elicited" from Dearing.[286] The court of appeals agreed.[287] Distinguishing its prior decision in *Alpha Capital Management, Inc. v. Rentenbach*,[288] the court of appeals held that the trial court had abused its discretion in imposing a half-hour time limit on witness examination.[289] The court reasoned that plaintiff's counsel was diligent in jury selection and opening statements, and her examination of Dearing was expeditious.[290] Because of this, there was "no reasonable basis for the trial court's determination that limiting witness examinations to 30 minutes for each side advanced the trial management goals set forth in [Rule] 611(a)."[291] Further, the court of appeals reasoned, the trial judge did not provide any explanation for the time limit or why it was necessary to avoid wasted time or protect the witness

278. 289 Mich. App. 652, 797 N.W.2d 700 (2010) (per curiam).
279. *Id.* at 653.
280. *Id.*
281. *Id.*
282. *Id.*
283. *Id.*
284. *Barksdale*, 289 Mich. App. at 654-55.
285. *Id.* at 655.
286. *Id.*
287. *Id.* at 657.
288. 287 Mich. App. 589, 792 N.W.2d 344 (2010). *Alpha Capital Mgmt.* is discussed fully in last year's *Survey*. *See* M Bryan Schneider, *Evidence*, 56 WAYNE L. REV. 1123, 1175-76 (2010).
289. *Barksdale*, 289 Mich. App. at 657.
290. *Id.*
291. *Id.*

under Rule 611(a)(2).[292] Because the trial court "impos[ed] an 'utterly arbitrary' time limit 'unrelated to the nature and complexity of [the] case or the length of time consumed by other witnesses,'"[293] the trial court abused its discretion by cutting off counsel's questioning of Dearing.[294] Moreover, the court of appeals concluded, the trial court abused its discretion in not allowing the plaintiff's counsel to make an offer of proof.[295] The court explained that "'[t]he trial court's need to complete witness testimony, however urgent, does not absolve it from its obligation to permit an offer of proof in accordance with [Rule] 103(a)(2),'"[296] and concluded that by both imposing an arbitrary time limit on witness examination and precluding the plaintiff's offer of proof, the trial court "prejudiced plaintiff's substantial rights."[297] Accordingly, the court of appeals reversed the trial court's judgment and remanded the case for a new trial.[298]

V. EXPERT, SCIENTIFIC, & OPINION TESTIMONY[299]

Article VII of the Michigan Rules of Evidence governs expert, technical, and opinion testimony.[300]

A. Admissibility, Reliability, and the Gatekeeping Function

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*.[301] 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."[302] The Michigan

292. *Id.*

293. *Id.* (alteration in original) (quoting *Alpha Capital Mgmt.*, 287 Mich. App. at 618 n.12).

294. *Id.*

295. *Barksdale*, 289 Mich. App. at 657.

296. *Id.* (quoting *Alpha Capital Mgmt.*, 287 Mich. App. at 619).

297. *Id.* at 657-58.

298. *Id.* at 658.

299. Portions of this section quote an earlier *Survey* article. *See* M Bryan Schneider, *Evidence*, 56 WAYNE L. REV. 701 (2010).

300. *See* MICH. R. EVID. 701.

301. 293 F. 1013 (D.C. Cir. 1923).

302. *Id.* at 1014.

Supreme Court adopted the *Frye* standard in *People v. Davis*.[303] In 1993, however, the Supreme Court held that the adoption of Federal Rule of Evidence 702 abrogated the *Frye* rule.[304] In *Daubert*, the Court concluded that Rule 702 nevertheless sets forth a standard of both scientific reliability[305] and relevance.[306] These standards require a trial court to perform a "gatekeeping function," "determin[ing] at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue."[307] Subsequent to the Court's decision, Federal Rule 702 was amended to explicitly incorporate the *Daubert* standard, and now provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) The testimony is based on sufficient facts or data;
>
> (c) The testimony is the product of reliable principles and methods; and
>
> (d) The expert has reliably applied the principles and methods to the facts of the case.[308]

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303. 343 Mich. 348, 370-72, 72 N.W.2d 269 (1955); *see also* People v. Young, 418 Mich. 1, 17-20, 340 N.W.2d 805 (1983); People v. Haywood, 209 Mich. App. 217, 221, 530 N.W.2d 497 (1995).

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

305. *Id.* at 589-90.

306. *Id.* at 591-92.

307. *Id.* at 592. Although *Daubert* specifically addresses scientific testimony, the Court 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 (1999).

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

Notwithstanding the abrogation of the *Frye* standard by Rule 702 and *Daubert*, the Michigan courts continued to apply the *Frye* rule.[309] This changed when the Michigan Supreme Court adopted an amendment to the Michigan Rules of Evidence which, with a minor non-substantive exception, mirrors Federal Rule 702.[310] During a prior *Survey* period, the Michigan Supreme Court issued a decision adopting the *Daubert* analysis under Rule 702. In *Gilbert v. DaimlerChrysler Corporation*,[311] the supreme court clarified the standards governing expert testimony under Rule 702. The court explained that Rule 702 does not alter the *Frye* test's requirement that a court ensure that expert testimony is reliable. Rather, Rule 702 "changes only the factors that a court may consider in determining whether expert opinion evidence is admissible."[312] 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."[313] The supreme court also admonished the trial courts to vigorously enforce this gatekeeping requirement. 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."[314] The court further explained that Rule 702 requires that expert testimony be based on specialized knowledge.[315] 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."[316] In the court's view, "[u]nless 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."[317] 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.

Unlike the last few *Survey* periods, in which the Michigan courts were very active in interpreting and applying these rules, only one

309. *See* People v. McMillan, 213 Mich. App. 134, 137 n.2, 539 N.W.2d 553 (1995).
310. *See* MICH. R. EVID. 702.
311. 470 Mich. 749, 685 N.W.2d 391 (2004).
312. *Id.* at 781.
313. *Id.* at 782.
314. *Id.*
315. *Id.* at 789.
316. *Id.*
317. *Gilbert*, 470 Mich. at 790.

published decision addressing expert testimony was issued during the *Survey* period. In *Edry v. Adelman*,[318] the plaintiff brought a medical malpractice claim alleging that the defendant failed to conform to the applicable standard of care by not testing whether a lump found in the plaintiff's breast was cancerous when the lump was first discovered.[319] The plaintiff alleged that the delay in diagnosis diminished her chances of long term survival.[320] In the pretrial proceedings, the parties deposed Dr. Barry Singer, the plaintiff's oncology expert.[321] He testified that the "plaintiff's chances of surviving five years would have been 95 percent had [the cancer] been diagnosed [when the lump was first discovered], and that the delay in diagnosis reduced her five-year survival chance to 20 percent."[322] Dr. Singer conceded that this opinion was contradicted by an American Joint Cancer Commission manual, but opined that "the manual was not applicable" because the plaintiff's cancer had spread to more lymph nodes.[323] In support of this theory "Dr. Singer referred to textbooks and journals," but those authorities were not produced by the plaintiff.[324] The defendant's expert, Dr. Joel Appel, contradicted Dr. Singer's testimony. Dr. Appel testified that "it was medically improper to consider the number of lymph nodes involved as a predictor of a patient's chance of survival,"[325] and that Dr. Singer's contrary testimony "was not based on recognized scientific or medical knowledge, was not generally accepted in the medical community, and could not be substantiated with any medical evidence."[326] The trial court concluded that Dr. Singer's testimony was not admissible under Rule 702 and ultimately granted summary disposition to the defendant, and the court of appeals affirmed.[327] On appeal, the supreme court agreed that Dr. Singer's testimony was properly excluded under Rule 702.[328]

The court first noted that it has previously implied that, "while not dispositive, a lack of supporting literature is an important factor in determining the admissibility of expert witness testimony."[329] With this

318. 486 Mich. 634, 786 N.W.2d 567 (2010).
319. *Id.* at 636-37.
320. *Id.* at 637.
321. *Id.*
322. *Id.*
323. *Id.*
324. *Edry*, 486 Mich. at 637.
325. *Id.* at 638.
326. *Id.*
327. *Id.* at 638-39.
328. *Id.* at 636.
329. *Id.* at 640 (citing *Daubert*, 509 U.S. at 593; Craig v. Oakwood Hosp., 471 Mich. 67, 83-84, 684 N.W.2d 296 (2004)).

standard and the general principles of Rule 702 in mind, the supreme court concluded that "Dr. Singer's testimony failed to meet the cornerstone requirements of MRE 702."[330] The court noted that Dr. Singer's opinion was contrary to both the opinion of the defendant's oncology expert and the published literature which had been admitted into evidence, and that the plaintiff failed to provide any of the literature Dr. Singer relied upon in his deposition testimony.[331] The court noted that the plaintiff did eventually provide some evidence to support Dr. Singer's testimony, but this evidence consisted of general statistics on publicly available websites which "were not peer-reviewed and did not directly support Dr. Singer's testimony."[332] The court thus concluded that the plaintiff had failed to properly support that Dr. Singer's testimony was based on a reliable application of reliable principles or methods, as required for admission under Rule 702.[333] The court emphasized that the introduction of peer-reviewed literature is not always required, or by itself sufficient, to support an expert's opinion, but found that "in this case the lack of supporting literature, combined with the lack of any other form of support for Dr. Singer's opinion, renders his opinion unreliable and inadmissible under [Rule] 702."[334] Having concluded that Dr. Singer's opinion was properly excluded, the court further concluded that the trial court did not err in granting summary disposition to the defendant.[335]

Justice Hathaway, joined by Justice Weaver, dissented. Her opinion focuses on the separate statute governing expert testimony in personal injury cases.[336] The statute provides that, in such an action, "a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact."[337] The statue then provides seven specific factors that a court must consider in making this determination.[338] Noting that the court previously held that all seven of the statutory factors "need to be examined before an expert's testimony can be precluded,"[339] Justice Hathaway concluded that the trial court had reviewed only one MCL

330. *Edry*, 486 Mich. at 640.
331. *Id.* at 640-41.
332. *Id.* at 640.
333. *Id.*
334. *Id.* at 641.
335. *Id.* at 642-44.
336. *Edry*, 486 Mich. at 645-57 (Hathaway, J., dissenting).
337. MICH. COMP. LAWS ANN. § 600.2955(1) (West 2000).
338. *Id.*
339. *Edry*, 486 Mich. at 650 (Hathaway, J., dissenting) (discussing Clerc v. Chippewa Cnty. War Mem'l Hosp., 477 Mich. 1067, 1068, 729 N.W.2d 221 (2007)).

section 600.2955(1) factor—the existence of peer reviewed literature—and therefore failed to properly perform its gatekeeping role of considering all the factors set forth in MCL section 600.2955(1).[340] Further, Justice Hathaway reasoned that the trial court's exclusion of the testimony, as well as the majority's decision, failed to make clear the "distinction between the proper role of the court as a *gatekeeper*, and the role of the *trier of fact*,"[341] and that the trial court's decision essentially amounted to a weighing of the credibility of the parties' experts.[342] Justice Hathaway's dissent focused on MCL section 600.2955, and did not separately consider the admissibility of Dr. Singer's opinion under Rule 702.[343] Regardless of the correctness of Justice Hathaway's application of MCL section 600.2955, the majority rejected the dissent's opinion because it concluded that expert testimony in a personal injury action must satisfy both MCL section 600.2955 and Rule 702, and the failure to satisfy either renders the evidence inadmissible.[344]

Although Michigan courts were not active in addressing expert witness issues during the current *Survey* period, it appears that the next *Survey* period may be more fruitful. In *People v. Kowalski*, the supreme court granted leave to appeal in a criminal case in which the trial court struck the defendant's proffered expert testimony.[345] The proposed testimony would have addressed false confessions, specifically how they came about and how the factors which produced false confessions were present in the defendant's statements to the police.[346] The supreme court granted leave to appeal to consider whether this evidence is admissible under Rule 702, or, even if not, whether its exclusion denied the defendant the right to present a defense.[347] The supreme court also granted leave to appeal in *Krohn v. Home-Owners Insurance Company*[348] Although the bulk of the issues involved in *Krohn* concern no-fault insurance issues, the court also directed the parties to address whether the court of appeals may "*sua sponte* rais[e] the issue whether the trial court failed to perform its gatekeeper function under [Rule] 702."[349] The

340. *Id.* at 650-54.
341. *Id.* at 654.
342. *Id.*
343. *Id.* at 645.
344. *Id.* at 642 n.7.
345. People v. Kowalski, 489 Mich. 858, 858, 795 N.W.2d 19 (2011).
346. People v. Kowalski, No. 294054, 2010 WL 3389741, at *1 (Mich. Ct. App. Aug. 26, 2010) (per curiam).
347. *Kowalski*, 489 Mich. at 858.
348. 488 Mich. 876, 788 N.W.2d 664 (2010).
349. *Id.* at 876.

supreme court's expected decisions in these cases should provide additional guidance into the operation of Rule 702.

B. Admissibility of Underlying Data

Under Rule 703, "[t]he facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence."[350] The corollary to this rule, as the Michigan Court of Appeals has explained, is that "an expert witness may not base his or her testimony on facts that are not in evidence."[351] The Michigan Supreme Court considered Rule 703 in *People v. Fackelman*,[352] decided shortly after the close of the *Survey* period. In *Fackelman*, the defendant was found guilty but mentally ill of various crimes arising from his assault of a man who he believed was responsible for the death of his son.[353] The defendant's son was killed in an automobile accident which the defendant characterized as a road-rage incident in which the victim chased the car in which the defendant's son was a passenger.[354] Both the victim and the driver of the car in which the defendant's son was traveling were charged with vehicular manslaughter.[355] Following a trial, the victim was convicted of misdemeanor negligent homicide and sentenced to six months in jail.[356] The evidence at trial showed that after the death of his son, the defendant was severely depressed and was prescribed medication to treat his depression.[357] On the day of the incident for which he was convicted, the defendant drove to the victim's home and threatened him with a gun.[358] The victim ran across the street and into a home.[359] The defendant followed and kicked in the door to the home.[360] The victim ran out the back door, and the defendant left in his car.[361] The defendant fled to his mother's home in Ohio, where he hid the gun before

350. MICH. R. EVID. 703.

351. People v. Unger, 278 Mich. App. 210, 248, 749 N.W.2d 272 (2008).

352. 489 Mich. 515, 524, 802 N.W.2d 552 (2011). *Fackelman* also discussed issues relating to the business records exception to the hearsay rule and the Confrontation Clause. *Id.* at 536-37. These aspects of the case are discussed *infra* notes 405-411 and accompanying text (business records) and *infra* notes 491-496 and accompanying text (confrontation).

353. *Fackelman*, 489 Mich. at 519-21.

354. *Id.* at 519.

355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.* at 520.

359. *Fackelman*, 489 Mich. at 520.

360. *Id.*

361. *Id.*

leaving.[362] A family friend eventually found the defendant near Toledo, Ohio, and drove him to Flower Hospital in Toledo.[363] The "[d]efendant was arrested en route to the hospital," but was allowed to be admitted to the hospital.[364]

The defendant was admitted to the psychiatric intensive care unit and examined by Dr. Agha Shahid, who prepared a report.[365] The defendant was later examined by Dr. Jennifer Balay, the state's expert, and Dr. Zubin Mistry, the defense expert.[366] Dr. Balay opined that while the defendant was mentally ill, he was not legally insane at the time of the assault.[367] Dr. Mistry, on the other hand, opined that the defendant was legally insane at the time of the crime. Both doctors had reviewed Dr. Shahid's report in formulating their opinions.[368] During direct examination by defense counsel, Dr. Mistry gave only his own diagnosis, and did not reference Dr. Shahid's diagnosis as reflected in the report prepared by Dr. Shahid.[369] During cross-examination, however, the prosecutor placed Dr. Shahid's diagnosis before the jury, questioning whether Dr. Mistry agreed with that diagnosis.[370] The prosecutor also placed Dr. Shahid's diagnosis before the jury during examination of the prosecution expert, Dr. Balay, and during closing argument.[371]

The Michigan Supreme Court reversed the defendant's convictions.[372] Preliminarily, the supreme court determined that by presenting to the jury Dr. Shahid's diagnosis, as reflected in her hearsay report, the prosecution denied the defendant his right to confront the witnesses.[373] The court also determined that, even in the absence of a confrontation problem, Dr. Shahid's diagnosis was not admissible under Rule 703.[374] The court noted that both Dr. Mistry and Dr. Balay relied, in part, on Dr. Shahid's report in formulating their opinions, and that to the extent that these experts relied on the facts and data in Dr. Shahid's report in formulating their opinions, "they were required to have been admitted into evidence under [Rule] 703."[375] But, the court explained,

362. *Id.*
363. *Id.*
364. *Id.*
365. *Fackelman*, 489 Mich. at 520.
366. *Id.*
367. *Id.*
368. *Id.*
369. *Id.* at 521-22.
370. *Id.* at 521-23.
371. *Fackelman*, 489 Mich. at 523.
372. *Id.* at 519.
373. *Id.* at 524-34.
374. *Id.* at 534-35.
375. *Id.* at 534.

Dr. Shahid's report contained more than mere facts and data; it also contained Dr. Shahid's opinion in the form of her diagnosis.[376] Because Rule 703 permits only the facts or data upon which an expert bases his or her opinion to be introduced, Dr. Shahid's opinion was not admissible under the rule, and should not have been presented to the jury.[377]

VI. HEARSAY[378]

"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."[379] 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."[380] 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."[381] 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.[382] In addition, Rule 802 provides simply that "[h]earsay is not admissible except as provided by these rules."[383] Rules 803, 803A, and 804 provide exceptions to the hearsay rules. During the *Survey* period, the Michigan courts issued several decisions addressing various exceptions to the hearsay rule.

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376. *Id.* at 534-35.

377. *Fackelman*, 439 Mich. at 535. The court also noted that because Dr. Shahid did not appear at trial, her opinion was inadmissible because Dr. Shahid "was not qualified as an expert under [Rule] 702." *Id.* at 535 n.13.

378. Portions of this section quote an earlier *Survey* article. *See* M Bryan Schneider, *Evidence*, 56 WAYNE L. REV. 1123, 1147-59 (2010).

379. 5 WIGMORE, *supra* note 3, § 1362, at 3.

380. *Id.* § 1364, at 28.

381. 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).

382. MICH. R. EVID. 801(d).

383. MICH. R. EVID. 802.

A. Exceptions to the Hearsay Rule

Rule 803 provides twenty-three distinct exceptions to the hearsay rule for various categories of statements.[384] These rules are applicable regardless of whether or not the declarant is otherwise available to testify at trial.[385] These exceptions embody certain circumstances in which

> [T]he 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.[386]

During the *Survey* period, the Michigan courts issued two published decisions involving Rule 803, both involving the business records exception set out in Rule 803(6).[387] The Michigan Supreme Court also considered the tender years exception codified in Rule 803A.[388]

1. Business Records Exception

Also excluded from the hearsay rule by Rule 803(6) are:

> A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of

384. MICH. R. EVID. 803(1)-(23).

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

386. 5 WIGMORE, *supra* note 3, § 1422, at 253. In addition to Rules 803 and 803A, which provide 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. *See* MICH. R. EVID. 804. The Michigan courts issued no significant decisions addressing Rule 804 during the *Survey* period.

387. *See infra*, notes 393, 405, and accompanying text.

388. *See infra*, note 427 and accompanying text.

> a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.[389]

As the Michigan Supreme Court has explained, this rule is "justified on grounds of trustworthiness: unintentional mistakes made in the preparation of a record would very likely be detected and corrected,"[390] and businesses have an institutional interest in preparing accurate reports.[391] To be admissible, the proponent of the business record must establish a proper foundation by presenting "a qualified witness [to] establish that the record was kept in the course of a regularly conducted business activity and that it was the regular practice of such business activity to make that record."[392]

In *Augustine v. Allstate Insurance Company*, the plaintiff recovered no-fault benefits from the defendant insurance company.[393] Included in the award was $327,090.60 in attorney fees.[394] Following a prior remand, the trial court conducted an evidentiary hearing with respect to the attorney fee issue.[395] The principal issue at the hearing was the reasonableness of the $500 hourly rate claimed by the plaintiff's attorneys for the work performed on the case.[396] In support of this claim, the plaintiff produced, and the trial court admitted, four letters from other attorneys setting forth the fees they charged in similar cases.[397] On appeal, the defendant claimed, inter alia, that the trial court erred in

389. MICH. R. EVID. 803(6).
390. Solomon v. Shuell, 435 Mich. 104, 120, 457 N.W.2d 669 (1990).
391. *Id.*; 5 WIGMORE, *supra* note 3, § 1522; *see also* WEISSENBERGER, *supra* note 63, § 803.29.
392. People v. Vargo, 139 Mich. App. 573, 580, 362 N.W.2d 840 (1984).
393. Augustine v. Allstate Ins. Co., 292 Mich. App. 408, 414, 807 N.W.2d 77 (2011).
394. *Id.* at 413.
395. *Id.*
396. *Id.*
397. *Id.* at 417.

admitting these letters because they constituted inadmissible hearsay.[398] The court of appeals agreed.[399]

The court concluded that the letters were not admissible as business records under Rule 803(6).[400] The court explained that the letters were not records kept in the ordinary course of business, but "were nothing more than responses to solicitations by plaintiff's counsel in form and content for use in supporting the demand for an attorney fee of $500 per hour."[401] Further, the court concluded that the letters were not admissible under the Rule 803(24) catch-all exception because they lacked any circumstantial guarantees of trustworthiness.[402] The letters, the court explained, "were prepared exclusively for litigation . . . the attorneys who wrote the letters had reason to exaggerate because it might benefit their attorney fee awards in the future, and there was no independent evidence presented to support the attorneys' claims that their rates were $500 per hour."[403] Thus, the court of appeals concluded that the trial court erred in admitting these letters.[404]

The Michigan Supreme Court also considered the business records exception in *People v. Fackelman*, which was decided shortly after the close of the *Survey* period.[405] In that case, the Michigan Supreme Court reversed the defendant's convictions, primarily on the ground that the admission of Dr. Shahid's opinion through the testimony of the other witnesses violated the defendant's right to confront the witness.[406] The court also concluded, however, that even apart from any confrontation problems, Dr. Shahid's report was not admissible under the business records exception.[407] The court explained that even if, as a substantive matter, Dr. Shahid's report fell within the scope of Rule 803(6), the prosecution failed to establish a foundation for admission of the report under this rule.[408] The court explained that Rule 803(6) requires that a proponent of evidence establish the applicability of the business records

398. *Id.* at 430.
399. *Augustine*, 292 Mich. App. at 431-32.
400. *Id.* at 431.
401. *Id.*
402. *Id.*
403. *Id.* at 431-32.
404. *Id.*
405. People v. Fackelman, 489 Mich. 515, 536, 802 N.W.2d 552 (2011). The *Fackelman* court also discussed issues relating to expert evidence and the Confrontation Clause. For a discussion of this aspect of the case, as well as a summary of the facts, see *supra* notes 352-377 and accompanying text (expert evidence) and *infra* notes 491-496 and accompanying text (confrontation).
406. *Id.* at 534.
407. *Id.* at 535.
408. *Id.* at 536.

exception through the testimony of a records custodian or other qualified witness.[409] Thus, the court explained, "a recordkeeper or other qualified witness from Flower Hospital would have had to testify for the report to have been properly admitted."[410] Because this was not done at the defendant's trial, the trial court erred in admitting the substance of Dr. Shahid's report.[411]

2. Tender Years Exception

At common law, courts recognized the so-called tender years exception to the hearsay rule.[412] Under this exception, hearsay evidence is admissible to corroborate the testimony of a young victim.[413] 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.[414]

Rule 803 as originally enacted, however, did not codify the tender years exception.[415] Thus, in *People v. Kreiner*, the court held that "[t]he tender years exception, as restated in *Baker*, did not survive adoption of the Michigan Rules of Evidence."[416]

Subsequent to *Kreiner*, the Michigan Supreme Court adopted Rule 803A, establishing once again the applicability of the tender years exception in Michigan.[417] Rule 803A is intended to codify the common law rule;[418] however, unlike the generally vague common law rule, Rule 803 provides detailed guidelines for the application of the exception:

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409. *Id.*
410. *Id.* at 536-37.
411. *Fackelman*, 489 Mich. at 537.
412. People v. Baker, 251 Mich. 322, 326, 232 N.W.2d 381 (1930).
413. *Id.*
414. *Id.*
415. People v. Kreiner, 415 Mich. 372, 379, 329 N.W.2d 716 (1982) (per curiam).
416. *Id.* at 377.
417. *See* MICH. R. EVID. 803A.
418. *See* MICH. R. EVID. 803A, 1991 Note; People v. Dunham, 220 Mich. App. 268, 271, 559 N.W.2d 360 (1996).

> 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;
>
> (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.[419]

In *People v. Dunham*,[420] the court of appeals held that answers to innocuous, open-ended questions in a child custody proceeding, in which the questions were not specifically directed toward issues of sexual conduct, were spontaneous under Rule 803A.[421] In *People v. Gursky*,[422] an unpublished decision decided during the last *Survey* period, the court of appeals extended *Dunham* and held that the victim's statements 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.[423] 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.[424] Thus, the court of appeals

419. 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. *Id.*

420. 220 Mich. App. 268, 559 N.W.2d 360 (1997).

421. *Id.* at 272.

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

423. *Id.* at *2.

424. *Id.*

concluded, "[t]aken as a whole, the victim's statements were primarily spontaneous, despite being prompted by [the family friend's] questions."[425] 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).[426]

In perhaps its most significant evidentiary decision of the *Survey* period, the Michigan Supreme Court held that the statements were not spontaneous and thus were inadmissible under Rule 803A, but nevertheless affirmed the defendant's conviction on the ground that the "admission of the hearsay evidence was harmless."[427] The statements at issue were made by the victim, GA, to her mother Lori and Lori's friend, Morgan, and concerned Lori's boyfriend, the defendant Gursky.[428] The supreme court began by describing in detail the nature of the statements made by the victim:

> Lori arrived at Morgan's home about 8:00 p.m. after picking her children up from their father's home. Morgan, acting on a suspicion that "something had been going on" with Gursky, asked GA "*if anyone had been touching her.*" GA did not verbally respond, but "*got a horrified look on her face*," and her eyes welled up. Morgan summoned GA to come closer to talk with Morgan and Lori, which she did and orally responded "*What do you mean?*" Morgan answered: "*Has anyone ever touched your private parts?*" GA's eyes welled up again, she started to suck her thumb, and she responded that somebody had. Morgan followed up: "*Where have you been touched? Who touched you?*" and then listed "*people's names, every man's name that could come to mind, the last of which was Jason [Gursky].*" At the mention of defendant's name, GA began "*bawling, [and] gasping for breath*," pointed to her vaginal area, and indicated that defendant had touched her "*down there.*"[429]

Lori and Morgan then elicited from the victim further details about the assaults, including their nature and frequency.[430] After discussing further the evidence adduced at trial and the general background

425. *Id.*
426. People v. Gursky, 483 Mich. 999, 999, 764 N.W.2d 570 (2009).
427. People v. Gursky, 486 Mich. 596, 618, 625, 786 N.W.2d 579 (2010).
428. *Id.* at 599-601.
429. *Id.* at 600 (alterations in original).
430. *Id.* at 600-01.

principles underlying Rule 803A,[431] the supreme court turned to the issue before it: the meaning of "spontaneous" as used in Rule 803A.[432]

The court began by noting that "spontaneous" is not defined in the rules of evidence, and thus it was appropriate to look to the dictionary definitions of the term.[433] Dictionary definitions of the term generally define "spontaneous" as involving some sort of natural or sudden impulse.[434] The court then surveyed other decisions defining spontaneous under the tender years exception, including the Michigan Court of Appeals decision in *Dunham*.[435] The court explained that these cases generally fall into three categories of spontaneity.[436] First, the court noted, are statements that "arise out of pure impulse—that is, they are made by the declarant without prompt, plan, or questioning."[437] Statements of this type are "[t]he most recognizable spontaneous statements" and are "prototypically spontaneous."[438] The second category consists of statements that result from a prompt or a question, but are nevertheless in some manner atypical, unexpected, or do not logically follow from the prompt, i.e., a statement that is a non sequitur.[439] These types of statements are also widely considered spontaneous.[440] Finally, the third category, "which poses closer questions,"[441] consists of statements such as those involved in *Dunham*: statements that are made in response to "open-ended and nonleading questions [and] that include answers or information outside the scope of the questions themselves."[442] These types of statements, the court explained, "are most likely to be nonspontaneous, and thus deserve extra scrutiny by trial courts before they may be admitted."[443]

Turning to Michigan Rule of Evidence 803A, the court held that the rule "generally requires the declarant-victim to initiate the *subject of sexual abuse*."[444] The court reasoned that the spontaneity requirement of Rule 803A is directed to ensure that the statement is the child's own,

431. *Id.* at 601-08.
432. *Id.* at 608.
433. *Gursky*, 486 Mich. at 608.
434. *See id.*
435. *Id.* at 608-12.
436. *Id.*
437. *Id.* at 610.
438. *Id.*
439. *Gursky*, 486 Mich. at 610-11.
440. *Id.*
441. *Id.* at 611.
442. *Id.* at 611.
443. *Id.* at 612.
444. *Id.* at 613.

rather than the statement of another person.[445] The court noted that the impulsive and non sequitur statements in the first two categories are spontaneous within the meaning of Rule 803A because they are "quintessentially the 'creation' of the child-declarant,"[446] and are thus impulsive and unplanned in accord with the dictionary definition of "spontaneous."[447] With respect to the third category of statements, however, a more stringent test applies.[448] The court reasoned that although "the mere fact that questioning occurred is not incompatible with a ruling that the child produced a spontaneous statement," such statements are admissible only where the child "broach[es] the subject of sexual abuse, and any questioning or prompts from adults [are] . . . nonleading or open-ended."[449] The court made clear that it was not holding "that any questioning by an adult automatically renders a statement 'nonspontaneous' and thus inadmissible."[450] Rather, a trial court "must look specifically at the questions posed in order to determine whether the questioning shaped, prompted, suggested, or otherwise implied the answers."[451]

Applying this test to the statements at issue in the case, the supreme court concluded that GA's statements to Lori and Morgan were not spontaneous, and thus were inadmissible under Rule 803A.[452] The court reasoned that Lori and Morgan initiated the questioning, they asked numerous, specific questions about sexual abuse, GA was hesitant, and Morgan herself suggested the defendant's name to GA.[453] The court concluded that "[t]hese facts demonstrate that GA's statements were not spontaneously given, nor did they arise out of an otherwise innocent conversation or set of nonleading and open-ended questions."[454] The court observed that there were admittedly some "spontaneous *elements* to GA's statements," but concluded that they were not enough.[455] Under the Michigan rule, the court explained, spontaneity is an independent requirement for admission, not merely a factor to consider in deciding

445. *Gursky*, 486 Mich. at 614.
446. *Id.*
447. *Id.*
448. *Id.*
449. *Id.*
450. *Id.*
451. *Gursky*, 486 Mich. at 615.
452. *Id.* at 618.
453. *Id.* at 616-17.
454. *Id.* at 617.
455. *Id.*

whether to admit a child's statement.[456] Because of this, and because the spontaneous elements of GA's statements were "insufficient to establish the *general* kind of spontaneity that the rule requires," GA's statements were inadmissible at trial.[457] Nevertheless, the court concluded that reversal of the defendant's conviction was not required because the error was harmless because the victim testified at trial and was subjected to cross-examination, and other evidence also corroborated the victim's credibility.[458]

B. 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,[459] as do trial court decisions regarding the manner of cross-examination. Although a full treatment of the Confrontation Clause is more appropriately suited for another Article in this *Survey*, given the Clause's relationship to the hearsay rules and the conduct of cross-examination, it is appropriate to briefly note here significant developments in this area of the law.[460]

In *Ohio v. Roberts*,[461] the United States Supreme Court held that hearsay evidence is admissible under the Confrontation Clause when it satisfies two requirements: necessity (i.e., unavailability of the declarant) and reliability.[462] As to the reliability element of this test, the Court also

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456. *Id.* As the court observed, the Michigan rule differs from the tender years exception adopted by several other jurisdictions, which consider spontaneity as only one factor going to the overall question of reliability, which in turn determines admissibility. *Id.* at 615 n.38. The court indicated that it "will assess in its administrative rules process whether the language of the current rule should be amended," presumably to make spontaneity merely a factor in determining admissibility of tender years statements, and not a prerequisite for admission. *Id.* at 618 n.39.

457. *Gursky*, 486 Mich. at 617.

458. *Id.* at 619-26. Justice Cavanagh, joined by Chief Justice Kelly, agreed with the majority's analysis of the tender years issue under Rule 803A, but dissented from the court's judgment because, in his view, the admission of GA's statements to Morgan was not harmless. *Id.* at 627-33 (Cavanagh, J., concurring in part and dissenting in part).

459. 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).

460. 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 cases or the reasoning of the deciding court.

461. 448 U.S. 56 (1980).

462. *Id.* at 65-66.

held that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception."[463] 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."[464] The Court abrogated this rule in *Crawford v. Washington*, establishing a dichotomy between testimonial and nontestimonial hearsay.[465] 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."[466] Explaining that *Roberts* departed from this proper understanding of the Confrontation Clause,[467] the Court held that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[468]

The Supreme Court further explicated the testimonial/non-testimonial distinction in *Davis v. Washington*.[469] 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."[470] Rather, the Court found it sufficient to simply hold that

> Statements 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

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463. *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).

464. *Roberts*, 448 U.S. at 66.

465. Crawford v. Washington, 541 U.S. 36, 68 (2004).

466. *Id.* at 59.

467. *Id.* at 60-68.

468. *Id.* at 68-69.

469. 547 U.S. 813, 822 (2006).

470. *Id.* at 822.

> interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[471]

Further, the *Davis* Court explicitly addressed the question of whether the Confrontation Clause applies only to testimonial hearsay,[472] 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,[473] 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."[474] Thus, where nontestimonial hearsay is at issue, the Confrontation Clause is not implicated at all, and need not be considered.[475] During the *Survey* period, the United States Supreme Court and the Michigan courts continued to develop the law under *Crawford*.

The Court next explicated the *Crawford* rule in *Melendez-Diaz v. Massachusetts*,[476] in which 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.[477] The Court reasoned that the analysis certificates were the functional equivalent of affidavits and were prepared solely for the purpose of providing evidence against the defendant, and thus were testimonial under a straightforward application of *Crawford*.[478] During the *Survey* period, the Court further extended the holding in *Melendez-Diaz* in *Bullcoming v. New Mexico*.[479] There, a laboratory report which contained a testimonial certification was found to be inadmissible unless the analyst who actually performed the relevant tests testified at trial and was subject to cross-examination.[480]

The Supreme Court provided further guidance on the testimonial/non-testimonial distinction in a case on appeal from the Michigan Supreme Court. In *People v. Bryant*, decided during the prior *Survey* period, the Michigan Supreme Court held that a shooting victim's statements to the police, made shortly after the shooting, identifying the

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471. *Id.*
472. *Id.* at 823.
473. *Id.* at 823-24 (discussing *Crawford*, 541 U.S. at 51).
474. *Id.* at 824.
475. *See* Hodges v. Commonwealth, 634 S.E.2d 680, 689 (Va. 2006) (discussing *Davis*, 547 U.S. 823-34).
476. 129 S. Ct. 2527 (2009).
477. *Id.* at 2532.
478. *Id.*
479. 131 S. Ct. 2705 (2011).
480. *Id.* at 2714-16.

defendant as the shooter were testimonial and thus barred in the absence of an opportunity to cross-examine the victim.[481] 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.[482] 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."[483] Obviously, his primary purpose in making these statements to the police was not to enable the police to meet an ongoing emergency,[484] 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."[485] During the current *Survey* period the United States Supreme Court reversed the Michigan Supreme Court's decision.[486] The Court explained that the testimonial/non-testimonial inquiry turns on whether the primary purpose of the out-of-court statement was to provide evidence for later use at trial, judged objectively rather than subjectively.[487] In what Justice Scalia's dissent characterized as an attempt to resurrect the *Ohio v. Roberts* rule,[488] the majority further suggested that when a statement falls within a well-recognized exception to the hearsay rule, it is a factor bearing on this objective inquiry.[489] Applying this objective test, the Court concluded that the victim's statements were primarily made to meet an ongoing emergency because the victim was in need of medical attention, an armed assailant was still at large, and the police questioning of the victim lacked any formality.[490]

The Michigan courts also considered a number of confrontation issues during the *Survey* period, including one in *People v. Fackelman*.[491]

481. People v. Bryant, 483 Mich. 132, 141-42, 768 N.W.2d 65 (2009), *cert. granted*, 130 S. Ct. 1685 (2010).
482. *Id.* at 141-46.
483. *Id.* at 144.
484. *Id.*
485. *Id.* at 145-46.
486. Michigan v. Bryant, 131 S. Ct. 1143 (2011).
487. *Id.* at 1156.
488. *Id.* at 1175 (Scalia, J., dissenting).
489. *Id.* at 1157.
490. *Id.* at 1163-67.
491. 489 Mich. 515, 518-24, 802 N.W.2d 552 (2011). *Fackelman* also discussed issues relating to expert witnesses and the business records exception to the hearsay rule. For a discussion of these issues and a summary of the facts, see *supra* notes 352-377 and

In that case, the Michigan Supreme Court reversed the defendant's convictions.[492] Primarily, the supreme court determined that by presenting to the jury Dr. Shahid's diagnosis, as reflected in her hearsay report, the prosecution denied the defendant his right to confront the witnesses.[493] Noting that the issue at trial was not whether the defendant had committed the crime but "whether he was legally insane at the time," the court concluded that Dr. Shahid's diagnosis that the defendant did not suffer from a psychosis constituted testimonial evidence that was used by the prosecution to prove the truth of the matter asserted, i.e., that the defendant was not legally insane at the time of the crime.[494] The court reasoned that Dr. Shahid's report, and the diagnosis contained therein, was admitted for the primary purpose of securing evidence for use at trial, and thus testimonial because the defendant's hospitalization was arranged by his lawyers with the approval of the police, and "expressly focused on defendant's alleged crime and the charges pending against him."[495] Because Dr. Shahid's report was testimonial hearsay, and because the prosecution did not present Dr. Shahid as a witness at trial, the introduction of the report violated the defendant's right to confront the witnesses against him.[496]

The Michigan Court of Appeals considered a number of confrontation issues in *People v. Bennett*.[497] In that case, Paula Bennett and Darell Benson were tried in a joint trial before separate juries.[498] They were charged and convicted of first degree murder arising from the shooting death of Stephanie McClure, Bennett's friend.[499] The evidence at trial showed that Benson had become angry with McClure over some items stolen from Bennett's apartment, in which Benson also resided.[500] Benson also accused McClure of killing the defendants' dog.[501] Benson made threatening statements to friends about killing McClure.[502] Benson armed himself, had Bennett drive him to McClure's residence, and shot

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accompanying text (expert witnesses) and *supra* notes 405-411 and accompanying text (business records).

492. *Id.* at 564.

493. *Id.* at 524-34.

494. *Id.* at 530-31.

495. *Id.* at 533-34.

496. *Id.*

497. 290 Mich. App. 465, 802 N.W.2d 627 (2010), *leave to appeal denied*, 489 Mich. 897, 796 N.W.2d 75 (2011).

498. *Id.* at 465.

499. *Id.* at 468-71.

500. *Id.* at 468.

501. *Id.* at 469.

502. *Id.* at 468.

McClure.[503] Benson was charged as the principal, and Bennett was charged with aiding and abetting him in the murder, based largely on conversations between her and Bennett that were overheard by others.[504]

On appeal Benson argued, inter alia, that he was denied his right to confront the witnesses by the introduction of several hearsay statements.[505] The Michigan Court of Appeals rejected each of these arguments. The court concluded that testimony from a friend of Bennett that Bennett told her that Benson had killed the victim, and from another friend that Bennett said Benson was threatening to kill the victim, were not testimonial because they were made to acquaintances and were not for the purpose of generating evidence for use in a trial.[506] The court of appeals also held that testimony by a witness concerning his father's statement that he should talk to the police was not testimonial hearsay because the father's statement was a command, not an assertion, and thus was not hearsay at all.[507]

In *People v. Dendel*, the defendant was convicted of second degree murder in connection with the death of her domestic partner.[508] The prosecution theorized that the defendant had injected the victim with insulin, leading to his death.[509] At trial, Dr. Michael Evans testified about toxicology tests performed by his company showing that the victim had a blood glucose level of zero, "consistent with [the defendant] having been injected with insulin."[510] Applying *Melendez-Diaz*, the court of appeals found that the admission of this testimony violated the defendant's right to confront the witnesses because Dr. Evans did not himself perform the tests.[511] After providing an in-depth discussion of the federal and state cases involving this type of evidence,[512] the court concluded that the test results were testimonial because the test was specifically performed at "the request of the medical examiner, who asked for the testing to investigate the possibility that [the victim] . . . died of an insulin injection."[513] The court explained that the original medical examiner had ruled that the victim died of natural causes and that the case was reopened at the request of the police specifically to look for evidence of

503. *Bennett*, 290 Mich. App. at 468-70.
504. *Id.* at 470-71.
505. *Id.* at 481.
506. *Id.* at 483.
507. *Id.*
508. People v. Dendel, 289 Mich. App. 445, 448, 797 N.W.2d 645 (2010).
509. *Id.* at 449.
510. *Id.* at 449-50.
511. *Id.* at 451.
512. *Id.* at 452-67.
513. *Id.* at 467.

an insulin injection; thus the testing was clearly performed in anticipation of a criminal trial.[514] Therefore, the test result was testimonial, and its introduction denied the defendant the right to confront the witnesses against her.[515]

The court of appeals also considered *Melendez-Diaz* in *People v. Dinardo*.[516] In that case, the court distinguished *Melendez-Diaz* in considering the admissibility of Datamaster breath test results, which recorded the defendant's blood-alcohol content upon his arrest for drunk driving.[517] The court of appeals concluded that the test results did not constitute testimonial hearsay.[518] Distinguishing *Melendez-Diaz* and two prior court of appeals cases,[519] the court reasoned that the test results in those cases were found to be testimonial "because they were all prepared by human analysts who recorded the results of various laboratory tests and set down their own conclusions in written form."[520] Here, in contrast, the Datamaster analysis was prepared entirely by the machine, with no human input or interpretation.[521] The court found this distinction dispositive, agreeing with other state and federal courts that "a machine is not a witness in the constitutional sense and that data automatically generated by a machine are accordingly nontestimonial in nature."[522]

Finally, the Michigan Court of Appeals considered an interesting confrontation issue in *People v. Jackson*.[523] In that case, the defendant was convicted of first degree murder and assault with intent to commit murder arising from the shooting death of Bennie Peterson and the wounding of Donteau Dennis.[524] At the hospital shortly after the shooting, Dennis was interviewed by Sergeant William Anderson, who testified at trial regarding the interview.[525] Dennis was unable to speak at

514. *Dendel*, 289 Mich. App. at 468.

515. *Id.* at 473. The court nevertheless affirmed the defendant's conviction, finding that the confrontation error was harmless in light of the other evidence presented at trial. *Id.* at 473-79.

516. 290 Mich. App. 280, 801 N.W.2d 73 (2010).

517. *Id.* at 283, 290.

518. *Id.* at 291.

519. *Id.* at 289-90 (distinguishing People v. Payne, 285 Mich. App. 181; 774 N.W.2d 714 (2009); People v. Lonsby, 268 Mich. App. 375; 707 N.W.2d 610 (2005)).

520. *Id.* at 290.

521. *Id.*

522. *Dinardo*, 290 Mich. App. at 290-91 (citing United States v. Moon, 512 F.3d 359, 362 (7th Cir. 2008); United States v. Washington, 498 F.3d 225, 230 (4th Cir. 2007); Wimbish v. Commonwealth, 658 S.E.2d 715, 719-20 (Va. Ct. App. 2008)); Caldwell v. State, 495 S.E.2d 308, 310 (Ga. Ct. App. 1997).

523. 292 Mich. App. 583, 808 N.W.2d 541 (2011).

524. *Id.* at 585-86.

525. *Id.* at 593.

that time, so Anderson asked yes or no questions to which Dennis responded by either squeezing (to indicate "yes") or not squeezing (to indicate "no") the hand of Nurse Molly Otsuji.[526] On appeal, the defendant did not challenge the admissibility of Dennis's responses to Anderson's questions, but argued that Otsuji's reports of those responses to Anderson constituted testimonial hearsay, and that he was therefore denied his right to confront Otsuji by her failure to testify at trial.[527] The court of appeals disagreed, finding the Confrontation Clause inapplicable under the language conduit rule.[528] Under this rule, the court explained, "an interpreter is considered an agent of the declarant, not an additional declarant, and the interpreter's statements are regarded as the statements of the declarant, without creating an additional layer of hearsay."[529] The court reasoned that "[a]lthough Nurse Otsuji was not interpreting a foreign language," by interpreting Dennis's hand signals she effectively "functioned as an interpreter by relaying Dennis's responses to Sergeant Anderson."[530] Thus, Nurse Otsuji's reports of Dennis's responses were not testimonial hearsay subject to the Confrontation Clause.

VII. CONCLUSION

As with the last *Survey* period, the Michigan courts were less active in issuing decisions on evidentiary issues during the current *Survey* period than they had been in prior *Survey* periods. However, the Michigan Supreme Court provided some useful guidance on Rule 404(b) evidence and the tender years exception. In light of the supreme court's grants of leave to appeal, the next *Survey* period will hopefully provide further guidance on issues of evidence law affecting Michigan practitioners.

526. *Id.*
527. *Id.* at 594.
528. *Id.* at 595-96.
529. *Jackson*, 292 Mich. App. at 595.
530. *Id.* at 596.