EVIDENCE

M. BRYAN SCHNEIDER†

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

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 To the extent they discuss significant issues of Michigan evidence law, however, unpublished decisions and decisions by the federal courts are also discussed.[2]

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

II. SPOLIATION OF EVIDENCE

The so-called spoliation inference governs situations in which one party is responsible for the loss or destruction of relevant evidence:

> It has always been understood—the inference, indeed, is one of the simplest in human experience—that a party's *falsehood* or *other fraud* in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit.[3]

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1. The *Survey* period covers cases decided between June 1, 2009, and May 31, 2010.

2. From the beginning of this section through this footnote is an excerpt from M. Bryan Schneider, *Evidence, 2008 Ann. Survey of Mich. Law*, 54 WAYNE L. REV. 229 (2008).

3. 2 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 278, at 133 (James H. Chadbourn rev. ed. 1979) (emphasis in original).

Under this "spoliation inference," the courts "have admitted evidence tending to show that a party destroyed evidence relevant to the dispute being litigated, [and that s]uch evidence permitted an inference . . . that the destroyed evidence would have been unfavorable to the position of the offending party."[4] The spoliation inference generally serves one or more of three goals: "(1) promoting accuracy in fact finding, (2) compensating the victims of evidence destruction, and (3) punishing spoliators."[5]

The traditional common law rule, and the rule still applied in the majority of jurisdictions, provides that the spoliation inference is appropriate only where the offending party intentionally destroys evidence.[6] The more modern trend, however, is that "a finding of 'bad faith' or 'evil motive' is not a prerequisite to [the] imposition of sanctions for destruction of evidence."[7] Under this view, in appropriate circumstances, the inference may be applied against a reckless or negligent spoliator.[8] In either event, it is important to bear in mind that the spoliation inference "does not prove the opposing party's case."[9] Rather, the inference is just that—an inference—which if not rebutted merely permits, but does not require, the jury to conclude "that the tenor of the specific unproduced evidence would be *contrary to the party's case*, or at least would not support it."[10] The Michigan Supreme Court adopted a three-part test for determining when the spoliation inference may be applied:

> A jury may draw an adverse inference against a party that has failed to produce evidence only when: (1) the evidence was under the party's control and could have been produced; (2) the party lacks a reasonable excuse for its failure to produce the evidence; and (3) the evidence is material, not merely cumulative, and not equally available to the other party.[11]

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4. Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 78 (3d Cir. 1994) (citation omitted).

5. JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE § 2.2 (1989); *see also Schmid*, 13 F.3d at 78.

6. *See, e.g.*, Vick v. Texas Emp't Comm'n, 514 F.2d 734, 737 (5th Cir. 1975).

7. Baliotis v. McNeil, 870 F. Supp. 1285, 1291 (M.D. Pa. 1994).

8. *See Schmid*, 13 F.3d at 78; *Baliotis*, 870 F. Supp. at 1291.

9. Schneider v. G. Guilliams, Inc., 976 S.W.2d 522, 526 (Mo. Ct. App. 1996).

10. 2 WIGMORE, *supra* note 3, § 290, at 217 (emphasis in original).

11. Ward v. Consol. Rail Corp., 472 Mich. 77, 85-86 (2005) (per curiam). From the beginning of this section through this footnote is an excerpt from M. Bryan Schneider, *Evidence, 2008 Ann. Survey of Mich. Law*, 54 WAYNE L. REV. 229 (2008).

Although not strictly an evidentiary issue, several states have adopted a spoliation tort, which provides for a separate tort remedy against a party who loses or destroys evidence.[12] During the *Survey* period, the Michigan Court of Appeals declined to recognize a separate spoliation tort.[13] In *Teel v. Meredith*, a fire destroyed the plaintiff's apartment, killing his wife and damaging the property.[14] The landlord had liability insurance through a policy issued by Allstate Insurance Company.[15] Allstate sent a representative to inspect the property, who "altered the scene and removed certain items from the apartment, thereby allegedly spoiling evidence concerning the origin and cause of the fire and affecting plaintiff's ability to bring, or succeed in, litigation relating to the fire."[16] The plaintiff brought suit against the landlord and Allstate raising, as relevant here, a claim that Allstate had spoliated evidence.[17] The trial court granted Allstate summary disposition, concluding that Michigan law does not recognize a spoliation tort.[18]

On appeal, the court of appeals rejected the plaintiff's argument that Michigan should recognize a tort of intentional or negligent spoliation of evidence.[19] The court began by explaining that although the courts may recognize new duties as a matter of common law, "in certain instances it is preferable for a duty to be statutorily declared."[20] The court found this to be the case with the spoliation tort, explaining that "[t]he traditional response to the problem of evidence spoliation frames the alleged wrong as an evidentiary concept, not as a separate cause of action," and that recognition of a spoliation tort "carries with it many potential concerns and effects, resulting in more complications than clarifications."[21] The court reasoned that difficult questions regarding the scope of the duty to preserve evidence, causation, and damages would arise by recognition of a spoliation tort.[22] The legislature, the court explained, would be better suited to developing such a tort because it has "the resources and tools needed to investigate the consequences of the proposed cause of action

12. *See generally* Trevino v. Ortega, 969 S.W.2d 950, 952 n.3 (Tex. 1998) (citing cases from jurisdictions which have adopted the tort).

13. *See* Teel v. Meredith, 284 Mich. App. 660 (2009), *leave to appeal denied*, 485 Mich. 1134 (2010).

14. *Meredith*, 284 Mich. App. at 661.

15. *Id.*

16. *Id.* at 661-62.

17. *Id.* at 660.

18. *Id.* at 662.

19. *Id.*

20. *Teel*, 284 Mich. App. at 663.

21. *Id.* at 664.

22. *Id.* at 677.

and to study the long-term effects of the cause of action in the jurisdictions that have recognized it."[23]

Judge Davis dissented, reasoning that the issue was not whether to recognize a new legal duty, but whether to recognize a new remedy for an existing legal duty.[24] Noting that under Michigan law "spoliation of evidence is . . . recognized as a legally wrongful act,"[25] Judge Davis reasoned that "the courts are not only empowered, but obligated to provide a remedy for violations of that right."[26] Judge Davis also was not persuaded to reject a cause of action based on the availability of the spoliation inference because, in a case such as the one before the court involving spoliation by a non-party, there is no effective remedy that can be had other than by punishing the party to the suit, who had no involvement in the spoliation.[27] Accordingly, Judge Davis would have held that "where an individual's ability to pursue or defend an action has been impaired by a third party's willful or negligent spoliation of evidence, that individual may pursue a tort action against the spoliator."[28]

The majority was not persuaded by Judge Davis's arguments. The majority explained that "very few states recognize spoliation of evidence as an independent tort, and those that do have not only faced considerable disapproval, but have varied among themselves in the parameters and application of such a tort."[29] The court also explained that, although there is a distinction between spoliation by a party to the case and spoliation by a non-party, "'[t]he victim of third party spoliation . . . is not entirely helpless.'"[30] In such a case, a court may still be able to sanction the offending party through use of the contempt power, the offending party may be subject to criminal sanctions, and there may be a relationship between the offending party and the party to the suit that it remains equitable to impose spoliation sanctions against the party to the suit.[31] Further, the majority explained that, even if it were to adopt Judge Davis's view of the spoliation tort, it "would nevertheless decline to find such a remedy appropriate under the specific facts and circumstances" before the court.[32] The court explained that the plaintiff accused Allstate

23. *Id.* at 664-65.
24. *Id.* at 674 (Davis, J., dissenting).
25. *Id.* at 677 (emphasis omitted).
26. *Teel*, 284 Mich. App. at 677.
27. *Id.* at 677-78.
28. *Id.* at 680.
29. *Id.* at 668.
30. *Id.* at 667 (quoting Dowdle Butane Gas Co. v. Moore, 831 So. 2d 1124, 1132 (Miss. 2002)).
31. *Id.* at 667-68 (quoting *Dowdle Butane Gas*, 831 So. 2d at 1132).
32. *Teel*, 284 Mich. App. at 666.

of failing to preserve a fan and a lamp, either of which might have been the cause of the fire, but did not accuse Allstate itself of destroying or taking the fan or lamp.[33] Allstate, however, did not have exclusive possession of the apartment, and the apartment had been inspected by both the Detroit Fire Department and the Michigan State Police.[34] Because Allstate did not itself destroy or lose the evidence, and because the plaintiff did "not articulate[] any basis for imposing a specific duty on Allstate to preserve or maintain the evidence[,] . . . there can be no cause of action for the alleged tort of spoliation of evidence."[35]

The majority's decision declining to recognize a spoliation tort is consistent with the bulk of the states that have considered the issue.[36] Further, the court's conclusion that the tort is not available where the defendant neither destroyed the evidence nor had a legally recognized duty to prevent others from destroying the evidence is consistent with even those jurisdictions that recognize a spoliation tort.[37]

III. ATTORNEY-CLIENT PRIVILEGE

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.[38] 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

33. *Id.* at 671 n.2.

34. *Id.* at 671-72.

35. *Id.* at 672-73.

36. *See* Fisher v. Bauer Corp., 239 S.W.3d 693, 703 (Mo. Ct. App. 2007) (citing cases); Fletcher v. Dorchester Mut. Ins. Co., 773 N.E.2d 420, 424 n.9 (Mass. 2002) (citing cases).

37. *See* Allis-Chalmers Corp. Prod. Liab. Trust v. Liberty Mut. Ins. Co., 702 A.2d 1336, 1340 (N.J. Super. Ct. App. Div. 1997) (holding that insurer defending product liability suit against forklift manufacturer had no duty to prevent destruction of forklift by product liability plaintiff where the forklift was owned by the product liability plaintiff and was not in the insurer's possession or control); *cf.* Smith v. Atkinson, 771 So.2d 429, 433 (Ala. 2000) (holding that because there is no general duty to preserve evidence, a spoliation cause of action is available only where the spoliator "has knowledge of a pending or potential lawsuit and accepts responsibility for evidence that would be used in that lawsuit"); Gayer v. Fine Line Const. & Elec., Inc., 970 So. 2d 424, 426 (Fla. Dist. Ct. App. 2007) (stating under the Florida spoliation tort, "[b]ecause a duty to preserve evidence does not exist at common law, the duty must originate either in a contract, a statute, or a discovery request").

38. *See* 8 WIGMORE, *supra* note 3, § 2175, at 3 (John T. McNaughton rev ed. 1961).

investigation of truth is regarded as more important and overpowering."[39] 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.[40] Because privileges are recognized "in derogation of the search for truth,"[41] a privilege (1) should not "be recognized unless it is clearly demanded by some specific important extrinsic policy,"[42] and (2) it must be narrowly construed.[43] The Michigan courts considered one privilege case during the *Survey* period, addressing the attorney-client privilege.

"The attorney-client privilege is one of the oldest recognized privileges for confidential communications,"[44] dating to at least the 16th century.[45] Although the privilege was originally grounded on the lawyer's duty of honor to maintain his client's confidences,[46] since the 18th century the rule has been, and continues to be, grounded upon the desire "to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'"[47] Under the common law privilege, as applied in Michigan, "[c]ommunications from a client to an attorney are privileged when they are made to counsel who is acting as a legal adviser and made for the purpose of obtaining legal advice."[48]

In *Laethem Equip. Co. v. Deere & Co.*,[49] the federal court considered a number of distinct issues relating to attorney-client privilege. *Laethem*

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39. *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. *See id.* at 4. This Part discusses only privileges.

40. *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 of sufficient social importance to justify some sacrifice of availability of evidence relevant to the administration of justice").

41. United States v. Nixon, 418 U.S. 683, 710 (1974).

42. 8 WIGMORE, *supra* note 3, § 2175, at 3.

43. *See Nixon*, 418 U.S. at 710; People v. Fisher, 442 Mich. 560, 574-75 (1993).

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

45. *See* 8 WIGMORE, *supra* note 3, § 2290 n.1, at 542.

46. *See id.* at 543.

47. *Swidler & Berlin*, 524 U.S. at 403 (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)); *see also* 8 WIGMORE, *supra* note 3, § 2290, at 543.

48. People v. Compeau, 244 Mich. App. 595, 597; *see also* 8 WIGMORE, *supra* note 3, § 2292, at 554.

49. 261 F.R.D. 127 (E.D. Mich. 2009). Disclosure: the author is employed as a law clerk for the magistrate judge whose decision was reviewed by the district court in *Laethem*. The author had no involvement in the case.

involved a suit by a franchisee alleging that Deere had wrongfully terminated its franchise to benefit a favored dealer.[50] As part of a contentious discovery phase, the parties disputed the discoverability of numerous documents prepared by Michael and Mark Laethem, co-owners of the plaintiff company, which were stored on two computer disks referred to as the "M & M disks."[51] These documents had not been initially disclosed to the defendant, but were later provided, inadvertently according to the plaintiffs, as part of a larger discovery production.[52] The defendant argued that the plaintiffs had waived any claim of privilege by disclosing the M & M disks and through their discovery conduct, and that many of the documents were not privileged.[53]

Turning first to the waiver issue, the court found that the plaintiffs had not waived the attorney-client privilege, either by their inadvertent disclosure of the privileged documents or through their litigation conduct.[54] With respect to the first issue, the court concluded that the inquiry was governed by Federal Rule of Evidence 502,[55] even though that rule had not become effective until after the inadvertent disclosure had occurred.[56] Rule 502, in relevant part, provides that a disclosure of material protected by the attorney-client privilege, "[w]hen made in a Federal proceeding," does not operate as a waiver of the privilege if "(1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error."[57]

The defendant argued that because the plaintiffs inadvertently disclosed the material in 2006, prior to a second inadvertent disclosure in 2008, none of the three elements of Rule 502(b) were met.[58] The court rejected this argument. First, the court rejected the defendant's argument that the disclosure was not inadvertent, reasoning that because the defendant denied having ever previously received the M & M disks, and because the defendant argued that the plaintiffs were trying to hide this information from the defendant, "it is the defendant who makes the strongest case for . . . conclu[ding] that disclosure was inadvertent."[59] Second, the court rejected the defendant's argument that the plaintiffs

50. *Id.* at 130.
51. *Id.* at 130-32.
52. *Id.* at 130-31.
53. *Id.* at 134.
54. *Id.* at 137.
55. *See* FED. R. EVID. 502.
56. *Laethem Equip.*, 261 F.R.D. at 137.
57. FED. R. EVID. 502(b).
58. *Laethem Equip.*, 261 F.R.D. at 135-37.
59. *Id.* at 135.

failed to take reasonable steps to prevent disclosure or to correct the error, explaining that these arguments were based on the defendant's contention that the disks had been disclosed in 2006, a contention for which there was no evidentiary support.[60]

Turning to the defendant's second waiver argument–that the privilege was waived by the plaintiff's litigation conduct–the court explained that, while Rule 502(b) applies to the issue of waiver by inadvertent disclosure, it "is not the sole source of law on the issue of waiver."[61] Because the case was before the federal court on diversity jurisdiction and raised only claims based on Michigan law, the privilege claim and the defendant's waiver by misconduct claim were governed by Michigan, rather than federal, law.[62] Applying Michigan law, the court found that the plaintiffs had not waived their claim of privilege by failing to complete and turn over a privilege log listing the documents on the M & M disks for which privilege was claimed in 2006.[63] The court noted the defendant's unpublished authority finding a waiver of privilege when no privilege log is provided, but distinguished that authority because in that case the failure to provide a privilege log was accompanied by a purposeful disclosure of the allegedly privileged material.[64] As the court discussed in connection with the waiver by inadvertent disclosure issue, however, the defendant had failed to establish that the documents or disks had been produced by the plaintiffs in 2006.[65] The court therefore found that "the plaintiffs did not effectuate a blanket privilege waiver by inadvertent disclosure or otherwise by their conduct."[66]

Having disposed of the various waiver issues, the court next turned to whether the documents on the M & M disks were, in fact, protected by the Michigan attorney-client privilege. Under Michigan law, the court noted, "'[t]he scope of the privilege is narrow: it attaches only to confidential communications by the client to its adviser that are made for the purpose of obtaining legal advice.'"[67] The defendant argued that a

60. *Id.* at 136.

61. *Id.* (citing FED. R. EVID. 502(b), advisory committee note).

62. *Id.* (citing FED. R. EVID. 501).

63. *Id.* at 137.

64. *Laethem Equip.*, 261 F.R.D. at 136 (discussing Large v. Our Lady of Mercy Med. Ctr., No. 94 Civ. 5986(JGK)THK, 1998 WL 65995, at *4 (S.D.N.Y. Feb. 17, 1998)).

65. *Id.*

66. *Id.* at 137. The defendant also argued in its reply brief that the plaintiffs waived the privilege by disclosing the information to a third party. The court rejected this argument because the defendant "fail[ed] to raise this argument in its initial privilege challenge," and because the defendant did "not elaborate to whom the documents were disclosed, or which documents would fall within that waiver." *Id.* at 145.

67. *Id.* at 139 (quoting Fruehauf Trailer Corp. v. Hagelthorn, 208 Mich. App. 447, 450 (1995)).

number of documents were not privileged "communications" under this standard because there were not sent to or received by anyone.[68] The court disagreed, explaining that many of the documents were merely electronic copies of documents that were communicated to the plaintiffs' counsel.[69] The court reasoned that "[t]he electronic version of a document prepared on a word processor is no less privileged than its paper version that is printed and mailed to an attorney."[70] Further, the court explained, "preliminary drafts of a document that is ultimately sent to counsel, and documents serving as outlines for oral conversations with counsel, amount to 'communications.'"[71] The court, pointing to no Michigan case law but finding support in treatises and decisions in other jurisdictions, explained that a "communication" for purposes of the attorney-client privilege consists of any attempt to convey information, and therefore, "'the communication need not in fact succeed' to be privileged."[72] Because the documents were electronic copies of documents sent to counsel, preliminary drafts of such documents, or notes prepared to communicate orally with counsel, the documents were protected from disclosure by the attorney-client privilege.[73]

The court next rejected the defendant's argument that certain documents stored on the plaintiffs' "jdvision" computer were not privileged.[74] This computer was a terminal for communicating with the defendant, and was accessible to all of the plaintiffs' employees; however, Michael Laethem testified that the computer also functioned as a back-up server, on which the plaintiffs stored other, privileged documents.[75] He also testified that although the computer itself was accessible by all employees, the files were protected by a password.[76] Based on this testimony, the court concluded that otherwise privileged documents did not lose their privileged status merely by being stored on the "jdvision" computer.[77] The court also rejected the defendant's argument that documents sent between the Laethem brothers were not privileged, noting again that preliminary drafts of communications with

68. *Id.*
69. *Id.* at 139.
70. *Laethem Equip.*, 261 F.R.D. at 139.
71. *Id.* at 140.
72. *Id.* (quoting RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 69 cmt. c (2000)).
73. *Id.*
74. *Id.* at 141.
75. *Id.* at 140-141.
76. *Laethem Equip.*, 261 F.R.D. at 141.
77. *Id.* at 141.

counsel are covered by the privilege, and that the privilege attaches to communications made through an attorney's and client's agents.[78] The court concluded that "[t]he fact that a communication went from one plaintiff to the other, and then to counsel for legal advice does not render the communication unprivileged."[79] Finally, the court rejected the defendant's argument that communications involving other Laethem family members—pre-dating those family members' waivers of the attorney's conflict of interest—were not privileged,[80] explaining that "[g]roup representation . . . does not defeat a claim of privilege asserted by one client as to that client's communication to the attorney."[81] Accordingly, the court rejected the defendant's arguments that the documents contained on the M & M disks were either not privileged or discoverable because the privilege had been waived.[82]

IV. JUDICIAL NOTICE

Under Rule 201, a court may take judicial notice of adjudicative facts that are "not subject to reasonable dispute in that [they are] either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[83] During the *Survey* period, the Michigan Court of Appeals considered Rule 201 in one decision.

In *Freed v. Salas*,[84] the plaintiff's decedent, a thirty-five year-old quadriplegic, was being transported from the hospital where he had been treated for pneumonia to his long-term care facility.[85] He was being transported in an ambulance owned by Healthlink Medical Transportation and driven by Kimberley Salas, both of whom were named as defendants in the action.[86] Salas, who was not driving in an

78. *Id.* at 142 (citing Leibel v. Gen. Motors Corp., 250 Mich. App. 229, 236 (2002)).

79. *Id.*

80. *Id.* at 142-43.

81. *Id.* at 143.

82. *Laethem Equip.*, 261 F.R.D. at 144. The court also rejected the defendant's argument that documents were not privileged under the crime-fraud exception to the attorney client privilege, because the defendant had failed to show any crime or fraud perpetrated by the plaintiffs. *Id.*

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

84. 286 Mich. App. 300 (2009). *Freed* also considered issues relating to evidence of settlements and expert testimony. These aspects of the case are discussed *infra* notes 416-450 and accompanying text (settlement evidence) and *infra* notes 603-618 and accompanying text (expert testimony).

85. *Freed*, 286 Mich. App. at 304.

86. *Id.*

emergency capacity and who had not activated the ambulance's lights or siren, ran a stop sign.[87] The ambulance was struck by a garbage truck owned by Waste Management and driven by William Whitty, both of whom were also named as defendants.[88] As a result of the injuries sustained in the accident, the plaintiff's decedent died.[89] After trial had commenced but before opening statements, the plaintiff, Healthlink, and Salas entered into a "high-low" settlement agreement.[90] As disclosed to the trial court, the agreement provided for the dismissal of Salas and an agreement by Healthlink to pay damages of not less than $900,000 and not more than $1,000,000, with Healthlink remaining in the case "to argue the nature and extent of damages."[91] The plaintiff and Healthlink concurred that the agreement should not be disclosed to the jury, although counsel for Waste Management and Whitty expressed no opinion on this request.[92]

As explained by the court of appeals, at trial the primary issues were "whether the garbage truck was being operated in excess of the speed limit or a reasonable speed, what percentage of fault to assign to the respective defendants, and whether Freed could feel pain or have knowledge of his injuries or impending death."[93] Prior to deliberations, the parties agreed to dismiss Whitty, leaving only Waste Management and Healthlink as defendants.[94] The jury returned a verdict finding both Waste Management and Healthlink negligent, and awarding damages of $14 million.[95] The jury found Healthlink 55 percent at fault and Waste Management 45 percent at fault, leading to a damage award (including costs and interest) against Waste Management of over $6.5 million.[96] Following the trial court's denial of its post-judgment motions, Waste Management appealed.[97]

Among other issues on appeal in *Freed*, Waste Management argued that the trial court erred in failing to take judicial notice that the speed limit on the road on which its truck was driving was 45 miles per hour.[98]

87. *Id.*
88. *Id.*
89. *Id.* at 304.
90. *Id.* at 305.
91. *Freed*, 286 Mich. App. at 305.
92. *Id.* at 305.
93. *Id.*
94. *Id.* at 306.
95. *Id.*
96. *Id.* at 306.
97. *Freed*, 286 Mich. App. at 306.
98. *Id.* at 340.

The court of appeals rejected this argument.[99] The court explained that, although there was a traffic control order stating the speed limit as 45 miles per hour, the order also indicated that it became effective only when speed limit signs reflecting this limit had been posted.[100] The evidence at trial, however, "indicated that the last sign before the area of accident read 35 miles an hour."[101] In light of this discrepancy between the posted sign and the traffic control order, and the language of the order providing that the 45 mile per hour speed limit was not effective until such signs had been posted, the court of appeals reasoned that the fact of the speed limit being 45 miles per hour "could not reasonably be said to have been undisputed or capable of accurate and ready determination" as required by Rule 201(b).[102] Thus, the trial court did not err in "refusing to take judicial notice of the speed limit."[103]

V. RELEVANCE

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

A. Relevance and Undue Prejudice Generally

The rules of relevance are addressed in Article IV of the Michigan Rules of Evidence. Rules 401 and 402 provide the general rules of relevance for the admission of evidence. 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."[104] Rule 402 provides, simply, 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.[105] 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.[106] Taken together,

99. *Id.*
100. *Id.* at 341.
101. *Id.*
102. *Id.*; *see also* MICH. R. EVID. 201(b).
103. *Freed*, 286 Mich. App. at 341.
104. MICH. R. EVID. 401.
105. MICH. R. EVID. 402.
106. *See generally* MICH. R. EVID. 403-411.

Rules 401 and 402 "constitute[] the cornerstone of the . . . evidentiary system."[107]

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

> An item of evidence, being but a single link in the chain of proof, need not prove conclusively the proposition for which it is offered. . . . It is enough if the item could reasonably show that a fact is slightly more probable than it would appear without that evidence. . . . A brick is not a wall.[108]

In other words, under Rules 401 and 402 "[e]vidence is not subject to exclusion solely because its probative value is extremely low. If evidence has any probative value whatsoever, it is relevant and admissible unless otherwise excludable for an affirmative reason."[109]

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.[110] 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."[111] "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."[112] Because the question of undue

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107. 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, *see* MICH. R. EVID. 401, 1978 Note; MICH. R. EVID. 402, 1978 Note. In addition, Michigan courts look to federal courts when analyzing these rules. *See, e.g.*, People v. Hall, 433 Mich. 573, 581 (1989).

108. MCCORMICK, *supra* note 40, § 185 at 278. The Michigan Supreme Court has cited approvingly Professor McCormick on this point. *See* People v. Brooks, 453 Mich. 511, 519 (1996).

109. WEISSENBERGER, *supra* note 107, § 401.3, at 99; *see* JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 17-18 (1827).

110. *See supra* note 106 and accompanying text.

111. MICH. R. EVID. 403.

112. WEISSENBERGER, *supra* note 10771, § 403.1, at 109. As Professor Weissenberger notes, the policy underlying Rule 403 is the same as that underlying the remaining rules

prejudice under Rule 403 is inextricably bound to a determination of the probative value of the evidence, Rule 403 determinations in large part derive from general relevance determinations under Rules 401 and 402. It is therefore appropriate to consider all three rules together.[113]

During the *Survey* period, the Michigan courts issued seven published decisions addressing these general principles of relevance, six arising in criminal cases and one in a civil case.

In a civil case, *Campbell v. Department of Human Services*,[114] the court of appeals considered the admissibility of evidence under the Elliott-Larsen Civil Rights Act (ELCRA).[115] Specifically, the court considered whether a plaintiff bringing an ELCRA claim may present evidence of conduct, which itself may not form the basis of a claim because it is barred by the statute of limitations, in order to provide background to support a claim based on conduct for which the suit is timely.[116] In *Garg v. Macomb County Community Mental Health Services*,[117] the Michigan Supreme Court rejected the "continuing violation" exception to the ELCRA statute of limitations, holding instead that a plaintiff may not "bring a viable CRA lawsuit for employment actions that occurred outside the limitations period."[118] The plaintiff in *Campbell* brought a claim of gender discrimination based on her employer's promotion of a male co-worker instead of her.[119] The defendant moved for summary disposition, arguing inter alia that the plaintiff presented no facts of gender discrimination occurring within the three year limitation period.[120] A subsidiary question raised by the motion was whether the plaintiff could rely on evidence of acts occurring

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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 86; *see also* 22 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE, § 5235, at 340 (1978) (the rules of limited admissibility "emerged from repeated applications of the doctrine of relevance to recurrent patters in the use of circumstantial evidence."). Rule 403 is thus akin to the "catch-all" exception to the hearsay rule. *See* MICH. R. EVID. 803.

113. From the beginning of this subsection through this footnote is an excerpt from M. Bryan Schneider, *Evidence, 2008 Ann. Survey of Mich. Law*, 54 WAYNE L. REV. 229 (2008).

114. 286 Mich. App. 230 (2009). *Campbell* also involved an issue of hearsay evidence. This aspect of the case is discussed *infra* notes 687-693 and accompanying text.

115. MICH. COMP. LAWS §§ 37.2101-.2804 (West 2001 & Supp. 2010).

116. *Campbell*, 286 Mich. App. at 233.

117. 472 Mich. 263 (2005).

118. *Campbell*, 286 Mich. App. at 233 (discussing *Garg*, 472 Mich. at 283-85).

119. *Id.* at 232.

120. *Id.* at 233.

outside the limitations period to support her claim.[121] The trial court denied the motion, concluding that it "had discretion to consider acts that occurred outside the limitations period as background evidence in order to establish a pattern of discrimination."[122] The case proceeded to trial, and the jury found in favor of the plaintiff.[123]

Among other issues on appeal, the defendant argued "that evidence of acts occurring outside the three-year limitation period should have been excluded" as irrelevant.[124] The court of appeals disagreed.[125] The court began its analyses by noting that, under *Garg*, "a plaintiff cannot recover for any injuries that occurred outside the three-year limitations period applicable to CRA claims."[126] However, as the court explained, the Michigan Supreme Court "in *Garg* did not squarely address whether acts or events outside the limitations period can be used as background evidence to establish a pattern of discrimination in order to prove a timely claim."[127] The court observed that some language in *Garg* suggested a rule prohibiting the introduction of such evidence, but found it significant that *Garg* had originally included a footnote explicitly "stating that acts outside the limitations period could *not* be used as background evidence of discrimination, but this footnote was deleted in an amendment to the opinion."[128] The court then turned to its own unpublished decision in *Ramanathan v. Wayne State University Board of Governors*.[129] In *Ramanathan*, the court of appeals held that *Garg* does not establish a per se rule of exclusion for evidence of discriminatory acts occurring outside the limitation period, and that the admissibility of such evidence is determined by the ordinary application of the rules of evidence.[130] The Michigan Supreme Court summarily reversed the court of appeals's decision in *Ramanathan* on other grounds, but did not address the evidentiary issue.[131]

In light of this development of the law, the *Campbell* court "decline[d] to read *Garg* as holding that injuries occurring outside the

121. *Id.* at 233.
122. *Id.* at 234.
123. *Id.*
124. *Campbell*, 286 Mich. at 234.
125. *Id.* at 238.
126. *Id.* at 236 (citing *Garg*, 472 Mich. at 282).
127. *Id.* at 237.
128. *Id.* (emphasis in original).
129. No. 266238, 2007 WL 28416 (Mich. Ct. App. Jan. 4, 2007) (per curiam), *rev'd in part*, 480 Mich. 1090 (2008).
130. *Ramanathan*, 2007 WL 28416, at *3.
131. *Campbell*, 286 Mich. at 237 (discussing *Ramanathan*, 480 Mich. at 1090-91); *see Ramanathan*, 480 Mich. at 1097 (Markman, J., dissenting) (noting majority's failure to address the evidentiary issue).

limitations period may never be used as evidence to support a claim for an injury occurring within the limitations period."[132] Rather, adopting the court's reasoning in its unpublished *Ramanathan* decision, the court held that the admissibility of such evidence turns on the rules of evidence, and such evidence "may be admitted under the sound discretion of the trial court."[133] This decision is correct. Nothing in the ELCRA abrogates the rules of evidence, and nothing in the statute or the case law addressing the statute provides any reason to conclude that relevant evidence of a plaintiff's claim should be inadmissible based on temporal considerations. In a discrimination case, acts which are not themselves actionable because they are time-barred may nonetheless be relevant under Rule 402. For instance, evidence of prior discriminatory practices may make it more probable that the conduct which is the subject of a timely suit was motivated by a discriminatory animus. Under Rules 402 and 403, "[t]he focus must remain on whether the evidence is relevant to demonstrate that discrimination played a role in the decision, and that determination is not served by a bright-line temporal restriction."[134] There is no basis on which to conclude that admissibility of such evidence cannot be handled by a straightforward application of Rules 402 and 403.[135]

The Michigan courts also considered issues of general relevance in six criminal cases during the *Survey* period. In two of those cases, the court of appeals addressed the admissibility of crime scene photographs. In *People v. Gayheart*,[136] the defendant was convicted of first degree murder.[137] The evidence at trial established that the defendant and the victim lived in the same apartment complex, and that, upon hearing of the victim's plan to move to Florida, the defendant asked permission to drive her car to Florida to visit "a woman with whom he had been romantically involved."[138] After initially agreeing, the victim changed her mind.[139] "The victim was last seen on September 20, 2005."[140] Nine

132. *Campbell*, 286 Mich. App. at 238.

133. *Id.*

134. Freeman v. Madison Metro. Sch. Dist., 231 F.3d 374, 382 (7th Cir. 2000).

135. *Cf.* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002) (a plaintiff may use untimely "prior acts as background evidence in support of a timely claim"); United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977) ("A discriminatory act which is not made the basis for a timely charge . . . may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue . . . .").

136. 285 Mich. App. 202 (2009), *leave to appeal denied*, 486 Mich. 957 (2010).

137. *Id.* at 204.

138. *Id.* at 205.

139. *Id.*

140. *Id*

days later, the victim's car was found in a parking lot in Florida, where the defendant was arrested for breaking into his former girlfriend's home.[141] Two days after that, the victim's body was found in a field in Indiana.[142] The prosecution presented evidence that a large pair of pliers were stolen from a maintenance worker at the apartment complex, and theorized that the defendant had taken the pliers and used them to kill the victim, beating her on the head.[143] As explained by the court of appeals, "[a]lthough the victim's body was partially decomposed when it was found, the evidence showed that she had sustained serious head trauma," including skull fractures evidencing seven to nine blows with a blunt object.[144]

Among other claims on appeal, the defendant argued that the trial court erred in admitting photographs of the victim's body, which were gruesome and therefore unfairly prejudicial.[145] The court of appeals disagreed.[146] The court began its analysis by noting the general rule that "[p]hotographs may be used to corroborate a witness's testimony, and gruesomeness alone need not cause exclusion."[147] The court then explained that the defendant's intent was directly relevant in light of the first degree murder charge against him, and reasoned that the photographs were probative of his intent "because they illustrated the nature and extent of the victim's injuries."[148] Further, the photographs were probative because they "specifically corroborated the [expert] testimony concerning the cause of the victim's death and the nature and extent of her fatal injuries."[149] In light of this probative value, the court concluded that the photographs were admissible under Rule 403.[150] Although gruesome, the court explained, the photographs were highly relevant and their mere gruesomeness alone was not sufficiently prejudicial to outweigh the probative value of the photographs.[151]

The court considered a similar issue in *People v. Mesik*.[152] In that case, the defendant was convicted of first degree murder arising from the

141. *Id.*
142. *Gayheart*, 285 Mich. App. at 205-06.
143. *Id.* at 206.
144. *Id.*
145. *Id.* at 226.
146. *Id.* at 228.
147. *Id.* at 227 (internal quotation and alternations omitted).
148. *Gayheart*, 285 Mich. App. at 227.
149. *Id.*
150. *Id.* at 228.
151. *Id.*
152. 285 Mich. App. 535 (2009), *leave to appeal denied*, 485 Mich. 1127 (2010). *Mesik* also involved an issue of hearsay evidence. This aspect of the case is discussed *infra* notes 694-704 and accompanying text.

death of Darrell McDonald.[153] The victim's body was discovered bound and gagged in his apartment, with multiple stab wounds and lacerations.[154] On appeal the defendant argued, inter alia, that the trial court erred in admitting "photographs of the victim's body at the crime scene."[155] Specifically, the defendant argued that "the photographs were not necessary because the manner of death was not disputed at trial and instead the main dispute involved the number and identity of the murderers."[156] The court rejected this claim.[157] The court first explained that "[w]hile gruesome photographs should not be admitted solely to garner sympathy from the jury, a photograph that is admissible for some other purpose is not rendered inadmissible because of its gruesome details."[158] And although the manner of the victim's death may not have been disputed, the prosecutor is still required to prove each element of the crime "regardless of whether the defendant specifically disputes or offers to stipulate any of the elements."[159] Because the prosecutor was obligated to prove the cause of the victim's death and the defendant's intent, and because the photographs were relevant to show these matters, they were properly admitted.[160]

The Michigan Supreme Court considered an interesting relevance question in *People v. Feezel*, released shortly after the close of the *Survey* period.[161] 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.[162] The evidence showed that, although there was a sidewalk adjacent to the road, the victim was walking in the road.[163] The victim was "extremely intoxicated," having a blood alcohol content of 0.268.[164] 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 15 miles per hour, and the prosecution's expert concurred with this assessment.[165] Prior to

153. *Mesik*, 285 Mich. App. at 537-38.
154. *Id.* at 537.
155. *Id.* at 544.
156. *Id.*
157. *Id.*
158. *Id.*
159. *Mesik*, 285 Mich. App. at 544.
160. *Id.* at 544.
161. 486 Mich. 184 (2010).
162. *Id.* at 187-88.
163. *Id.* at 188.
164. *Id.* at 188-89.
165. *Id.* at 190.

trial, the prosecutor filed a motion *in limine* seeking to exclude evidence that the victim was intoxicated, arguing that the evidence was irrelevant.[166] The trial court agreed and granted the motion.[167] The court of appeals affirmed the defendant's convictions.[168] 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 conduct," and because it is foreseeable that a pedestrian may be walking in the roadway, the victim's intoxication was irrelevant.[169] The defendant appealed to the Michigan Supreme Court raising several claims, including the evidentiary issue.[170]

The supreme court reversed the court of appeals's decision, concluding that evidence of the victim's intoxication was relevant to the question of proximate cause.[171] The court began its analysis by noting that causation was an element of each of the offenses for which the defendant was convicted.[172] The court then explained that, under criminal law, "cause" is a term of art denoting both "factual causation and proximate causation"[173] and both must be proven to hold a defendant criminally liable. 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.[174] 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."[175] 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."[176]

With this explication of the causation element in mind, the supreme court concluded that the "victim's BAC [blood alcohol content] was a relevant and admissible fact for the jury's consideration when

166. *Id.* at 189.
167. *Feezel*, 486 Mich. at 189.
168. *Id.* at 190.
169. *Id.* at 190-91 (quoting People v. Feezel, No. 276959, 2008 WL 4890170 (Mich. Ct. App. Nov. 13, 2008)) (internal quotations omitted).
170. *Id.* at 191.
171. *Id.* at 191-92.
172. *Id.* at 193-94.
173. *Feezel*, 486 Mich. at 194.
174. *Id.* at 195.
175. *Id.* (internal quotation omitted).
176. *Id.* at 196.

determining whether the prima facie element of proximate causation was proved beyond a reasonable doubt."[177] After explaining the general operation of Rules 401 through 403,[178] the court found that, under the facts of the case, the victim's blood alcohol content was admissible. First, the court found that the evidence was relevant under Rule 401 because the prosecutor was required to establish causation, and in particular proximate causation, beyond a reasonable doubt.[179] 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.[180] 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 him."[181] 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.[182]

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.[183] 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 . . . ."[184] 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 . . . ."[185] Noting that proximate cause is determined on a case-by-case basis,[186] the court concluded that "while 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 for the accident . . . or . . . of the victim's death."[187] In reaching this conclusion, the court emphasized

177. *Id.*
178. *Id.* at 197-98.
179. *Feezel*, 486 Mich. at 198.
180. *Id.* at 198-99.
181. *Id.* at 199.
182. *Id.*
183. *Id.* at 199.
184. *Id.* at 200.
185. *Feezel*, 486 Mich. at 200.
186. *Id.* at 201.
187. *Id.* at 201-02.

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.[188]

In a case decided shortly before the end of the last *Survey* period, but published within this *Survey* period, the Michigan Court of Appeals considered the admissibility of flight evidence in a criminal case, and its decision was reversed by the Michigan Supreme Court during the *Survey* period. In *People v. Smelley*,[189] the defendant was convicted of second degree murder, assault, and firearms offenses arising from the shooting of two victims while they were driving in a car.[190] The defendant raised a number of evidentiary and other claims on appeal including, as relevant here, a claim that the trial court erred in admitting evidence of his arrest in Georgia two weeks after the murder as evidence of flight.[191] The defendant argued that the evidence was not probative and was unfairly prejudicial because, at the time he went to Georgia, he "did not know he was wanted for a crime and, in fact, he was not wanted for a crime because there was no warrant for his arrest."[192] "The trial court took the matter under advisement," but ultimately allowed the arresting DEA agent to testify concerning the arrest and gave a flight instruction to the jury.[193]

On appeal, the court of appeals agreed with the defendant that the evidence was inadmissible.[194] The court explained that although evidence of flight is admissible "when it is probative of a defendant's consciousness of guilt[,] . . . mere departure from the crime scene or . . . jurisdiction, does not give rise to such an inference."[195] The court of appeals reasoned that, in this case, the defendant's traveling to Georgia

188. *Id.* at 202. Justice Young, joined by Justices Corrigan and Markman, dissented from the court's disposition of other issues in the case, but agreed with the majority's resolution of the evidentiary issue. *See id.* at 217 (Young, J., concurring in part and dissenting in part).

189. 285 Mich. App. 314 (2009) (per curiam), *rev'd in part*, 485 Mich. 1023 (2010). *Smelley* also involved other acts evidence and two hearsay issues. These aspects of the case are discussed *infra* notes 315-23 and accompanying text (other acts); *infra* notes 705-16 and accompanying text (non-hearsay); and *infra* notes 734-754 and accompanying test (state of mind exception to the hearsay rule).

190. *Smelley*, 285 Mich. App. at 315-16.

191. *Id.* at 332.

192. *Id.*

193. *Id.*

194. *Id.* at 333.

195. *Id.*

demonstrated nothing more than mere departure, and thus was not probative of a consciousness of guilt. The court noted that there was no evidence presented "that defendant left the jurisdiction because he was aware of, or motivated by fear of apprehension for, the homicide in this case,"[196] nor that the defendant had any knowledge that the police were looking for him in connection with the crime.[197] Therefore, "the prosecutor could not reasonably imply that in leaving the jurisdiction defendant was in 'flight' in the legal sense" that would render the evidence relevant and admissible.[198]

On the prosecutor's application for leave to appeal, the Michigan Supreme Court summarily reversed the court of appeals's decision with respect to the flight evidence.[199] The court rejected the court of appeals's reasoning that the prosecutor had to prove that the defendant left Michigan because he feared apprehension, explaining that "[i]f that was required, flight evidence would rarely be admissible because it is obviously difficult to prove somebody's motives."[200] Further, the court briefly explained, the prosecutor did present evidence of defendant's knowledge by presenting evidence that the defendant was the shooter.[201] Such evidence "rebutted defendant's claim that he had no knowledge of the homicide."[202] Concurring in this decision, Justice Corrigan provided some further analysis.[203] She noted that although flight evidence is often equivocal and is not sufficient by itself to sustain a conviction, it is "generally relevant and admissible."[204] This being the case, "[w]hether defendant fled to Georgia for reasons other than his consciousness of guilt regarding these offenses affects only the weight, and not the admissibility, of the [flight] evidence."[205] Thus, in Justice Corrigan's view, the evidence was properly admitted at trial.[206]

In *People v. Gipson*,[207] the defendant was convicted of first degree murder and armed robbery in connection with the beating death of his drug supplier.[208] The prosecution presented evidence that the defendant

196. *Smelley*, 285 Mich. App. at 333.
197. *Id.*
198. *Id.*
199. *See* People v. Smelley, 485 Mich. 1023 (2010).
200. *Id.* at 1023.
201. *Id.*
202. *Id.*
203. *Id.* at 1023-24.
204. *Id.* at 1024 (Corrigan, J., concurring) (internal quotation omitted).
205. *Smelley*, 485 Mich. at 1024.
206. *Id.* at 1025.
207. 287 Mich. App. 261 (2010) (per curiam), *leave to appeal denied*, 487 Mich. 854 (2010).
208. *Id.* at 261-62.

arranged a meeting to purchase drugs from the victim.[209] At the time of the meeting, the defendant's brother struck the victim on the head with a bottle, and both the defendant and his brother repeatedly punched and kicked the victim.[210] The defendant argued that he did not know of his brother's plan to assault the victim, and that he only struck the victim once or twice because he thought the victim was going to hit him.[211] On appeal, the defendant argued that the trial court "erred in admitting evidence that, after the charged offenses, he obtained a tattoo that read 'Murder 1' and depicted a chalk outline of a dead body underneath."[212] The court of appeals rejected this claim, concluding that the evidence was admissible under Rules 401 through 403.[213]

The court noted that the defendant proffered several plausible reasons for the tattoo that had nothing to do with the murder, including as a reference to his dog which had been shot in a police raid.[214] However, the court observed, the prosecutor also presented evidence that the defendant had altered the tattoo to look like a dog when he became aware that the police wanted to photograph the tattoo, and that it was plausible that the tattoo was meant as "a symbolic representation of defendant's acknowledged connection to the victim's death."[215] Because the prosecutor did not unduly focus his case on the tattoo, "and because defendant had the opportunity to present his own explanation of the tattoo," the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.[216]

Finally, in *People v. Schaw*[217] the defendant was convicted of assault and unlawful imprisonment arising from an altercation with his wife. The evidence showed that during an argument, the defendant "choked and restrained" the victim, and held a knife to her throat while threatening to kill her.[218] On appeal, the defendant argued that the trial court erred in admitting recordings of conversations between him and his wife while he was in jail awaiting trial, which the prosecution introduced to show that the defendant had attempted to coerce the victim to change her testimony.[219] During these conversations, the "defendant stated [several]

209. *Id.* at 262.
210. *Id.*
211. *Id.*
212. *Id.*
213. *Gipson*, 287 Mich. at 263-64.
214. *Id.* at 263.
215. *Id.*
216. *Id.* at 264.
217. 288 Mich. App. 231 (2010) (per curiam).
218. *Id.* at 232.
219. *Id.* at 236.

times that he was a convicted felon."[220] Applying Rules 401 through 403, the court of appeals rejected the defendant's argument.[221]

The court reasoned that the "[d]efendant's statements that he was a convicted felon" and had spent time in prison "were relevant in this case because they were made in the context of his concerted efforts to convince [the victim] to recant her earlier statements regarding his conduct during the assault."[222] In context, the court explained, defendant's invocation of his status as a former prisoner was part of his attempt to convince the victim to lie.[223] Because the statements were part of his effort to induce the victim to change her story, "they were highly probative of consciousness of guilt."[224] Further, the court found that the evidence was not unduly prejudicial because the victim gave detailed testimony concerning the assault which was corroborated by the defendant's own statement to the police, and because defense counsel informed the jury that the previous convictions were of a different nature than the charges for which the defendant was on trial.[225] The court of appeals therefore found no error in the admission of the evidence.[226]

B. Character and Other Acts Evidence

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."[227] 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;

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220. *Id.*
221. *Id.* at 236-38.
222. *Id.* at 237.
223. *Schaw*, 288 Mich. App. at 237.
224. *Id.* at 238.
225. *Id.*
226. *Id.*
227. MICH. R. EVID. 404(a).

> (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 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.[228]

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.[229] Rule 405 works in conjunction with Rule 404(a), providing the permissible means of proving character where character is admissible under Rule 404(a). Specifically, Rule 405 provides that character may be proved "by testimony as to reputation or by testimony in the form of an opinion"[230] and, where character "is an essential element of a charge, claim, or defense," character may be proved by specific instances of conduct.[231] The Michigan Court of Appeals considered these rules in one case during the *Survey* period.

In *People v. Roper*,[232] the defendant was convicted of second degree murder arising from the stabbing death of his roommate, Anthony Jones.[233] The evidence at trial established that the defendant, the victim, and Theodore Morrow (another roommate) went to a nightclub, where there was a minor disagreement because the defendant had not paid his

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228. *Id.* Issues involving the character of a witness under Rules 607-609 are discussed in Part VI of this Article, *infra*.

229. *See* WEISSENBERGER, *supra* note 107, § 404.2, at 120.

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

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

232. 286 Mich. App. 77 (2009) (per curiam), *leave to appeal denied*, 486 Mich. 928 (2010).

233. *Id.* at 79.

part of the bill.[234] The three returned home, where the victim again confronted the defendant about the bill, and raised other issues he had with the defendant.[235] The defendant testified that the victim "got in his face," chest-bumped him, and pushed him into a table.[236] The victim then approached and punched him, and the defendant grabbed a knife from the kitchen counter.[237] When the victim continued to step forward, the defendant swung the knife at the victim.[238] The defendant testified that, because he was concerned with the victim's injuries, he followed the victim outside.[239] Once outside, he kicked the victim in the ribs "because he was still angry."[240] Morrow testified as well that he saw the defendant kicking the victim and yelling at him.[241] The defendant eventually fled the scene.[242] At trial, the defendant argued that he acted in self-defense, or alternatively that the killing was manslaughter, not murder.[243] The jury rejected these arguments, finding the defendant guilty of murder.[244]

Among other claims on appeal, the defendant argued that the trial court erred in allowing character evidence at trial.[245] Initially, the prosecutor sought to present the testimony of the defendant's ex-girlfriend, who would have testified "about several instances where defendant drank and then attacked her under circumstances that suggested that defendant could be easily provoked to violence."[246] The prosecutor also sought to present evidence concerning an incident in the bathroom of the home in which the defendant, after drinking, threatened several people with a knife.[247] The trial court found that this evidence was inadmissible, and the prosecutor did not present the evidence during her case-in-chief.[248] During his own testimony, however, the defendant testified that he "just snapped" and did not intend to hurt the victim.[249] The prosecutor then cross-examined the defendant on his character, asking the defendant if reacting with violence was how he responded to

234. *Id.* at 80.
235. *Id.*
236. *Id.* at 80-81.
237. *Id.* at 81.
238. *Roper*, 286 Mich. App. at 81.
239. *Id.* at 81-82.
240. *Id.* at 82.
241. *Id.*
242. *Id.*
243. *Id.* at 83.
244. *Roper*, 286 Mich. App. at 83.
245. *Id.* at 90.
246. *Id.* at 93.
247. *Id.*
248. *Id.*
249. *Id.* at 94.

someone saying things that he did not like.[250] The defendant denied this, and the prosecutor asked about the prior bathroom incident involving Larry Farmer.[251] Defense counsel objected, but the court allowed the prosecutor to inquire about the incident, concluding that the defendant had opened the door by testifying as to his character.[252]

The court of appeals rejected the defendant's argument that he had not opened the door to cross-examination about specific instances of conduct.[253] The court reasoned that, in explaining how he had "snapped," the "defendant very clearly stated that he was not the sort of person who would do 'anything like that'–that is, who would resort to violence without provocation."[254] This unequivocal statement, the court explained, "explicitly asserted that [the defendant's] actions during the fight were atypical of his character and invited the jury to conclude that he must have been severely provoked given that he did not have an aggressive or violent character."[255] The testimony therefore placed the defendant's character at issue, opening the door for the prosecutor to rebut the testimony through cross-examination under Rule 404(a)(1).[256]

Next, the court of appeals rejected the defendant's argument that the court erred in allowing the prosecutor to call his ex-girlfriend to testify as a rebuttal witness concerning specific instances of conduct relevant to his character.[257] The court explained that the prosecutor questioned the defendant on cross-examination about several instances of violent conduct.[258] After the defense rested, the prosecutor then called the defendant's ex-girlfriend, who testified as to each incident inquired about on cross-examination.[259] The court noted that unlike Rule 405(b), which permits proof of specific instance of conduct where character is an element of a claim or defense, Rule 405(a) only allows "inquiry" on cross-examination into specific instances of conduct.[260] "Given the differences between MRE 405(a) and MRE 405(b)," the court explained, "the limitation in MRE 405(a) must be understood to prohibit the presentation of evidence regarding specific instances of conduct to prove

250. *Roper*, 286 Mich. App. at 93.
251. *Id.* at 95.
252. *Id.*
253. *Id.* at 97.
254. *Id.* at 96.
255. *Id.*
256. *Roper*, 286 Mich. App. at 96.
257. *Id.* at 98-99.
258. *Id.*
259. *Id.* at 97-99.
260. *Id.* at 97.

character in any case except those covered under MRE 405(b)."[261] Discussing the Michigan Supreme Court's decision in *People v. Champion*,[262] the court of appeals noted that the supreme court held that the prosecutor may cross-examine a defendant's character witnesses regarding specific instances of conduct, "but could not call a rebuttal witness to testify directly about the specific instances of misconduct."[263]

Nevertheless, the court of appeals found a distinction between the case before it and *Champion*. Specifically, the court noted that when the prosecutor attempted to cross-examine the defendant, he first denied any memory of the incidents, and then denied that they happened altogether.[264] The prosecutor was therefore "left with a situation where she could not rebut defendant's denials without calling a witness to testify about the specific instances of conduct that defendant denied."[265] The court of appeals therefore found it necessary to consider "whether Michigan law recognizes an exception to the permissible forms of inquiry into character under MRE 405(a) . . . where a defendant places his character at issue on direct examination and then denies the occurrence of specific instances of conduct on cross-examination."[266] The court answered this question in the affirmative, relying on the Michigan Supreme Court's decision in *People v. Vasher*.[267] In that case, the defendant was charged with sexually molesting his granddaughter and two other young girls.[268] After the defendant placed his character in issue, the prosecutor inquired on cross-examination "whether the defendant had told the mother of one of the victims that [young girls] should have sex with men in the family . . . so [that] they know what sex is like."[269] The defendant denied that he had said this, and the prosecutor called a rebuttal witness to testify to this statement.[270] The supreme court found that the rebuttal evidence was proper, notwithstanding the general rule that a witness may not be impeached on collateral matters, because the testimony did not go to a collateral matter.[271] Rather, the character and specific instance of conduct evidence was a matter "closely bearing

261. *Id.*
262. 411 Mich. 468 (1981).
263. *Roper*, 286 Mich. App. at 100 (discussing *Champion*, 411 Mich. at 470-71).
264. *Id.* at 100-01.
265. *Id.* at 101.
266. *Id.* at 102.
267. 449 Mich. 494 (1995).
268. *See Roper*, 286 Mich. App. at 102 (discussing *Vasher*, 449 Mich. at 496).
269. *Id.* at 102 (quoting *Vasher*, 449 Mich. at 498) (internal quotations omitted).
270. *Roper*, 286 Mich. App. at 102-03 (discussing *Vasher*, 449 Mich. at 502-04).
271. *Id.* at 103.

on defendant's guilt or innocence,"[272] and the testimony was a proper rebuttal because it was limited to "'a simple contradiction of the defendant's testimony that directly tended to disprove the exact testimony given by the witness . . . .'"[273]

The *Roper* court recognized that the supreme court in *Vasher* "did not frame the issue as an exception to the limitations on character evidence" under Rule 405.[274] Nevertheless, that is the effect of the *Vasher* decision, a point recognized by the dissenting justices in *Vasher*.[275] Thus, the court of appeals reasoned that under *Vasher:*

> [A] prosecutor may present rebuttal evidence concerning specific instances of conduct to prove a defendant's character, notwithstanding the limitations imposed under MRE 405, when all the following are true: (1) the defendant places his or her character at issue through testimony on direct examination; (2) the prosecution cross-examines the defendant about specific instances of conduct tending to show that the defendant did not have the character trait he or she asserted on direct examination; (3) the defendant denies the specific instances raised by the prosecution in whole or in part . . . ; and (4) the [prosecutor's] rebuttal testimony is limited to contradicting the defendant's testimony on cross-examination.[276]

Finding that all of these factors were present in the case before the court, the court of appeals found no error in the admission of the rebuttal testimony.[277]

2. Other Acts Evidence Under Rule 404(b)

After Rule 403, the most significant rule of limited admissibility is reflected in Rule 404(b), which prohibits the introduction of other bad acts evidence. Specifically, Rule 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other

272. *Id.* at 104 (citing *Vasher*, 449 Mich. at 504).
273. *Id.* (quoting *Vasher*, 449 Mich. at 505).
274. *Id.*
275. *See id.* at 104-05 (discussing *Vasher*, 449 Mich. at 507-12 (Cavanagh, J., dissenting)).
276. *Roper*, 286 Mich. App. at 105.
277. *Id.* at 107.

> 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.[278]

Unlike the other rules of limited admissibility, however, Rule 404(b) is not primarily grounded in concerns about the low probative value of other acts evidence. On the contrary, such evidence "is objectionable not because it has no appreciable probative value but because it has too much. The natural and inevitable tendency of the tribunal–whether judge or jury–is to give excessive weight to the" evidence.[279] It is also thought to be unfair to make a party refute charges long since grown stale.[280]

The Michigan Supreme Court has established a four-part test for determining the admissibility of other acts evidence.[281] In order to be admissible under this test: (1) the evidence must be relevant for a purpose other than the defendant's propensity to commit the charged crime–*i.e.*, it must be admitted for one of the permissible purposes listed in Rule 404(b)(1); (2) the evidence must be relevant under Rule 402; (3) the danger of unfair prejudice must not substantially outweigh the probative value of the evidence under Rule 403; and (4) the trial court may give a limiting instruction upon the request of the party against whom the evidence is offered.[282] Although developed in the context of a criminal case, the *VanderVliet* test applies equally to other acts evidence offered in civil trials.[283]

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."[284]

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

279. 1A WIGMORE, *supra* note 2, § 58.2, at 1212 (Peter Tillers rev. ed. 1983); *see also* Michelson v. United States, 335 U.S. 469, 475-76 (1948).

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

281. *See* People v. VanderVliet, 444 Mich. 52, 74-7 (1993)

282. *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).

283. *See* Elezovic v. Ford Motor Co., 259 Mich. App. 187, 206 (2003), *aff'd in part and rev'd in part on other grounds*, 472 Mich. 408 (2005); Lewis v. LeGrow, 258 Mich. App. 175, 208 (2003).

284. 22 WRIGHT & GRAHAM, *supra* note 112, § 5239, at 429-31 (footnotes omitted).

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.[285] 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."[286] During the *Survey* period, the Michigan courts issued four published decisions involving Rule 404(b) evidence. As with the vast majority of Rule 404(b) cases, all four involved criminal trials.

The Michigan Supreme Court considered Rule 404(b) evidence in *People v. Williams*.[287] In that case, the defendant was arrested and charged with drug and firearm offenses following a November 4, 2004, search of his motel room.[288] He was also arrested and charged with separate drug and firearm offenses following a separate search of a house on February 2, 2005.[289] Prior to trial, the prosecutor moved to consolidate the charges arising from the two arrests into a single trial.[290] The trial court granted the motion, and the defendant was convicted of drug and firearm offenses arising from both searches and arrests.[291] The Michigan Court of Appeals affirmed the defendant's convictions, and the defendant appealed to the Michigan Supreme Court, arguing that the offenses had been improperly joined.[292]

The principal issue before the supreme court was whether the trial court had properly joined the charges in a single trial under the relevant court rule.[293] After concluding that the charges were properly joined,[294] the court further concluded that any error in the joinder was harmless

285. *See* People v. Engelman, 434 Mich. 204, 213 (1990).

286. United States v. Crowder, 141 F.3d 1202, 1206 (D.C. Cir. 1998); *see* 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 its inadmissibility of an evidential fact for one purpose does not prevent the admissibility for any other purpose otherwise proper."). For a more complete discussion of the conflicting exclusionary and inclusionary views of Rule 404(b), see 22 WRIGHT & GRAHAM, *supra* note 112, § 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).

287. 483 Mich. 226 (2009).

288. *Id.* at 228-29.

289. *Id.* at 229.

290. *Id.*

291. *Id.* at 230.

292. *Id.* at 230-31.

293. *See* MICH. CT. R. 6.120.

294. *Williams*, 483 Mich. at 232-43.

because "the evidence of each charged offense could have been introduced in the other trial under MRE 404(b)."[295] The court provided little analysis of the Rule 404(b) issue noting only that, contrary to the dissent's assertion, the evidence was not admissible only upon a showing of a single scheme, but could also have been admissible to show motive, opportunity, and the like.[296] Because "'all or substantially all of the evidence of one offense would [have been] admissible in a separate trial of the other,'"[297] any error in joining the cases was harmless.[298]

Justice Kelly dissented. After rejecting the majority's interpretation and application of the joinder rule,[299] she turned to the majority's harmless error determination. In her view, the court's conclusion that any error by the joinder was harmless because the evidence of each offense would have been admissible in a trial on the other offense under Rule 404(b) "takes too much for granted."[300] In her view, the success of this argument "depends on the existence of the very 'single scheme or plan' that would establish that the offenses were 'related' and make severance unnecessary."[301] She noted the majority's observation that the evidence might have been admissible under Rule 404(b) for a purpose other than showing a common scheme, but reasoned that this was the sole basis upon which the prosecutor had argued for admission of the other acts evidence if the defendant had separate trials.[302] Because in her view the defendant was entitled to severance, it was "improper simply to assume that the evidence of defendant's other crimes would be admissible for another purpose under MRE 404(b)," particularly in light of the fact that even if admissible under Rule 404(b) the trial court might have "concluded that its prejudicial effect outweighed its probative value" under Rule 403.[303]

In *People v. Seals*,[304] the defendants Nicholas and Lewis Seals were convicted of felony murder arising from the 1996 robbery and shooting death of George Powell in his home.[305] At trial, the prosecution introduced, for impeachment purposes, testimony that Nicholas Seals had

295. *Id.* at 243.
296. *Id.* at 244 n.26.
297. *Id.* at 244 (quoting Byrd v. United States, 551 A.2d 96, 99 (D.C. 1988)).
298. *Id.*
299. *Id.* at 250-67 (Kelly, J., dissenting).
300. *Williams*, 483 Mich. at 269.
301. *Id.* (quoting MICH. CT. R. 6.120).
302. *Id.* at 269 n.40.
303. *Id.*
304. 285 Mich. App. 1 (2009) (per curiam).
305. *Id.* at 3-4. Because the case involved two defendants with a common last name, I refer here to "Nicholas" rather than the conventional "Seals" or defendant.

given pursuant to an investigative subpoena.[306] In the testimony, Nicholas had denied any knowledge of or involvement in the murder.[307] He also denied any connection to drugs or guns, and the testimony played for the jury included the investigating detective's statements to Nicholas about police contacts with Nicholas involving drugs or guns before and after the murder.[308] A tape of the recorded testimony was played for the jury, including the statements concerning Nicholas's prior contact with drugs and guns.[309] Nicholas appealed arguing, inter alia, that the investigative subpoena testimony included other acts evidence prohibited by Rule 404(b).[310] After rejecting Nicholas's argument that the evidence was improperly admitted for impeachment purposes,[311] the court of appeals turned to the Rule 404(b) question.

The court of appeals rejected Nicholas's argument that the admission of the investigative subpoena testimony violated Rule 404(b) because it included information of his prior involvement with guns or drugs.[312] Noting that Rule 404(b) prohibits the introduction of other acts evidence only to show action in conformity therewith, the court explained that the prosecutor had used this testimony solely to show that Nicholas had lied about his involvement with guns or drugs, in turn to show a consciousness of guilt.[313] Further, because the prosecutor's theory was that the defendants had gone to the home of a known drug dealer to steal his money and drugs, the fact that Nicholas "had previously bought or used drugs and had previously handled guns could be used to demonstrate motive and opportunity."[314] Accordingly, the trial court did not err in admitting this evidence.

The Michigan Court of Appeals also considered a Rule 404(b) issue in *People v. Smelley*.[315] In that case, the defendant was convicted of second degree murder, assault, and firearms offenses arising from the

306. *Id.* at 4.
307. *Id.* at 5.
308. *Id.* at 4-5.
309. *Id.* at 5.
310. *Seals*, 285 Mich. App. at 10.
311. *Id.* at 5-10.
312. *Id.* at 11.
313. *Id.*
314. *Id.*
315. 285 Mich. App. 314 (2009) (per curiam), *rev'd in part on other grounds*, 485 Mich. 1023 (2010). *Smelley* also involved relevance and two hearsay evidence issues. These aspects of the case are discussed *supra* notes 189-206 and accompanying text (relevance); *infra* notes 705-16 and accompanying text (non-hearsay); and *infra* notes 734-754 and accompanying text (state of mind hearsay exception). *Smelley* was decided shortly before the *Survey* period, but was released for publication during the *Survey* period.

shooting of two victims while they were driving in a car.[316] The defendant raised a number of evidentiary and other claims on appeal including, as relevant here, a claim that he was denied a fair trial by the introduction of other acts evidence concerning his possession of a gun.[317] During cross-examination of an investigating officer, defense counsel elicited from the officer that there was no evidence the defendant had ever owned or possessed the caliber of gun used in the shooting.[318] On redirect, however, the prosecutor elicited that the defendant had previously been arrested for carrying a concealed weapon and explicitly referenced four prior arrests or convictions involving firearms.[319]

On appeal, the prosecutor conceded that the prosecutor's questions and the officer's answers were improper under Rule 404(b), but argued that the error was harmless.[320] The court of appeals disagreed, explaining that the evidence was "deliberately injected into the proceedings by the prosecution,"[321] and that "there was no evidence presented during this trial that defendant had a gun on the night of the shooting . . . ."[322] Because the evidence was highly prejudicial and was injected into the trial deliberately, its admission, coupled with other evidentiary errors found by the court of appeals, warranted reversal.[323]

Finally, in *People v. Malone*[324] the defendant was convicted of stealing a financial transaction device.[325] The charges arose from an investigation into the identify theft of several high ranking employees of the Wayne County financial department.[326] The investigation ultimately led to the defendant, whose home was searched.[327] The search uncovered post-it notes containing the personal information of four county employees, including social security and driver's license numbers.[328] Contrary to the defendant's testimony that she had obtained the information from the payroll computer and written it down in the course of her employment, several county officials testified that the defendant

316. *Smelley*, 285 Mich. App. at 315-16.
317. *Id.* at 331.
318. *Id.*
319. *Id.* at 330-31.
320. *Id.* at 331.
321. *Id.*
322. *Smelley*, 285 Mich. App. at 332.
323. *Id.* Although the Michigan Supreme Court vacated in part the court of appeals decision, it left undisturbed that court's holding on the other acts issue. *Smelley*, 485 Mich. at 1023.
324. 287 Mich. App. 648 (2010) (per curiam).
325. *Id.* at 649-50.
326. *Id.* at 650.
327. *Id.*
328. *Id.* at 650-51.

could not have obtained the information from the computer, but would have had to access the paper files, and that it was not necessary for the defendant to write that information down and retain it.[329]

Among other claims, the defendant argued on appeal that the trial court had improperly admitted other acts evidence, namely, evidence concerning the actions of other individuals uncovered during the investigation which ultimately led to the defendant.[330] The court of appeals rejected this claim, concluding that the evidence was not improper Rule 404(b) evidence.[331] Rather, the court reasoned, the evidence "was offered to show that the investigation was initiated by the report of identity theft . . . and how investigators came to focus on defendant."[332] The court explained that "'[i]t is the nature of things that an event often does not occur singly and independently, isolated from all others,'"[333] and thus "[i]t is proper to provide background information to the jury to allow them to examine the full transaction."[334] Because this evidence was admitted for the limited purpose of showing how the investigation came to focus on the defendant, the evidence was not improper Rule 404(b) evidence.[335]

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."[336] Similarly, the prior domestic abuse statute provides, in relevant part, that "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts

329. *Id.* at 651 n.2, 3.
330. *Malone*, 287 Mich. App. at 661.
331. *Id.* at 661-62.
332. *Id.*
333. *Id.* at 662 (quoting People v. Delgado, 404 Mich. 76, 83 (1978)).
334. *Id.*; *see also* People v. Scholl, 453 Mich. 730, 742 (1996).
335. *Malone*, 287 Mich. App. at 662.
336. MICH. COMP. LAWS ANN. § 768.27a(1) (West 2000 & Supp. 2010). The statute also requires the prosecutor to give notice prior to trial of his intention to present evidence pursuant to the statute. *See id.* Under the statute, a "listed offense" is any offense listed in the sex offender registry statute. *See id.* § 768.27a(2) (citing MICH. COMP. LAWS ANN. § 28.722(e) (West 2004 & Supp. 2010)).

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."[337]

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 section 768.27a and section 768.27b control over Rule 404(b).[338] 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 section 768.27a, but subsequently vacated its grant of leave to appeal and denied the defendant's application for leave to appeal.[339] Subsequently, the court denied leave to appeal in *People v. Xiong*,[340] which the court had held in abeyance pending its decision in *Watkins*. The supreme court also denied leave to appeal with respect to these issues in *Schultz*, *Petri*, and *Wilcox*.[341] This pattern continued during the current *Survey* period, with the Michigan Supreme Court declining to grant leave to appeal in *People v. Thompson*,[342] a case raising these issues.[343] The Michigan Court of Appeals did not address the constitutionality of section 768.27a or section 768.27b during the current *Survey* period, but it did issue two published decisions applying the statutes.

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337. *Id.* § 768.27b(1) (West 2000 & Supp. 2010). As with the prior sexual assault statute, this statute requires the prosecutor to provide notice prior to trial. *See 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. *See id.* § 768.27b(4).

338. *See* People v. Petri, 279 Mich. App. 407, 411-12 (2008), *leave to appeal denied*, 482 Mich. 1186 (2008), *leave to appeal denied*, 483 Mich. 917 (2009); People v. Schultz, 278 Mich. App. 776, 778-79 (2008), *leave to appeal denied*, 482 Mich. 1078 (2008); People v. Watkins, 277 Mich. App. 358, 364-65 (2007), *leave to appeal granted*, 480 Mich. 1167, (2008), *order granting leave to appeal vacated and leave to appeal denied*, 482 Mich. 1114 (2008); People v. Pattison 276 Mich. App. 613, 619-20 (2007), *leave to appeal denied*, 485 Mich. 1102 (2010).

339. *See* People v. Watkins, 482 Mich. 1114 (2008).

340. 483 Mich. 951 (2009).

341. *See* People v. Schultz, 482 Mich. 1078 (2008); People v. Petri, 482 Mich. 1186 (2008); People v. Wilcox, 483 Mich. 1094 (2009) (leave to appeal granted limited to sentencing guidelines of Michigan Compiled Laws section 777.1. Chief Justice Kelly would grant leave to appeal based on her dissent in *People v. Xiong*.).

342. 485 Mich. 883 (2009).

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

In *People v. Mann*[344] the court applied the prior sexual assault statute, section 768.27a. In *Mann*, the defendant was convicted of four counts of criminal sexual conduct (three first degree counts and one second degree) arising from his sexual assault of eight-year-old R.B. and six-year-old J.B.[345] The defendant, who was seventeen years old, was a friend of R.B.'s older brother. J.B. was a friend of R.B.[346] The defendant was often at the apartment where R.B. lived with his mother and brother, and often spent the night.[347] He was also often alone in the apartment with R.B. while R.B.'s brother and mother were at work.[348] Through the testimony of the victims, R.B's mother, and medical witnesses, the prosecution established that the defendant engaged in fellatio and anal intercourse with R.B., and had sexual contact with J.B.[349] Among other claims on appeal, the defendant argued that the trial court erred in admitting evidence that he had previously committed an attempted sexual assault against a minor in 2002.[350] Relying on section 768.27a, the court of appeals rejected this claim.[351]

The court began by noting that the crimes with which the defendant was charged–first and second degree criminal sexual conduct–were "listed offenses" under section 769.27a, as was the prior act of attempted criminal sexual conduct against a minor.[352] Because both the charged offenses and the prior offense were listed offenses under the statute, the prior offense was admissible if otherwise relevant.[353] The court reasoned that the evidence was relevant "because it tended to show that it was more probable than not that the two minors in this case were telling the truth . . ." and "made the likelihood of Mann's behavior toward the minors at issue in this case more probable."[354] Further, the court concluded that the probative value of the evidence was not outweighed by the danger of unfair prejudice. The court reasoned that the evidence was highly probative because the veracity of the minor victims was a central issue in the case, and that the danger of unfair prejudice was mitigated by the trial court's instruction to the jury that it should consider

344. 288 Mich. App. 114 (2010) (per curiam).
345. *Id.* at 115.
346. *Id.*
347. *Id.*
348. *Id.* at 116.
349. *Id.*
350. *Mann*, 288 Mich. App. at 119.
351. *Id.*
352. *Id.* at 117-18 (citing MICH. COMP. LAWS ANN. § 28.722(e)(x), (xiii) (West 2004 & Supp. 2010); MICH. COMP. LAWS ANN. § 768.27a(2)(b) (West 2000 & Supp. 2010)).
353. *Id.* at 118.
354. *Id.*

the evidence only for the purpose of assessing the veracity of the victims.[355] And because the evidence was admissible under section 768.27a, the court of appeals found no need to separately consider the admissibility of the evidence under Rule 404(b).[356]

The court of appeals considered the domestic assault statute, section 768.27b, in *People v. Railer*.[357] In that case, the defendant was convicted of unlawful imprisonment arising from an assault on his girlfriend.[358] In April 2008, the victim was arrested after marijuana was found in her car.[359] She claimed at trial that the marijuana belonged to the defendant, but that she took the blame at the time of her arrest because she loved him.[360] A couple of months later, the defendant approached her car while she was sitting in it, reached through the window, and grabbed her by the throat.[361] He threatened to kill her at that time.[362] The following night, the defendant got into the victim's car and made her drive him to a friend's house.[363] Once there, he took her keys and phone and, refusing to return them, grabbed her by the wrist and forced her into the friend's apartment.[364] The victim was able to briefly escape and phone her sister.[365] She then sat in the parking lot, waiting for police to arrive.[366] The defendant dragged the victim into the car by her hair and drove to a different parking lot.[367] Once stopped, the defendant punched and choked the victim.[368] When the defendant went inside a store, the victim was able to obtain assistance from a stranger, who took her into the store.[369] The police were called, and the defendant was arrested.[370]

On appeal, the defendant claimed that the trial court violated Rule 404(b) by allowing the admission of prior acts of violence against two former girlfriends of the defendant.[371] The court of appeals rejected this argument, concluding that the evidence was admissible under section

355. *Id.*
356. *Mann*, 288 Mich. App. at 119.
357. 288 Mich. App. 213 (2010).
358. *Id.* at 214.
359. *Id.*
360. *Id.*
361. *Id.* at 215.
362. *Id.*
363. *Railer*, 288 Mich. App. at 215.
364. *Id.*
365. *Id.*
366. *Id.*
367. *Id.*
368. *Id.*
369. *Railer*, 288 Mich. App. at 216.
370. *Id.*
371. *Id.* at 219.

768.27b notwithstanding whether it was admissible under Rule 404(b).[372] The court noted that the defendant had been charged with "assault with intent to commit great bodily harm," conduct which amounts to "domestic violence" under the statute in light of the fact that he and the victim were in a dating relationship.[373] The court further explained that the conduct testified to by the defendant's former girlfriends–one testifying that the defendant had "forced her into his van" and the other testifying that the defendant would "grab and yell at her"–likewise constituted "domestic violence" under the statute.[374] The court found that the evidence was not excludable under Rule 403 because it was "highly relevant to defendant's tendency to assault" the victim and the testimony "was brief and not nearly as graphic or violent as defendant's transgressions recounted in [the victim's] testimony."[375] Because the prior acts testimony met the statutory definition and was not unfairly prejudicial, it was properly admitted.[376]

C. Past Sexual History (Rape Shield Law)

Rape-shield laws represent a particular species of the character evidence rule reflected in Rule 404. "Like most States, Michigan has a 'rape-shield' statute designed to protect victims of rape from being exposed at trial to harassing or irrelevant questions concerning their past sexual behavior."[377] Michigan's rape-shield law provides:

> Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g [the sexual conduct offense provisions] unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> > (a) Evidence of the victim's past sexual conduct with the actor.

372. *Id.*
373. *Id.* at 220 (citing MICH. COMP. LAWS ANN. § 768.27b(5)(a)(i), (ii), (iv) (West 2000 & Supp. 2010)).
374. *Id.*
375. *Railer*, 288 Mich. App. at 220.
376. *Id.* at 221.
377. Michigan v. Lucas, 500 U.S. 145, 146 (1991).

> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.[378]

The statute further provides that, if a defendant seeks to introduce evidence under (a) or (b), he must give notice of his intent to do so within ten days of the arraignment.[379]

During the *Survey* period, the Sixth Circuit considered a habeas corpus case addressing the Michigan rape shield law. In *Gagne v. Booker*,[380] the habeas petitioner was convicted in state court of criminal sexual conduct along with his codefendant, Donald Swathwood.[381] It was undisputed that the victim and Gagne had been in a dating relationship which ended about a month prior to the assault, and that on the night of the assault, Gagne, Swathwood, and another man came over to the victim's house, where the four drank and possibly smoked marijuana.[382] The victim testified that she willingly showered and performed oral sex with Gagne, believing that Swathwood and the other friend had left her house.[383] Swathwood then entered the room and engaged in sexual intercourse with her while Gagne held her down.[384] Both men took turns having intercourse with the victim while the other held her down.[385] Gagne and Swathwood agreed with the victim's description of the sexual activity, but testified that they did not hold the victim down and that she consented to the activity.[386] Prior to trial, the judge excluded under the rape-shield statute two incidents sought to be introduced by Gagne: an incident of consensual sexual activity involving the victim, Gagne, and another man; and an incident in which the victim invited Gagne's father

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378. MICH. COMP. LAWS ANN. § 750.520j(1) (West 2004). The rule established in the rape-shield law is also reflected in Rule 404(a)(3), which provides an exception to the general prohibition on character evidence for, in a criminal sexual conduct prosecution, "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." MICH. R. EVID. 404(a)(3).

379. *See* MICH. COMP. LAWS ANN. § 750.520j(2).

380. 606 F.3d 278 (6th Cir. 2010), *vacated and reh'g en banc granted* (July 20, 2010). Because the decision in *Gagne* had been vacated and the case set for rehearing by the en banc court, an extended discussion of the case is not necessary or appropriate. Thus, the discussion that follows is cursory.

381. *Id.* at 279.

382. *Id.* at 280.

383. *Id.*

384. *Id.*

385. *Id.*

386. *Gagne*, 606 F.3d at 280-81.

to join the two in group sexual activity.[387] The trial court did, however, permit Gagne to introduce evidence that he, the victim, Swathwood, and two other females had engaged in group sex.[388] During closing argument, the prosecutor "repeatedly emphasized the unlikeliness of the defendants' version of the story,"[389] while defense counsel attacked the victim's credibility by pointing to the group sex incident which had been admitted at trial.[390] On appeal, the Michigan Court of Appeals rejected Gagne's claim that he was denied a fair trial by the exclusion of the other sexual activity evidence, concluding that "the evidence of the group sexual activity with [another man] and the invitation to Gagne's father were irrelevant because they involved third parties, not Swathwood."[391] Gagne filed a petition for a writ of habeas corpus[392] in the federal district court, arguing that he had been denied his constitutional right to present a defense by the exclusion of the evidence.[393] The federal court agreed, and granted the writ of habeas corpus.[394] On the State's appeal, the Sixth Circuit affirmed.[395]

The Sixth Circuit explained that, under the Supreme Court's decision in *Crane*, "a proper inquiry into the constitutionality of a court's decision to exclude evidence begins with considering the relevancy and cumulative nature of the excluded evidence, and the extent to which it was 'central' or 'indispensable' to the defense."[396] A court must then balance this factor against "the state's interests in enforcing the evidentiary rule on which the exclusion was based . . . ."[397] After applying this balancing test, the Sixth Circuit found that the Michigan Court of Appeals had "underestimated the vital nature of the disputed material," which the court considered "highly relevant" to the issue of

387. *Id.* at 281.

388. *Id.* at 281-82.

389. *Id.* at 282.

390. *Id.*

391. *Id.* (citing People v. Smallwood, Nos. 235540, 235541, 2003 WL 1880143, at *1-*2 (Mich. Ct. App. Apr. 15, 2003)).

392. *See* 28 U.S.C.A. § 2254 (West 1996).

393. *Gagne*, 606 F.3d at 283. As one federal district court has explained:

> Although the Constitution does not explicitly provide a criminal defendant with the right to 'present a defense', the Sixth Amendment provides a defendant with the right to process to obtain witnesses in his favor and to confront the witnesses against him, and the Fourteenth Amendment guarantees a defendant due process of law. Implicit in these provisions is the right to present a meaningful defense.

Coy v. Renico, 414 F. Supp.2d 744, 774 (E.D. Mich. 2006); *see also* Holmes v. South Carolina, 547 U.S. 319, 324 (2006); Crane v. Kentucky, 476 U.S. 683, 690 (1986).

394. *Gagne*, 606 F.3d at 283.

395. *Id.* at 289.

396. *Id.* at 284; *see also Crane*, 476 U.S. at 690-91.

397. *Gagne*, 606 F.3d at 284.

the victim's consent.[398] Specifically, the prior events were highly relevant because the victim and Gagne were both involved in each of them, and because they were similar to the events giving rise to the charges.[399] Further, the court rejected the State's argument that the evidence was cumulative to the group sex incident which had been admitted at trial given the differences between the two incidents–notably the fact that the incident admitted did not involve the victim having sex with two different men simultaneously–and the prosecutor's repeatedly stressing the unlikelihood of Gagne's testimony regarding the group sex incident, and the incident giving rise to the charges.[400] The Sixth Circuit further concluded that Gagne's interest outweighed the State's interest in enforcing the policies behind the rape-shield statute.[401] The court noted that the Michigan statute contains an exception for prior sexual conduct involving the victim and the defendant, "illustrat[ing] that the Michigan legislature recognized that the defendant has a heightened claim to the introduction of evidence of previous sexual contact with his accuser."[402] Further, given "the extraordinary nature of the events giving rise to the charge," the exclusion of evidence that the victim had previously engaged in three-way sex or sought out such sex "'effectively disabled' the defendant" from presenting his case.[403]

Judge Batchelder dissented, unwilling to join what she concluded was "the inevitable, albeit unacknowledged, consequence of [the court's] decision–that rape-shield statutes are *ipso facto* unconstitutional, inasmuch as their very purpose is to exclude, on policy grounds, evidence that is almost always 'highly relevant, non-cumulative, and indispensable to the central dispute in a criminal trial.'"[404] After discussing why, in her view, the majority's decision did not comport with either governing Supreme Court law or the standards applicable in a habeas corpus proceeding,[405] Judge Batchelder also rejected the majority's assertion that this evidence was highly relevant and central to Gagne's case.[406] The evidence regarding the prior three-way sex and the victim's invitation to Gagne's father, she explained, was "simply Gagne's uncorroborated testimony about these alleged incidents."[407] "No

398. *Id.* at 286.
399. *Id.*
400. *Id.* at 287.
401. *Id.* at 288.
402. *Id.*
403. *Gagne*, 606 F.3d at 288 (quoting *Crane*, 469 U.S. at 689).
404. *Id.* at 293 (Batchelder, J., dissenting) (quoting *id.* at 289 (majority op.)).
405. *Id.* at 293-98.
406. *Id.* at 298-99.
407. *Id.* at 299.

one contends that either [the other man] or Gagne's father was prepared to testify about these incidents, or that there was any other 'proof.'"[408] She also rejected the majority's assertion that the group sex incident which was admitted was the only evidence Gagne had to support his case, because both Gagne and Swathwood testified and the victim was subject to cross-examination.[409] In light of these facts, in Judge Batchelder's view, the majority's position, was:

> [T]hat 'the most relevant evidence' in a rape trial, the 'indispensable' evidence, is the perpetrator's testimony about the victim's promiscuity or prior sex acts. And this, according to the majority, is because a rape defendant has a constitutional right to prove present consent by producing evidence of past willingness, at least insofar as the defendant can characterize that evidence as highly relevant, noncumulative, and central to the dispute.[410]

The Sixth Circuit has since vacated the decision and granted the State's petition for rehearing en banc.[411] The case bears watching as the next *Survey* period progresses.

D. Offers of Settlement

Another rule of limited admissibility renders inadmissible evidence of settlements and offers to compromise. Rule 408 prohibits the introduction of settlements and offers to compromise as to a claim "to prove liability for or invalidity of the claim or its amount."[412] Two distinct policies underlie this rule. First, evidence of settlement or attempts to settle are not necessarily probative of a claim's validity; often such an offer "implies merely a desire for peace, not a concession of wrong done."[413] Second, the rule fosters settlement of disputes, a socially beneficial outcome.[414] This second policy consideration supports a view of Rule 408 in the nature of a privilege, and for this reason, the rule

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408. *Id.*

409. *Gagne*, 606 F.3d at 299.

410. *Id.*

411. *See generally* Gagne v. Booker, 606 F.3d 278 (6th Cir. 2010), *vacated and reh'g en banc granted* (July 20, 2010).

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

413. 4 WIGMORE, *supra* note 3, § 1061, at 36 (James H. Chadbourne rev. ed. 1972).

414. *See* FED. R. EVID. 408 advisory committee note; WEISSENBERGER, *supra* note 107, § 408.2, at 170.

departs from the common law and explicitly prohibits introduction not only of settlements and offers, but of statements made in settlement negotiations.[415] The Michigan Court of Appeals considered Rule 408-type evidence in two cases decided during the *Survey* period.

Although not directly involving Rule 408, the court of appeals considered settlement evidence in *Freed v. Salas*.[416] Among other issues on appeal in *Freed*, Waste Management argued that the trial court had erred by failing to disclose to the jury the high-low agreement between the plaintiff and Healthlink.[417] The court of appeals rejected this argument.[418] The court began its analysis by discussing whether the agreement between the plaintiff and Healthlink was a "*Mary Carter*" agreement.[419] *Mary Carter* agreements, derived from a Florida case,[420] generally "come into play in multiparty litigation when plaintiff reaches a settlement with one defendant under the terms of which the settling defendant remains a party and retains a financial interest in the plaintiff's successful recovery against the non-settling parties."[421] The principal feature of a *Mary Carter* agreement, however, is its secrecy:

> A 'Mary Carter Agreement,' however, is basically a contract by which one co-defendant secretly agrees with the plaintiff that, if such defendant will proceed to defend himself in court, his own maximum liability will be diminished proportionately by increasing the liability of the other co-defendants. Secrecy is the essence of such an arrangement, because the court or jury as trier of the facts, if apprised of this, would likely weigh differently the testimony and conduct of the signing defendant as related to the non-signing defendants. By painting a gruesome testimonial picture of the other defendant's misconduct or, in some cases, by

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415. *See* WEISSENBERGER, *supra* note 107, § 408.3, at 170-71; 23 WRIGHT & GRAHAM, *supra* note 112, § 5302, at 170, 173-76.

416. 286 Mich. App. 300 (2009). For a discussion of the facts of the case, see *supra* 84-97 and accompanying text. *Freed* also considered issues relating to judicial notice and expert testimony. These aspects of the case are discussed *supra* notes 84-103 and accompanying text (judicial notice) and *infra* notes 603-18 and accompanying text (expert testimony).

417. *Id.* at 312.

418. The court of appeals noted that by failing to request that the judge disclose the agreement to the jury at any time during the trial, Waste Management had forfeited the alleged error. *Id.* at 314. Nevertheless, because the issue presented a question of law on which the record was fully developed, the court addressed the merits of the claim. *Id.*

419. *Id.* at 315.

420. *See* Booth v. Mary Carter Paint Co., 202 So. 2d 8 (Fla. Dist. Ct. App. 1967).

421. 2 DAVID LEONARD, THE NEW WIGMORE: A TREATISE ON EVIDENCE: SELECTED RULES OF LIMITED ADMISSIBILITY § 3.7.5.a, at 381-82 (2002).

> admissions against himself and the other defendants, he could diminish or eliminate his own liability.[422]

Such agreements often "create a sham of adversity,"[423] and "carry substantial potential for distortion of the truth determination process."[424] Because the settling defendant's incentive is not to minimize its own liability but to maximize that of his co-defendants, and "[b]ecause the jury is unaware of the potential for biased testimony created by such an arrangement, the potential for a miscalculation of actual responsibility is great."[425] For this reason, courts generally require that such agreements be disclosed to the jury.[426]

The *Freed* court concluded that the agreement between the plaintiff and Healthlink was not a true *Mary Carter* agreement because it did not give Healthlink any incentive to assist the plaintiff's case against Waste Management.[427] On the contrary, Healthlink still had an incentive to minimize the damages proved by the plaintiff, and any interest it had in common with the plaintiff in establishing Waste Management's proportion of fault was caused not by the agreement, but by the fact of Healthlink and Waste Management being jointly liable tortfeasors.[428] Further, the court noted, although the agreement was not disclosed to the jury, it was disclosed to the court and Waste Management, and thus did not constitute a *Mary Carter* agreement.[429]

This conclusion, however, did not dispose of the issue,[430] in light of the court of appeals's earlier decision in *Hashem v. Les Stanford Oldsmobile*.[431] The court of appeals held that the agreements involved in that case were not pure *Mary Carter* agreements because they were not kept secret from the court or the parties.[432] Nevertheless, the agreements were kept secret from the jury, and had the other hallmarks of a *Mary Carter* agreement.[433] After explaining the distorting effect of *Mary*

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422. *Id.* at 382-83 (quoting Ward v. Ochoa, 284 So. 2d 385, 387 (Fla. 1973)).

423. Franklin v. Morrison, 711 A.2d 177, 190 (Md. 1998) (internal quotations omitted).

424. LEONARD, *supra* note 421, at 383.

425. *Id.*

426. *Id.* This result is fully consistent with Rule 408, which permits the introduction of settlement agreements for purposes other than establishing the validity of a claim, "such as proving bias or prejudice of a witness." MICH. R. EVID. 408.

427. *Freed*, 286 Mich. App. at 316-17.

428. *Id.* at 315-16.

429. *Id.* at 317.

430. *Id.*

431. 266 Mich. App. 61 (2005).

432. *Id.* at 83.

433. *Id.*

Carter agreements on the truth-seeking function, the court explained that these effects, although perhaps not as severe, were also present in the quasi-*Mary Carter* agreements at issue in the case.[434] With respect to the high-low agreements specifically, the court reasoned:

> With respect to these . . . agreements, the distortion of the adversarial process is arguably less pronounced because, given the range of awards provided for in a "high low" agreement, the settling defendants retain an interest in ensuring that the total amount of damages is as small as possible. Nonetheless, the integrity of the judicial system is placed into question when a jury charged with the responsibility to determine the liability and damages of the parties is denied the knowledge that there is, in fact, an agreement regarding damages between a number of the parties.[435]

The court therefore concluded that "wise judicial policy must favor disclosure of such agreements to the jury."[436] The court, however, did not establish a bright-line rule. The court explained that Michigan courts favor settlement as a matter of public policy, and that the confidentiality of settlement agreements helps promote this public policy by encouraging settlement.[437] Because of these important policy considerations, even in the case of a true *Mary Carter* agreement disclosure of the settlement to the jury "must be thoughtfully limited to avoid prejudice,"[438] such as by not disclosing the terms of the agreement or the parties' insurance coverage.[439] In each case, "the interest of fairness served by disclosure of the true alignment of the parties . . . must be weighed against the countervailing interests in encouraging settlements and avoiding prejudice to the parties."[440]

Applying *Hashem*, the *Freed* court rejected Waste Management's argument that the trial court was required to disclose the high-low agreement to jury sua sponte.[441] The court found "nothing in the language of *Hashem* that mandates disclosure of all high-low agreements,"[442] and even if there was some duty on the trial court, that

434. *Id.* at 83-84.
435. *Id.* at 84-85.
436. *Id.* at 85; *see also Freed*, 286 Mich. App. at 317-18 (discussing *Hashem*).
437. *Hashem*, 266 Mich. App. at 85-86.
438. *Id.* at 86.
439. *Id.*
440. *Id.*
441. *Freed*, 286 Mich. App. at 319.
442. *Id.*

duty was not necessarily to disclose the agreement but to "'fashion procedures that ensure fairness to all the litigants. . . .'"[443] The court reasoned that there was no unfairness created by not disclosing the agreement because "Healthlink's position at trial remained unchanged by the agreement. It had a vested interest in reducing plaintiff's total damages and in allocating fault to Waste Management, and all its actions during trial clearly reflected this position."[444] In reaching this conclusion, the court of appeals rejected Waste Management's argument that the $100,000 difference between the low and high ends of the agreement did not give Healthlink a sufficient incentive to be truly adverse to the plaintiff.[445] The court reasoned that this difference was several times larger than the differences involved in the *Hashem* high-low agreements, and that a difference of only $125,000 between Waste Management's settlement offer and the plaintiff's demand was sufficient for Waste Management to decide to litigate the case.[446]

Finally, the court noted that this conclusion was consistent with the policy underlying Rule 408, which encourages settlement and avoids prejudice.[447] The court explained that "disclosure of [settlement] agreements is a 'two-edged sword' and that either or both parties may prefer that a jury not be informed if it."[448] In light of this, the court reasoned, "[i]t seems likely that Waste Management did not request disclosure as a matter of trial tactics," because it would have "suggest[ed] to the jury that the damages in the case were far greater than Waste Management claimed."[449] Ultimately, because Healthlink retained a real stake in the case adverse to the plaintiff's position, and because the jury knew of the proper alignment of the parties, the trial court was not required to disclose the existence of the high-low agreement to the jury.[450]

In *Alpha Capital Management, Inc. v. Rentenbach*,[451] the plaintiff Alpha Capital Management (ACM) brought suit against its counsel, Paul Rentenbach and the law firm Dykema Gossett, alleging breach of

443. *Id.* (quoting *Hashem*, 266 Mich. App. at 86).
444. *Id.* at 320.
445. *Id.*
446. *Id.*
447. *Freed*, 286 Mich. App. at 320-21.
448. *Id.* at 321 (quoting Brewer v. Payless Stations, Inc., 412 Mich. 673, 678 (1982)).
449. *Id.* at 321-22.
450. *Id.* at 322.
451. 287 Mich. App. 589 (2010). *Alpha Capital Management* also addressed the issue of management of examination by the court. This aspect of the case is discussed *infra* notes 501-07 and in accompanying text.

fiduciary duties and other torts.[452] ACM, a financial consulting firm, was founded in 1991 by Ralph Burrell, who initially owned 55% of the company's stock.[453] The remaining 45% was owned by Robert Warfield.[454] Shortly after the formation of the company, each partner owned 50% of the stock.[455] After problems developed between Burrell and Warfield in 1999, the two began to negotiate a buy-out agreement in which one of the partners would buy-out the other.[456] The defendant Rentenbach, who was the attorney for ACM, was subsequently retained to represent Warfield in the buy-out negotiations.[457] Burrell refused to waive the conflict of interest, but Rentenbach continued to represent Warfield.[458] The parties eventually agreed to a three-phase buy-out plan, at the conclusion of which Burrell would purchase the shares owned by Warfield.[459] However, Burrell subsequently was unable to make a quarterly payment required by the agreement.[460] Warfield, with others involved in ACM, established Alpha Partners, L.L.C.[461] Shortly after Burrell defaulted on the purchase note and Warfield declined to exercise his right to purchase ACM, most of ACM's clients shifted to Alpha Partners.[462] Throughout this course of events, Rentenbach continued to represent Warfield.[463]

In 2006, ACM filed suit against Rentenbach and Dykema Gossett, alleging breach of fiduciary duty, tortious interference with contractual relations, and abetting of Warfield in violating his covenant not to compete with ACM.[464] A jury returned a verdict in favor of the defendants.[465] Among other issues on appeal, ACM argued that the trial court erred in allowing the defendants to elicit testimony that ACM had settled prior litigation involving many of the ACM employees or shareholders involved in the buy-out and related proceedings.[466] The trial court rejected ACM's argument that this evidence was barred by Rule 408, concluding that the rule applied only to settlements and negotiations

452. *Alpha Capital Mgmt.*, 287 Mich. App. at 582.
453. *Id.*
454. *Id.*
455. *Id.*
456. *Id.* at 593.
457. *Id.* at 592.
458. *Alpha Capital Mgmt.*, 287 Mich. App. at 594.
459. *Id.*
460. *Id.* at 595.
461. *Id.* at 597.
462. *Id.*
463. *Id.*
464. *Alpha Capital Mgmt.*, 287 Mich. App. at 597.
465. *Id.* at 598-99.
466. *Id.* 621.

in the case before the court, not to settlements in other cases.[467] The court of appeals rightly rejected this reasoning, explaining that "'under MRE 408, evidence of a settlement made by a party to the present litigation with a third person is not admissible to prove liability.'"[468] Rule 408, the court explained, "plainly does not take into account a 'prior action' exception."[469] This conclusion is consistent with, and furthers, the primary purpose behind Rule 408 of encouraging settlement.[470]

Despite this conclusion, however, the court of appeals found that reversal was not warranted.[471] The court noted that ACM first brought the prior litigation into the suit, including a number of detailed paragraphs in its complaint describing the prior litigation and the case evaluation award in that litigation.[472] The court reasoned that "because ACM's theory of the case placed the [prior litigation] settlement and its attendant legal fees at issue in the instant case," the trial court properly allowed defense counsel to refer to the prior case during trial.[473] And, in the court's view, any of those references which may have violated Rule 408 were harmless.[474]

VI. WITNESSES

A. Control of Examination and Appearance of Witnesses 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.[475] During the *Survey* period, the Michigan Supreme Court adopted an amendment to Rule 611, adding a subsection regarding witness appearance. In addition to this significant development, the Michigan Court of Appeals also issued a decision addressing control of examination under Rule 611(a).

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467. *Id.* at 621-22.

468. *Id.* at 621 (quoting Windemuller Elec. Co. v. Blodgett Mem'l Med. Ctr., 130 Mich. App. 17, 23 (1983)).

469. *Id.*

470. *See* Hudspeth v. Comm'r, 914 F.2d 1207, 1214 (9th Cir. 1990).

471. *Alpha Capital Mgmt.*, 287 Mich. App. at 623.

472. *Id.*

473. *Id.* at 623.

474. *Id.*

475. *See* MICH. R. EVID. 611.

1. Amendment of Rule 611 Regarding Witness Appearance

On August 29, 2009, the Michigan Supreme Court adopted an amendment to Rule 611 effective September 1, 2009.[476] This amendment added a new subsection (b), and relettered existing subsections (b) and (c) as subsections (c) and (d), respectively.[477] The newly added subsection (b) provides: "The court shall exercise reasonable control over the appearance of parties and witnesses so as to (1) ensure that the demeanor of such persons may be observed and assessed by the fact-finder and (2) ensure the accurate identification of such persons."[478]

This rule had its genesis in a case arising in small claims court in Hamtramck.[479] In that case, the plaintiff, a practicing Muslim, refused to remove her niqab, which covered her entire face, unless it was before a female judge.[480] The male trial judge, noting that no female judge was available and that it was necessary for him to observe her demeanor as she testified, gave the plaintiff the option of removing the niqab or having the case dismissed.[481] When the plaintiff refused to remove the head covering, the trial judge dismissed the case without prejudice.[482]

Justice Corrigan, concurring in the adoption of the rule, explained its rationale. Surveying cases addressing the importance of a witness's demeanor to an assessment of her credibility, particularly in criminal trials,[483] Justice Corrigan explained that the new rule "requires trial courts to consider whether the witness's attire will inhibit the ability of the trier of fact to assess demeanor so much that it gives rise to a violation of the criminal defendant's right of confrontation."[484]

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476. MICH. SUP. CT. ADMIN. FILE NO. 2007-13, AMENDMENT OF RULE 611 OF THE MICH. RULES OF EVIDENCE (Aug. 25, 2009), *available at* http://www.courts.michigan.gov/supremecourt/resources/administrative/2007-13-08-25-09-order.pdf (hereinafter "Mich. Sup. Ct. Order").

477. *See supra* note 476.

478. MICH. R. EVID. 611(b).

479. *See* Mich. Sup. Ct. Order, *supra* note 476, at 2 (citing Muhammad v. Paruk, 553 F. Supp.2d 893 (E.D. Mich. 2008)).

480. *See id.*

481. *Id.*

482. *See id.* (Corrigan, J., concurring in adoption of rule). The plaintiff subsequently filed a federal civil rights action against the trial judge in the U.S. District Court for the Eastern District of Michigan. *See Muhammad*, 553 F. Supp.2d at 895-96. The federal court declined to exercise jurisdiction over the claim, concluding that any declaratory judgment by the court would "necessitate a detailed examination of how [the judge] manages his court room as a state court judge" and "would undoubtably increase friction in the relationship between our state and federal courts." *Id.* at 900. An appeal of that decision is currently pending before the Sixth Circuit.

483. *See* Mich. Sup. Ct. Order, *supra* note 476, at 3-5 (Corrigan, J., concurring).

484. *Id.* at 5.

Addressing objections to the rule based on free exercise of religion concerns, Justice Corrigan noted that a number of Islamic authorities allow exceptions to the rule prohibiting a woman from being uncovered in front of an unrelated male for certain situations, including the giving of testimony before a judge.[485]

Justice Kelly, joined by Justice Hathaway, dissented in part from the court's adoption of Rule 611(b).[486] While she had no per se problem with the rule adopted by the court, she would have added an exception providing that, notwithstanding the rule, ". . . no person shall be precluded from testifying on the basis of clothing worn because of a sincerely held religious belief."[487] Justice Kelly reasoned that the Michigan Constitution provides strong protection to the free exercise of religion, providing that a person's religious practice may be burdened only to serve a compelling state interest, and only if less intrusive means of serving that interest are not available.[488] While she conceded that "the government and litigants have a compelling interest in confronting witnesses and determining their credibility in courts of law,"[489] she argued that this fundamental interest can best be balanced with a person's fundamental free exercise right by adopting means short of "requir[ing] a plaintiff to choose between removing her niqab or having her case dismissed . . . ."[490] For example, Justice Kelly noted that trials often occur before blind judges or jurors, and that courts routinely admit hearsay evidence where the speaker of the statement is not in court to testify.[491] Justice Kelly also discounted the importance of facial expression to determining credibility, noting several studies which suggest that facial demeanor is an unreliable guide to credibility.[492] She concluded that "a judge should not force a woman who wears a niqab [pursuant to] a sincerely held religious belief . . ." because "less obtrusive means exist" to "protect the right of confrontation."[493]

Justice Markman, also concurring in the adoption of the rule, disagreed with Justice Kelly's free exercise analysis.[494] Relying on the United States Supreme Court's decision in *Employment Division,*

485. *Id.* at 5-6.
486. *Id.* at 10 (Kelly, J., concurring in part and dissenting in part).
487. *Id.* at 10.
488. *Id.* at 11 n.19.
489. Mich. Sup. Ct. Order, *supra* note 476, at 11.
490. *Id.* (emphasis added).
491. *Id.* at 12-13.
492. *Id.* at 13.
493. *Id.* at 14.
494. *See id.* at 7 (Markman, J., concurring).

Department of Human Resources of Oregon v. Smith,[495] he observed that "a law does not offend the Free Exercise Clause of the First Amendment if it is neutral towards religion and only incidentally affects religion, as long as it is 'generally applicable and otherwise valid.'"[496] Further, Justice Markman reasoned, even applying a compelling state interest test, the new rule would satisfy constitutional concerns:

> [I]t can hardly be disputed that there is a "compelling governmental interest" in support of the requirement that a witness or party be required to remove veils, face coverings, masks, or any other obscuring garments. It is a "compelling interest" born of our society's commitment to a legal system in which all persons are treated equally. It is a "compelling interest" born of a commitment to a legal system in which the search for truth is paramount, and in which this search may require judges and juries to assess the credibility of parties and witnesses by, among other means, evaluating their expressions and demeanor. It is a "compelling interest" born of a commitment to a system in which appellate courts accord deference to lower courts largely because of the ability of such courts to directly assess witness credibility. And it is a "compelling interest" born of a commitment to a system in which criminal defendants possess the constitutional right to a face-to-face confrontation with their accusers.[497]

Believing that the exception advocated by Justice Kelly would "nullify the entire purpose of the proposed rule by making every witness a law unto himself or herself,"[498] Justice Markman concurred in the adoption of the rule.

2. Control of Manner of Examination

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."[499] The Michigan

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495. 494 U.S. 872 (1990).
496. Mich. Sup. Ct. Order, *supra* note 476, at 9 (quoting *Smith*, 494 U.S. at 878).
497. *Id.* at 8-9 (footnotes omitted).
498. *Id.* at 9.
499. MICH. R. EVID. 611(a); *see also* WEISSENBERGER, *supra* note 107, § 611.2, at 341.

Court of Appeals considered this rule in *Alpha Capital Management, Inc. v. Rentenbach*.[500] In that case, a jury returned a verdict in favor of the defendants.[501] Among other issues on appeal, Alpha Capital Management (ACM) argued that the trial court erred in limiting each side to forty-five minutes of examination with respect to the testimony of Warfield and Rentenbach.[502] ACM argued that because the facts covered a ten-year period it was "arbitrary and unreasonable," and "prevented ACM's counsel from adequately cross-examining Rentenbach regarding several critical documents and impeaching him with deposition testimony."[503] The court of appeals rejected this claim, concluding that the trial court had not abused its discretion under Rule 611(a) to control the manner and mode of examination.[504] The court explained that the trial court initially imposed a one-hour limit on ACM's examination of Burrell, but did not enforce that limitation when counsel objected that he needed more time and further testimony from Burrell, and he would shorten the time needed for other witnesses.[505] The court allowed counsel to question Burrell for four and a half hours, and thereafter limited each party's examination of each witness to forty-five minutes.[506] Under the circumstances of the case, the court of appeals concluded, the trial court did not abuse its discretion because "counsel had adequate time to develop the facts and issues at the center of the parties' dispute" and because "the trial court permitted ACM more than three hours for its examination of Burrell on the basis of counsel's pledge that he could complete the rest of the witness examinations in a half hour."[507]

B. Character of a Witness Under Rule 608

Rule 608 governs the admissibility of evidence of the character and conduct of witness. Under the rule, "[t]he credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation," provided that "(1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is

500. 287 Mich. App. 589, 616 (2010). For a discussion of the facts of the case, see *supra* 464-465 and accompanying text. *Alpha Capital Management* also addressed the issue of settlement evidence. The court's analysis of this issue is discussed *supra* notes 466-74 and accompanying text.

501. *Alpha Capital Mgmt.*, 287 Mich. App. at 592.

502. *Id.* at 615.

503. *Id.*

504. *Id.* at 615.

505. *Id.* at 616.

506. *Id.* at 616-17.

507. *Alpha Capital Mgmt.*, 288 Mich. App. at 618.

admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise."[508] The rule goes on to provide that extrinsic evidence may not be admitted to show specific instances of conduct of the witness, but that specific instances of conduct which are probative of truthfulness may "be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified."[509] The court of appeals considered this rule in one case decided during the *Survey* period.

In *Ykimoff v. W.A. Foote Memorial Hospital*, the plaintiff brought a medical malpractice action against the defendant hospital and his treating physician, Dr. David Eggert, arising from Dr. Eggert's treatment of circulatory problems in his hip.[510] Dr. Eggert performed an aortofemoral bypass, which was complicated by the severity of the blockages in the plaintiff's aorta.[511] After the surgery, the plaintiff experienced pain and a loss of sensation in his legs.[512] The skin on his right leg began to demonstrate mottling, and Dr. Eggert performed a second surgery, finding a blood clot at the site of the bypass.[513] Dr. Eggert performed a thrombectomy, removing the clot.[514] Nonetheless, following this surgery the plaintiff experienced weakness and numbness in his legs.[515] The plaintiff brought a medical malpractice action, alleging the care he received from both Dr. Eggert and the post-anesthesia care nurses was negligent.[516] The trial court granted summary disposition to the defendants with respect to Dr. Eggert's care, and the remaining claims

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

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

510. 285 Mich. App. 80 (2009). *Ykimoff* also involved issues of expert testimony and hearsay evidence. These aspects of the case are discussed *infra* notes 589-600 and accompanying text (expert testimony) and *infra* notes 724-31 and accompanying text (hearsay). The Michigan Supreme Court has directed the clerk of that court to schedule oral argument on whether to grant the application for leave to appeal filed in that case. *See* Ykimoff v. W.A. Foote Mem'l Hosp., 486 Mich. 851 (2010). In light of the fact that the court directed the case to be considered along with *Martin v. Ledingham*, 486 Mich. 851 (2010), a case which raised no evidentiary issues but only issues of substantive medical malpractice law, see *Martin v. Ledingham*, 282 Mich. App. 158, (2009), it does not appear that the supreme court will be addressing any evidentiary claims in deciding whether to grant leave to appeal.

511. *Ykimoff*, 285 Mich. App. at 83.

512. *Id.*

513. *Id.*

514. *Id.*

515. *Id.* at 82-84.

516. *Id.*

proceeded to trial.[517] The jury found in the plaintiff's favor, and after applying the statutory cap on noneconomic damages, the trial court entered a verdict in plaintiff's favor for slightly more than $1.4 million.[518]

Among other issues on appeal, the defendant hospital argued that the trial court erred by allowing several witnesses to testify concerning the plaintiff's character and integrity.[519] The court of appeals rejected this argument, agreeing that there was error but finding that the error was harmless.[520] The court noted that, at trial, the defendant had introduced a surveillance video of the plaintiff that showed, contrary to the plaintiff's testimony, that his daily function and physical abilities were not as significantly limited as he alleged.[521] This video, the court reasoned, "impliedly impugned plaintiff's truthfulness, as it suggested that plaintiff's residual injuries were not as extensive or limiting as alleged."[522] However, the responsive character testimony offered by plaintiff was admissible under Rule 608 only after his character for truthfulness had been attacked.[523] In the court of appeals's view, the surveillance video did not attack the plaintiff's *character* for truthfulness, only his "overall 'integrity.'"[524] Thus, the plaintiff's rebuttal evidence was not properly admitted under Rule 608.[525] Nevertheless, the court concluded that the error was harmless, because the jury was presented with sufficient evidence to determine the extent of the plaintiff's limitations, much of the testimony offered by the plaintiff was relevant as background to explain what the plaintiff was doing in the surveillance video, and the trial court properly instructed the jury on how to assess the credibility of the witnesses.[526]

C. Refreshing Recollection of Witness

"When a witness at trial is unable or seems disinclined to relate the totality of facts within the witness's knowledge, a party is afforded the opportunity to prompt testimony or correct omissions by 'refreshing' the

517. *Ykimoff*, 285 Mich. App. at 84.
518. *Id.* at 84-85.
519. *Id.* at 102.
520. *Id.* at 102-03.
521. *Id.*
522. *Id.*
523. *Ykimoff*, 285 Mich. App. at 102.
524. *Id.*
525. *Id.*
526. *Id.* at 103.

witness's recollection through the use of an object or writing."[527] This is a rule of common law, not codified in any rule of evidence, although Rule 612 does codify some procedures for refreshing recollection.[528] Under Michigan law, a witness may use a writing or object to refresh her recollection where it is shown "(1) that the witness' present memory is inadequate; (2) that the writing could refresh the witness' present memory; and (3) that reference to the writing actually does refresh the witness' present memory."[529]

In *Genna v. Jackson*, the defendant was away from her condominium for six months while she visited her brother in Florida. [530] While away, her hot water heater ruptured, causing flooding and a mold infestation.[531] The plaintiffs, who lived in the adjoining condominium, began to experience health problems caused by the mold.[532] The plaintiffs filed suit against the defendant, and after a jury trial were awarded over $300,000 in damages.[533] Among other issues on appeal, the defendant argued that the trial court erred in allowing plaintiff Mario Genna to have his recollection refreshed regarding the contents of the condominium.[534] The defendant argued that, because the typewritten list used to refresh Genna's recollection was identical to a handwritten list that had been excluded from evidence, it was improper for the list to be used to refresh Genna's recollection.[535]

The court of appeals rejected this argument.[536] While noting that the typewritten list was identical to the handwritten list excluded by the trial court, the court explained that there was no error because the list "was never placed into evidence; it was merely used to refresh Mario's memory."[537] Because a proper foundation showing that Genna could not

527. WEISSENBERGER, *supra* note 107, § 612.1, at 353.

528. *See* MICH. R. EVID. 612. The rule generally provides that, where a witness uses a writing or object to refresh her recollection, the opposing party must be given the opportunity to examine the writing or object. A writing used to refresh a recollection is distinguishable from a prior statement of a witness governed by MICH. R. EVID. 613, or a past recollection recorded governed by MICH. R. EVID. 803(5). *See* WEISSENBERGER, *supra* note 107, §§ 612.2-.3, at 354-55.

529. Moncrief v. City of Detroit, 398 Mich. 181, 190 (1976) (citing People v. Rodgers, 388 Mich. 513, 519 (1972); MCCORMICK ON EVIDENCE § 9 (2nd ed. 1972)).

530. 286 Mich. App. 413 (2009), *leave to appeal denied*, 486 Mich. 1043 (2010). *Genna* also involved an issue of lay opinion testimony. This aspect of the case is discussed *infra* notes 666-72 and accompanying text.

531. *Genna*, 286 Mich. App. at 415.

532. *Id.*

533. *Id.* at 415-16.

534. *Id.* at 421-22.

535. *Id.* at 422-23.

536. *Id.* at 423.

537. *Genna*, 286 Mich. App. at 423.

recall and that the document helped refresh his recollection was laid, "it was not improper for the trial court to have allowed Mario Genna to refresh his memory from the document in question."[538] The court of appeals's decision correctly recognizes the distinction between a writing's admissibility and its use to refresh recollection. As a general rule, "anything may be used to refresh a witness' recollection, even inadmissible evidence."[539] This is because when a witness's recollection is refreshed "it is the testimony of the witness, the recollection, which is evidence, not the document or writing used to refresh recollection."[540]

VII. EXPERT, SCIENTIFIC, AND OPINION TESTIMONY

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

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

For most of the 20th century, the admissibility of expert and scientific testimony in courts throughout the country was governed by the standard announced in *Frye v. United States*.[541] 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."[542] The Michigan Supreme Court adopted the *Frye* standard in *People v. Davis*.[543] In 1993, however, the Supreme Court held that the adoption of Federal Rule of Evidence 702 abrogated the *Frye* rule.[544] In *Daubert*, the Court concluded that Rule 702 nevertheless sets forth a standard of both scientific reliability[545] and relevance.[546] These standards require a trial court to perform a "gatekeeping function," determining at the outset

538. *Id.*

539. United States v. Weller, 238 F.3d 1215, 1221 (10th Cir. 2001) (citing United States v. Reppy, 157 F.2d 964, 967 (2d Cir. 1946)); *see also* Pecoraro v. Walls, 286 F.3d 439, 444 (7th Cir. 2002).

540. Koehler v. Abey, 168 Mich. 113, 119 (1911).

541. 293 F. 1013 (D.C. Cir. 1923).

542. *Id.* at 1014.

543. 343 Mich. 348, 370-72 (1955); *see also* People v. Young, 418 Mich. 1, 17-20 (1983); People v. Haywood, 209 Mich. App. 217, 221 (1995).

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

545. *Id.* at 589-90.

546. *Id.* at 591-92.

"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."[547] Subsequent to the Court's decision, Federal Rule 702 was amended to explicitly incorporate the *Daubert* standard, and now provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[548]

Notwithstanding the abrogation of the *Frye* standard by Rule 702 and *Daubert*, the Michigan courts continued to apply the *Frye* rule.[549] This changed when the Michigan Supreme Court adopted an amendment to Michigan Rule of Evidence which, with a minor non-substantive exception, mirrors Federal Rule 702.[550] During a prior *Survey* period, the Michigan Supreme Court issued a decision adopting the *Daubert* analysis under Rule 702. In *Gilbert v. DaimlerChrysler Corp.*, the supreme court clarified the standards governing expert testimony under Rule 702. [551] The court explained that Rule 702 does not alter the *Frye* test's requirement that a court ensure that expert testimony is reliable.[552] Rather, Rule 702 "changes only the factors that a court may consider in determining whether expert opinion evidence is admissible."[553] The court explained that the *Daubert* standard "simply allows courts to consider more than just 'general acceptance' in determining whether expert

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

548. FED. R. EVID. 702; *see also* Nelson v. Tenn. Gas Pipeline Co., 243 F.3d 244, 250 n.4 (6th Cir. 2001) (explaining that post-*Daubert* amendment to Rule 702 was intended to incorporate, not alter, 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).

549. *See* People v. McMillan, 213 Mich. App. 134, 137 n.2 (1995).

550. *See* MICH. R. EVID. 702.

551. 470 Mich. 749 (2004).

552. *Id.* at 781.

553. *Id.*

testimony must be excluded."[554] The supreme court also admonished the trial courts to vigorously enforce this gatekeeping requirement.[555] 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."[556] The court further explained that Rule 702 requires that expert testimony be based on specialized knowledge.[557] 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."[558] In the court's view, "[u]nless the information requiring expert interpretation actually goes through the crucible of analysis by a qualified expert, it is of little assistance to the jury and therefore inadmissible under MRE 702."[559] 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.[560]

In a case decided shortly after the close of the *Survey* period, the Michigan Supreme Court considered a case involving the gatekeeping requirements under Rule 702.[561] The plaintiff in *Edry v. Adelman* 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.[562] The plaintiff alleged that the delay in diagnosis diminished her chances of long term survival.[563] In the pretrial proceedings, the parties deposed Dr. Barry Singer, plaintiff's oncology expert.[564] He testified that the plaintiff's chance of surviving for five years would have been 95% had the cancer been diagnosed when the lump was first discovered, but that the delay in diagnosis reduced her five year survival chance to 20%.[565] Dr. Singer conceded that this opinion was contradicted

554. *Id.* at 782.
555. *Id.* at 782-83.
556. *Id.* at 782.
557. *Gilbert*, 470 Mich. at 789.
558. *Id.* (emphasis added).
559. *Id.* at 790.
560. Unlike the previous few *Survey* periods, the Michigan courts issued no significant decisions addressing expert qualifications during this *Survey* period.
561. *See* Edry v. Adelman, 486 Mich. 634 (2010).
562. *Id.* at 636-37.
563. *Id.* at 637.
564. *Id.*
565. *Id.*

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.[566] In support of this theory Dr. Singer referred to textbooks and journals, but those authorities were not produced by the plaintiff.[567] The defendant's expert, Dr. Joel Appel, contradicted Dr. Singer's testimony.[568] 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,"[569] 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."[570] 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.[571] On appeal of this decision, the supreme court agreed that Dr. Singer's testimony was properly excluded under Rule 702.[572]

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."[573] With this 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."[574] 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 relied upon by Dr. Singer in his deposition testimony.[575] 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."[576] 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

566. *Id.*
567. *Edry*, 486 Mich. at 637-38.
568. *Id.* at 638.
569. *Id.*
570. *Id.*
571. *Id.* at 638-39.
572. *Id.* at 642.
573. *Edry*, 486 Mich. at 640 (citing *Daubert*, 509 U.S. at 589; Craig v. Oakwood Hosp., 471 Mich. 67, 83-84 (2004)).
574. *Id.* at 640.
575. *Id.* at 640-41.
576. *Id.* at 641.

methods, as required for admission under Rule 702.[577] 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 MRE 702."[578] 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.[579]

Justice Hathaway, joined by Justice Weaver, dissented. Her opinion focused on the separate statute governing expert testimony in personal injury cases.[580] That 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."[581] The statute then provides seven specific factors that a court must consider in making this determination.[582] Noting that the court has previously held "that all the § 2955 factors need to be examined before an expert's testimony can be precluded,"[583] Justice Hathaway concluded that the trial court had reviewed only one section 2955 factor–the existence of peer reviewed literature–and therefore had failed to properly perform its gatekeeping role of considering all the factors set forth in section 2955.[584] Further, Justice Hathaway reasoned that the trial court's exclusion of the testimony, and 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*,"[585] and that the trial court's decision essentially amounted to a weighing of the credibility of the parties' experts.[586] Justice Hathaway's dissent focused on section 2955, and did not separately consider the admissibility of Dr. Singer's opinion under Rule 702.[587] Regardless of the correctness of her application of section 2955, the majority rejected her opinion because it concluded that expert testimony in a personal injury action must satisfy

577. *Id.*
578. *Id.*
579. *Edry*, 486 Mich. at 642-44.
580. *Id.* at 645 (Hathaway, J., dissenting)
581. MICH. COMP. LAWS ANN. § 600.2955(1) (West 2000).
582. *Id.*
583. *Edry,* 486 Mich. at 650 (Hathaway, J., dissenting) (discussing Clerc v. Chippewa Cnty. War Mem'l Hosp., 477 Mich. 1067, 1068).
584. *Id.* at 645.
585. *Id.* at 654 (emphasis added).
586. *Id.*
587. *Id.* at 646-47.

both section 2955 and Rule 702, and the failure to satisfy either renders the evidence inadmissible.[588]

At the beginning of the *Survey* period, about a year before the supreme court's decision in *Edry*, the Michigan Court of Appeals reached a contrary conclusion. In *Ykimoff v. W.A. Foote Memorial Hospital*, the plaintiff brought a medical malpractice action against the defendant hospital and his treating physician, Dr. David Eggert, arising from Dr. Eggert's treatment of circulatory problems in his hip.[589] The jury found in the plaintiff's favor on his medical malpractice action, and after applying the statutory cap on noneconomic damages, the trial court entered a verdict in plaintiff's favor for slightly more than $1.4 million.[590]

Among other issues on appeal, the defendant hospital argued that the trial court had erred in permitting the plaintiff's expert to testify on the lost opportunity doctrine.[591] The defendant argued that the evidence was inadmissible under section 2955 because the expert "did not cite or rely on professional treatises or publications."[592] The court of appeals rejected this argument. The court explained that the defendant did not dispute the expert's qualifications, and reasoned that the defendant's argument "confus[ed] the admissibility of the testimony with the weight to be attributed to the expert's opinion."[593] Concluding with little analysis that the testimony of the plaintiff's expert satisfied the requirements for admission of expert testimony explained in *Surman v. Surman*,[594] the court stated that "criticism regarding the scientific or theoretical basis for Dr. Flanigan's opinion is more properly confined to challenge during cross-examination rather than attempting to invalidate his overall

588. *Id.* at 642 n.7.

589. 285 Mich. App. 80 (2009). For a discussion of the facts of the case, see *supra* notes 510-518 and accompanying text. *Ykimoff* also involves issues of witness impeachment and hearsay evidence. These aspects of the case are discussed *supra* notes 519-26 and accompanying text (impeachment) and *infra* notes 724-731 and accompanying text (hearsay).

The Michigan Supreme Court has directed the clerk of that court to schedule oral argument on whether to grant the application for leave to appeal filed in that case. *See* Ykimoff v. W.A. Foote Mem'l Hosp., 486 Mich. 851 (2010). In light of the fact that the court directed the case to be considered along with *Martin v. Ledingham*, 486 Mich. 851 (2010), a case which raised no evidentiary issues but only issues of substantive medical malpractice law, see *Martin v. Ledingham*, 282 Mich. App. 158, (2009), it does not appear that the supreme court will be addressing any evidentiary claims in deciding whether to grant leave to appeal.

590. *Ykimoff*, 285 Mich. App. at 84-85.

591. *Id.* at 100.

592. *Id.*

593. *Id.* at 101.

594. 277 Mich. App. 287, 308 (2007); *see Ykimoff*, 285 Mich. App. at 100-101.

qualification."[595] It is not clear, however, whether the court fully analyzed the issue before it. Much of the court's discussion related to the expert's qualifications.[596] For example, in the passage quoted above, the court spoke of the trial court "invalidat[ing] his overall qualification," and the court relied in large part upon a passage from *Surman* addressing qualification of an expert.[597] As the court noted, however, the defendant did not dispute Dr. Flanigan's qualifications, only the reliability of his opinion.[598] And it is clear that "the relevance and reliability inquiries . . . are separate from the threshold question of whether a witness is 'qualified as an expert by knowledge, skill, experience, training, or education' to render his or her opinions."[599] Thus, "[w]hile there is inevitably some overlap among the basic requirements–qualification, reliability, and helpfulness–they remain distinct concepts and the courts must take care not to conflate them."[600] The court's opinion in *Ykimoff* appears to conflate the concepts of qualification and reliability.

The scope of an expert's opinion is governed, in part, by MRE rule 704, which provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."[601] FRE rule 704 codifies a rejection of the "ultimate issue" rule, which prohibited a witness from giving an opinion on a precise issue which it was the province of the jury to determine.[602] In two cases during the *Survey* period, the Michigan Court of Appeals considered the scope of an expert's testimony under Rule 704. First, in *Freed v. Salas* the plaintiff decedent won a verdict for damages, with the jury finding that Waste Management and William Whitty were liable for decedent's death. [603]

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595. *Ykimoff*, 285 Mich. App. at 101.

596. *Id.* at 100-102.

597. *Id.* at 101 (quoting *Surman*, 277 Mich. App. at 309-10).

598. *Id.* at 100-101.

599. Nimely v. City of New York, 414 F.3d 381, 396 n.11 (2d Cir. 2005) (quoting FED. R. EVID. 702); *see also Edry*, 486 Mich. at 642 ("Under MRE 702, it is generally not sufficient to simply point to an expert's experience and background to argue that the expert's opinion is reliable and, therefore, admissible.").

600. United States v. Frazier, 387 F.3d 1244, 1260 (11th Cir. 2004) (citing Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd., 326 F.2d 133333, 1341 (11th Cir. 2003)).

601. MICH. R. EVID. 704.

602. *See* FED. R. EVID. 704, advisory committee note; WEISSENBERGER, *supra* note 107, § 704.2, at 406.

603. 286 Mich. App. 300 (2009). For a discussion of the facts of the case, see *supra* notes 84-97 and accompanying text. *Freed* also considered issues relating to judicial notice and evidence of settlements. These aspects of the case are discussed *supra* notes 98-103 (judicial notice) and *supra* notes 416-450 and accompanying text (settlement evidence).

Among other issues on appeal in *Freed*, Waste Management argued that the accident reconstruction experts' testimony improperly opined on the issue of negligence.[604] The court of appeals disagreed, first rejecting Waste Management's reliance on the Michigan Supreme Court's decision in *O'Dowd v. Linehan*.[605] In *O'Dowd*, the court held that an accident reconstruction expert's testimony "as to how the accident occurred based on his own investigation" was improper opinion on an ultimate issue reserved for the jury because it "undertook to fix the blame for the accident."[606] The *Freed* court found that *O'Dowd* was inapposite, because it was decided prior to the adoption of Rule 704.[607] The court reasoned that "testimony as to accident causation has become routine since the adoption of MRE 704," and thus *O'Dowd* should not "be read to bar an accident reconstructionist from testifying about what and whose actions caused the accident."[608] Thus, the trial court did not err in allowing the experts to opine on the issue of fault.[609]

The court also rejected Waste Management's argument that the testimony of Healthlink's expert that Whitty was driving negligently was improper.[610] In support of this argument, Waste Management relied on *Koenig v. South Haven*,[611] a case in which the court of appeals upheld the trial court's exclusion of expert testimony that the defendants' actions constituted gross negligence under the governmental immunity statute.[612] The *Freed* court found *Koenig* distinguishable, reasoning that unlike in *Koenig* Healthlink's expert made only a single statement that Whitty was negligent because he was driving fifty-one miles per hour while the speed limit was thirty-five miles per hour.[613] Further, the court concluded that even if this testimony was inadmissible, the error was harmless because "[t]he statement that speeding is unreasonable or negligent is so undeniably true that the jury did not need the expert's testimony to reach that conclusion; it would have reached the same conclusion anyway."[614]

Judge Talbot dissented from this portion of the court's opinion. He agreed that "[o]pinion evidence may embrace ultimate issues of fact,

604. *Freed*, 286 Mich. App. at 337.
605. 385 Mich. 491 (1971).
606. *Id.* at 513.
607. *Freed*, 286 Mich. App. at 337.
608. *Id.* at 338.
609. *Id.*
610. *Id.*
611. 221 Mich. App. 711 (1997), *rev'd on other grounds*, 460 Mich. 667 (1999).
612. *Id.* at 726-27.
613. *Freed*, 286 Mich. App. at 338-39.
614. *Id.* at 339.

such as, in this instance, the speed of the garbage truck before impact."[615] In his view, however, the trial court went too far in allowing the expert to opine that Whitty and Salas were negligent to suggest an apportionment of fault.[616] Such testimony, Judge Talbot reasoned, amounted to an improper opinion regarding the law, and it is well established that "'the opinion of an expert may not extend to the creation of new legal definitions and standards and to legal conclusions.'"[617] Judge Talbot concluded that "by permitting the experts to opine that Waste Management's driver was negligent and to suggest an apportionment of fault, the trial court effectively removed the determination of negligence from the jury . . . ."[618]

The court of appeals considered a similar issue in *Alpha Capital Management, Inc. v. Rentenbach.*[619] A jury returned a verdict in *Alpha Capital Management* in favor of the defendants.[620] Among other issues on appeal, Alpha Capital Management (ACM) argued that the trial court erred in allowing the defendants' expert to opine on legal conclusions and matters of contract interpretation.[621] The court of appeals rejected this claim, explaining that both parties' experts agreed on the ethical standards for lawyers applicable in the case.[622] The disagreement centered only on how those principles applied to the facts at hand.[623] The court concluded that the testimony of both experts was not improper, but rather "properly brought their specialized legal expertise to bear on the instant facts."[624] Further, the court concluded that ACM had waived any objection to the defense expert's testimony regarding the interpretation of the parties' stock purchase agreement because ACM elicited from its own expert, over the defendants' objection, contract interpretation testimony.[625]

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615. *Id.* at 346.

616. *Id.* at 348.

617. *Id.* (quoting Carson, Fisher, Potts & Hyman v. Hyman, 220 Mich. App. 116, 122 (1996)).

618. *Id.* at 34.

619. 287 Mich. App. 589 (2010). For a discussion of the facts of the case, see *supra* 451-65 and accompanying text. *Alpha Capital Mgmt.* also addressed issues of settlement evidence and examination of witnesses. These aspects of the case are discussed *supra* notes 466-74 and accompanying text (settlement evidence) and *supra* notes 500-07 and accompany text (examination).

620. *Alpha Capital Mgmt.*, 287 Mich. App. at 598.

621. *Id.* at 623.

622. *Id.* at 623-24.

623. *Id.* at 624.

624. *Id.*

625. *Id.*

B. Treatises Relied Upon by Experts Under Rule 707

Rule 707 provides that "statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony" are admissible "for impeachment purposes only" when "called to the attention of an expert witness upon cross-examination."[626] The rule further provides that "[i]f admitted, the statements may be read into evidence but may not be received as exhibits."[627] The Michigan Court of Appeals considered the operation of Rule 707 in *Lockridge v. Oakwood Hospital*.[628] In that case, the plaintiff brought a medical malpractice action against the defendants arising from the death of the plaintiff's fourteen-year-old son.[629] The plaintiff's decedent collapsed with chest pain and difficulty breathing as he walked to the school bus stop.[630] The plaintiff took him to the defendant hospital, where the emergency room physician diagnosed the plaintiff as suffering from anxiety and hyperventilation.[631] The boy died in his sleep that evening from an aortic dissection.[632] The plaintiff filed suit, alleging that the treating physician breached the standard of care by failing to order a chest x-ray.[633] At trial, the plaintiff's expert testified that such an x-ray likely would have revealed the existence of an abnormality in the aorta, leading to further testing which would have lead

626. MICH. R. EVID. 707.

627. *Id.* Rule 707 is modeled on the learned treatise exception to the hearsay rule found in the Federal Rules of Evidence. However, it differs from the federal rule in two respects. First, under the federal rule, statements from a learned treatise may be introduced on direct examination when relied upon by the expert. Second, unlike the Michigan rule, the federal rule does not limit introduction to impeachment purposes only. *Compare* MICH. R. EVID. 707, *with* FED. R. EVID. 803(18). *See generally* 2 JAMES K. ROBINSON, ET AL., MICHIGAN COURT RULES PRACTICE, EVIDENCE, § 707.1 (3d ed.). Unlike Federal Rule 803(18), Michigan Rule 707:

[R]epresents the traditional view and stems from concerns about the reliability of hearsay printed material, the possible confusion of the trier of fact from exposure to sophisticated, technical texts, concerns about taking portions of treatises out of context, and a judgment that expert opinion is best adduced through testimony, subject to cross-examination, rather than through production of technical reports.

Id.

628. 285 Mich. App. 678 (2009).

629. *Id.* at 680.

630. *Id.*

631. *Id.*

632. *Id.* at 681.

633. *Id.* at 681.

to a proper diagnosis of the aortic dissection.[634] The jury found in favor of the plaintiff, awarding $300,000 in damages.[635]

Among other claims on appeal, the defendants argued the trial court erred by allowing the plaintiff's counsel to read from a medical treatise in violation of Rule 707.[636] The court of appeals agreed that plaintiff's counsel had violated Rule 707, but found the error harmless.[637] The court explained that defense counsel had raised only a single objection at trial to the testimony of the plaintiff's expert regarding the medical text–namely, to the expert's testimony that, in his opinion, the treatise was authoritative.[638] The court of appeals found that this objection was meritless, because "[Rule] 707 expressly contemplates that a learned treatise may be 'established as a reliable authority by the testimony of admission of *the witness or by other expert testimony* or by judicial notice . . . .'"[639] Noting that the defendants had raised no other objection, the court reviewed the matter for plain error.[640] The court concluded that plaintiff's counsel had violated Rule 707 by reading portions of the treatise and presenting it to the jury as substantive evidence, but that the error was harmless because this violation of Rule 707 was relatively isolated, and because other properly admitted evidence, notably the testimony of the plaintiff's other expert, presented the same facts as set forth in the treatise.[641]

C. Expert Witness Evidence at Summary Disposition Stage

In an important procedural case decided during the *Survey* period, the Michigan Court of Appeals clarified the application of Rule 702 at the summary disposition stage of a civil case.[642] In *Dextrom v. Wexford County*, the plaintiff homeowners brought suit against Wexford County and various county departments alleging that they were damaged by the seepage of contaminants into their groundwater from the Wexford County Landfill.[643] The defendants moved for summary disposition, which the trial court denied, finding that genuine issues of fact remained "concerning whether the operation [of the landfill] fell within the

634. *Lockridge*, 285 Mich. App. at 681.
635. *Id.*
636. *Id.* at 689.
637. *Id.* at 689-90.
638. *Id.* at 690.
639. *Id.* at 691 (quoting MICH. R. EVID. 707) (emphasis and alteration added).
640. *Lockridge*, 285 Mich. App. at 691.
641. *Id.* at 691 n.4.
642. *See* Dextrom v. Wexford Cnty., 287 Mich. App. 406 (2010).
643. *Id.* at 410.

proprietary function exception to governmental immunity."[644] As part of their argument against summary disposition, the plaintiffs argued that even if the operation of the landfill was protected by governmental immunity in the 1970s and 1980s, it was no longer protected because it now came within the proprietary function exception.[645] Further, the plaintiffs argued that the defendants could not show that the contamination occurred during the earlier decades in which the landfill operation was covered by governmental immunity.[646] In support of this latter claim, the plaintiffs submitted the affidavit of an expert, Christopher Grobbel, "who opined that the contamination was still flowing from the landfill at the present time."[647] At oral argument on the parties' motions for summary disposition, the defendants argued that the affidavit was not admissible under Rule 702 because it did not list Grobbel's qualifications or explain the methodology that he employed in formulating his opinion.[648] The trial court rejected this argument, finding that the parties' competing experts raised a genuine issue of material fact with respect to the time of the contamination.[649]

On appeal the defendants argued, *inter alia*, "that Grobbel's affidavit should not have been considered because the reliability standards required by MRE 702 were not satisfied."[650] The court of appeals rejected this claim.[651] The court reasoned that the rule governing summary disposition does not require that the evidence submitted be admissible in form; otherwise affidavits, which are generally not admissible at trial, could not be considered on a motion for summary disposition.[652] Rather, all that is required is that the content of the affidavit be admissible at trial.[653] Further, the court rules require only that an affidavit be made on personal knowledge, state the admissible facts, and show that the affiant can testify to those facts at trial based on personal knowledge.[654] Based on these rules, the court of appeals found "no requirement that an expert's qualifications and methods be incorporated into an affidavit submitted in support of, or opposition to, a

644. *Id.*
645. *Id.* at 413.
646. *Id.*
647. *Id.*
648. *Dextrom*, 287 Mich. App. at 414.
649. *Id.* at 414-15.
650. *Id.* at 426.
651. *Id.* at 428.
652. *Id.*
653. *Id.* at 427 (discussing Maiden v. Rozwood, 461 Mich. 109, 124 n. 6 (1999); MICH. CT. R. 2.116(G)(6)).
654. *Dextrom*, 287 Mich. App. at 427 (discussing MICH. CT. R. 2.119(B)(1)).

motion for summary disposition."[655] All that is required is that the substantive content of the expert's affidavit be admissible.[656] The requirements of Rule 702, the court reasoned, "are foundational to the admission of the expert's testimony at trial,"[657] and thus whether Grobbel could "ultimately meet the MRE 702 requirements to be sworn as a witness [was] a matter reserved for trial."[658] Because the defendants did not challenge the contents of Grobbel's affidavit, it was properly considered by the trial court in denying summary disposition.[659] The court of appeals's decision, while superficially consistent with the court rules governing summary disposition, appears to be contrary to the practice in the federal courts.[660]

D. Lay Opinion Testimony

At common law, under the "opinion testimony" rule, it was generally held that lay witnesses were not permitted to offer opinions in evidence.[661] This rule derived from two legal developments beginning in the 17th century. First, "the rule requiring personal knowledge was once sometimes phrased as a rule against opinion testimony, and this phrasing of the personal knowledge requirement led to the notion that witnesses must testify to facts."[662] Second, the rules relating to expert testimony evolved to prohibit such testimony unless it was necessary for the jury.[663] "From these developments came the idea that opinion testimony by law witnesses was not evidence at all, and that lay witnesses should give only

655. *Id.* at 428.
656. *Id.*
657. *Id.*
658. *Id.*
659. *Id.*
660. *See* Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 311 (2d Cir. 2008) ("Under *Daubert*, the district court functions as the gatekeeper for expert testimony, whether proffered at trial or in connection with a motion for summary judgment." (quoting Raskin v. Wyatt Co., 125 F.3d 55, 66 (2d Cir. 1997) (internal citations and quotation omitted)); Certain Underwriters at Lloyd's, London v. Inlet Fisheries, Inc., 389 F. Supp.2d 1145, 1152 (D. Alaska 2005) ("When expert testimony is offered, the trial judge serves as 'gatekeeper' to ensure that it meets the requirements of Rule 702, including determining admissibility with respect to a motion for summary judgment." (citations and footnotes omitted)). *See generally* General Elec. Co. v. Joiner, 522 U.S. 136 (1997) (reviewing trial court's exclusion of expert affidavit at summary judgment stage).
661. *See* 3 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 342, at 578 (2d ed. 1994).
662. *Id.*
663. *Id.*

facts, leaving the jury to say what they mean."[664] This flat prohibition was abrogated by the adoption of Rule 701, which provides:

> If the witness is not testifying as an expert, the witness' [sic] testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' [sic] testimony or the determination of a fact in issue.[665]

Although not discussing Rule 701 specifically, the court of appeals considered the admissibility of lay opinion testimony in *Genna v. Jackson*.[666] Following a jury verdict for the plaintiff, the defendant argued that the trial court had erred in admitting Mario Genna's testimony concerning the value of the contents of his condominium, because Genna lacked the necessary expertise to give this testimony.[667] The court of appeals rejected this claim.[668]

The defendants argued that the plaintiff was not qualified to opine on the value of the destroyed property because he was not a mold specialist and therefore could not testify as to what items may have been salvageable.[669] The court of appeals rejected this argument, noting that a mold expert had testified that any porous item was not salvageable and that the plaintiffs' son had testified that most of the items in the condominium had to be thrown out.[670] The court reasoned that Genna "would have been aware of the value of those items, because they were his belongings and he knew how much he had paid for them."[671] Because the opinion was within the competence of the witness and was

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664. *Id.*; *see also* 7 WIGMORE, *supra* note 3, § 1917 (James H. Chadbourne rev. ed. 1978) (discussing historical development of the opinion testimony rule); WEISSENBERGER, *supra* note 107, § 701.2 (discussing same).

665. MICH. R. EVID. 701. Professors Mueller and Kirkpatrick assert that this rule is "[s]o sensible . . . that it is hard to believe that the law was ever different." MUELLER & KIRKPATRICK, *supra* note 661, § 342, at 578. This rule mirrors Federal Rule 701 as originally enacted. *See id.*, 1978 Note. In 2000, Federal Rule 701 was amended to add a third condition for the admissibility of lay opinion testimony, namely that it be "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." FED. R. EVID. 701. This amendment assures that the rigorous rules regarding expert testimony will not be evaded through Rule 701. *See* WEISSENBERGER, *supra* note 107, § 701.5, at 357-58.

666. 286 Mich. App. 413 (2009), *leave to appeal denied*, 486 Mich. 1043 (2010). For a discussion of the facts of the case, see *supra* notes *530*-533and accompanying text. *Genna* also discussed refreshing a witness's recollection. *See supra* notes 534-40 and accompanying text.

667. *Id.* at 423.

668. *Id.* at 424.

669. *Id.*

670. *Id.*

671. *Id.*

corroborated by other evidence, the trial court did not err in allowing Genna to testify as the value of the items destroyed by the mold.[672]

VIII. HEARSAY

"The theory of the hearsay rule is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of cross-examination."[673] 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."[674] 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."[675] Rule 801 also defines two categories of statements as "non-hearsay" notwithstanding the Rule's definition of hearsay: prior statements of a witness and admissions of a party-opponent.[676] Rule 802 provides simply that "[h]earsay is not admissible except as provided by these rules."[677] Rules 803, 803A, and 804 provide exceptions to the hearsay rules.[678]

A. Hearsay and Non-Hearsay

As noted above, hearsay generally is an out-of-court statement offered to prove the truth of the matter asserted.[679] Thus, a statement may be non-hearsay if it is offered for a reason other than to prove the truth of the matter asserted in the statement.[680] Further, notwithstanding the general definition of hearsay, certain statements are considered

672. *Genna*, 286 Mich. App. at 424.

673. 5 WIGMORE, *supra* note 3, § 1362, at 3 (James H. Chadbourne rev. ed. 1974).

674. *Id.* § 1364, at 28.

675. 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).

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

677. MICH. R. EVID. 802.

678. *See* MICH. R. EVID. 803; MICH. R. EVID. 803A; MICH. R. EVID. 804. From the beginning of section VIII. Hearsay through this footnote is an excerpt from M. Bryan Schneider, *Evidence, 2008 Ann. Survey of Mich. Law*, 54 WAYNE L. REV. 229 (2008).

679. *See supra* note 675.

680. *See supra* note 675.

nonhearsay by operation of Rule 801.[681] The Michigan Court of Appeals issued three decisions addressing these issues during the *Survey* period.

In *Campbell v. Department of Human Services*,[682] the court of appeals considered the admissibility of evidence in a case under the Elliott-Larsen Civil Rights Act (ELCRA).[683] The plaintiff in *Campbell* brought a claim of gender discrimination based on her employer's promotion of a male coworker instead of her.[684] The defendant moved for summary disposition, arguing, *inter alia*, that the plaintiff presented no facts of gender discrimination occurring within the three-year limitation period.[685] A subsidiary question raised by the motion was whether the plaintiff could rely on evidence of acts occurring outside the limitations period to support her claim.[686] The trial court denied the motion, concluding that it "had discretion to consider acts that occurred outside the limitations period as background evidence in order to establish a pattern of discrimination."[687] The case proceeded to trial, and the jury found in favor of the plaintiff.[688]

Among other issues on appeal, the defendant argued that the trial court erred in admitting medical documents through the plaintiff's testimony, because those documents constituted hearsay.[689] The court rejected the defendant's argument. First, the court found that the admission of one doctor's note through the plaintiff's testimony was not error because the note was admitted solely to establish notice, and was not presented to establish the truth of the matter asserted in the note.[690] Thus, the note was not hearsay under Rule 801.[691] With respect to a second note, offered to show that the plaintiff had been diagnosed with anxiety and depression disabling her from work, and a prescription offered to show that the plaintiff had been prescribed an antidepressant, the court concluded that even if these documents constituted inadmissible hearsay, any error in their admission was harmless.[692] The court reasoned that the documents were cumulative of the plaintiff's own

681. MICH. R. EVID. 801.

682. 286 Mich. App. 230 (2009). *Campbell* also considered an issue of relevance. This aspect of the case is discussed *supra* notes 114-35 and accompanying text.

683. *See* MICH. COMP. LAWS ANN. §§ 37.2101-.2804 (West 2001 & Supp. 2010).

684. *Campbell*, 286 Mich. App. at 232.

685. *Id.* at 234.

686. *Id.* at 232-33.

687. *Id.* at 234.

688. *Id.*

689. *Id.* at 245.

690. *Campbell*, 286 Mich. App. at 245.

691. *Id.*

692. *Id.* at 245-46.

testimony, and that her testimony concerning her subjective feelings by itself supported an award of noneconomic damages.[693]

In *People v. Mesik*, the defendant was convicted of first-degree murder arising from the death of Darrell McDonald. [694] The victim's body was discovered bound and gagged in his apartment, with multiple stab wounds and lacerations.[695] On appeal the defendant argued, *inter alia*, that the prosecutor committed misconduct by referring to hearsay statements in his questioning of the defendant.[696] Specifically, during cross-examination the prosecutor questioned the defendant about testimony given by a witness at the defendant's preliminary examination, and statements within that testimony made to the witness by the defendant's accomplice.[697] Although several of the prosecutor's statements regarding the testimony of the witness were inaccurate, the court rejected the defendant's argument that the prosecutor's questions amounted to the introduction of inadmissible hearsay.[698]

First, the court of appeals reasoned that the prosecutor's question, which merely restated testimony given by the witness at trial, was not introduced to prove the truth of the matter asserted.[699] Rather, the prosecutor's question incorporating the witness' testimony that the defendant and his accomplice had killed the victim was offered to rebut the defendant's assertion that the witness was biased against the defendant and in favor of the accomplice.[700] Because the evidence was not offered to show that defendant in fact killed the victim, but to rebut the defendant's claim that the witness was biased against him, it was not improper hearsay.[701]

Further, the court of appeals concluded that the prosecutor's questions did not amount to "hearsay because they are not even evidence."[702] The court explained that the defendant did not confirm the prosecutor's statements regarding the witness's testimony, and the prosecutor's questions themselves did not constitute evidence, as the jury

693. *Id.* at 246.

694. 285 Mich. App. 535, 537-38 (2009), *leave to appeal denied*, 485 Mich. 1127 (2010). *Mesik* also involved an issue of relevance. This aspect of the case is discussed *supra* notes 152-160 and accompanying text.

695. *Mesik*, 285 Mich. App. at 537.

696. *Id.* at 538.

697. *Id.* at 538-39.

698. *Id.* at 540.

699. *Id.*

700. *Id.*

701. *Mesik*, 285 Mich. App. at 540.

702. *Id.*

was properly instructed.[703] Because "the prosecutor's questions are not evidence [they] therefore cannot be hearsay."[704]

Finally, in *People v. Smelley*,[705] the defendant was convicted of second degree murder, assault, and firearms offenses arising from the shooting of a driver of a vehicle that carried a surviving passenger. [706] The defendant raised a number of evidentiary and other claims on appeal including, as relevant here, a claim that the trial court had erred in admitting a statement of identification as non hearsay under Rule 801(d)(1)(C).[707] That rule defines as "not hearsay" a statement "of identification of a person made after perceiving the person" that "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement."[708] In *Smelley*, the trial court permitted the victim's sister to testify that the person riding in the car with the victim, Ramon McLeod, told her that the defendant was the shooter.[709] The court of appeals agreed with the defendant that the trial court had erred in admitting this testimony.[710] The court reasoned that McLeod subsequently testified that he did not, in fact, see the defendant shoot the victim, and because McLeod denied making the statement, the testimony of the victim's sister regarding the statement was, in the court's view, not properly admissible under Rule 801(d)(1)(C).[711]

The court's conclusion on this issue represents a misapplication of Rule 801(d)(1)(C). As the court of appeals noted but did not resolve, there is room to debate whether the statement made by McLeod to the victim's sister was truly a statement of identification under Rule 801(d)(1)(C).[712] This issue aside, however, the basis upon which the court of appeals rested its decision was incorrect. The mere fact that a declarant denies making a previous statement of identification does not render inadmissible other evidence that he made such a statement.[713] Rule 801(d)(1)(C) requires only that the declarant of the statement be

703. *Id.* at 540-41.

704. *Id.* at 541.

705. 285 Mich. App. 314 (2009) (per curiam), *rev'd in part*, 485 Mich. 1023 (2010). *Smelley* also involved issues of relevance, other acts evidence, and the state of mind exception to the hearsay rule. These aspects of the case are discussed *supra* notes 189-206 and accompanying text (relevance), *supra* notes 315-23 (other acts evidence), and *infra* notes 734-54 and accompanying text (state of mind exception to the hearsay rule).

706. *Smelley*, 285 Mich. App. at 315-16.

707. *See id.* at 328 (citing MICH. R. EVID. 801(d)(1)(C)).

708. *Id.*

709. *Smelley*, 285 Mich. App. at 328-29.

710. *Id.* at 330.

711. *Id.* at 329-30.

712. *Id.* at 330.

713. *See* MICH. R. EVID. 801(d)(1)(C).

subject to cross-examination concerning the statement; nothing in the rule requires that the declarant affirm that he made the statement.[714] On the contrary, the Michigan Supreme Court has held that "statements of identification are not limited by whether the out-of-court declaration is denied or affirmed at trial."[715] Rather, "[a]s long as the statement is one of identification, Rule 801(d)(1)(C) permits the substantive use of any prior statement of identification by a witness as nonhearsay, provided the witness is available for cross-examination."[716]

B. Exceptions to the Hearsay Rule–Availability of Declarant Immaterial (Rule 803)

Rule 803 provides twenty-three distinct exceptions to the hearsay rule for various categories of statements.[717] These rules are applicable regardless of whether or not the declarant is otherwise available to testify at trial.[718]

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.[719]

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

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714. *Id.*

715. People v. Malone, 445 Mich. 369, 377 (1994).

716. *Id.*; *see also* 30B WRIGHT & GRAHAM, *supra* note 112, § 7013.

717. *See* MICH. R. EVID. 803(1)—(23).

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

719. 5 WIGMORE, *supra* note 673, § 1422, at 253. From the beginning of this subsection through this footnote is an excerpt from M. Bryan Schneider, *Evidence, 2008 Ann. Survey of Mich. Law*, 54 WAYNE L. REV. 229 (2008).

1. Present Sense Impression

Under Rule 803(1), an otherwise hearsay statement is not excluded by the hearsay rule if it is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."[720] This rule is based on "the assumption that statements of perception, describing the event and uttered in close temporal proximity to the event, bear a high degree of trustworthiness."[721] Because the statement is made contemporaneously, "there is little danger of a lapse in memory" and "there is little time for calculated misstatement."[722] To be admissible under Rule 803(1), three criteria must be met: "(1) the statement must provide an explanation or description of the perceived event, (2) the declarant must personally perceive the event, and (3) the explanation or description must be substantially contemporaneous with the event."[723]

In *Ykimoff v. W.A. Foote Memorial Hospital*,[724] a jury found in favor of plaintiff on his medical malpractice action, and after applying the statutory cap on noneconomic damages, the trial court entered a verdict in plaintiff's favor for slightly more than $1.4 million.[725]

Among other issues on appeal, the plaintiff argued on cross-appeal from the trial court's grant of summary disposition to Dr. Eggert that the trial court erred in failing "to consider testimony by various members of plaintiff's family that the nursing staff had indicated that Dr. Eggert had been unresponsive to their calls and pages, in violation of the standard of care."[726] The court of appeals rejected this claim. The court noted that the

720. MICH. R. EVID. 803(1).

721. WEISSENBERGER, *supra* note 107, § 803.2, at 481.

722. *Id.* at 482.

723. People v. Hendrickson, 459 Mich. 229, 236 (1998) (quotation omitted); *see also* WEISSENBERGER, *supra* note 107, §§ 803.3-.5.

724. 285 Mich. App. 80 (2009). For a discussion of the facts of the case, see *supra* notes 510-518 and accompanying text. *Ykimoff* also involves issues of witness impeachment and expert testimony. These aspects of the case are discussed *supra* notes 519-26 and accompanying text (impeachment) and *supra* notes 591-600 and accompanying text (expert testimony).

The Michigan Supreme Court has directed the clerk of that court to schedule oral argument on whether to grant the application for leave to appeal filed in that case. *See* Ykimoff v. W.A. Foote Mem'l Hosp., 486 Mich. 851 (2010). In light of the fact that the court directed the case to be considered along with *Martin v. Ledingham*, 486 Mich. 851 (2010), a case which raised no evidentiary issues but only issues of substantive medical malpractice law, *see Martin v. Ledingham*, 282 Mich. App. 158 (2009), it does not appear that the supreme court will be addressing any evidentiary claims in deciding whether to grant leave to appeal.

725. *Ykimoff*, 285 Mich. App. at 84-85.

726. *Id.* at 103.

out-of-court statements by the nurses, offered to show that Dr. Eggert had failed to respond to their pages, "unquestionably compromised hearsay."[727] The court then considered, and rejected, the plaintiff's argument that these statements were admissible as present sense impressions under Rule 803(1).[728] The court found that the three requirements for the admission of a present sense impression were not satisfied, because it was "not clear from the record that the alleged statements by the nursing staff were substantially contemporaneous with the purported difficulties encountered in contacting Dr. Eggert."[729] In particular, at least some of the comments were not made until the following day, and these statements plainly failed to exhibit a "temporal proximity with the alleged events."[730] Finally, the court explained that the statements were not admissible under present sense impression because there was no corroborating evidence establishing their reliability.[731]

2. State of Mind

The state of mind exception to the hearsay rule provides that a statement is not hearsay if it is "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition . . . ."[732] "The underlying rationale for this hearsay exception is that statements concerning the declarant's then existing physical or mental condition are trustworthy because their spontaneity makes them at least as, if not more, reliable than testimony at trial on the same subject."[733]

In *People v. Smelley*[734] the defendant was convicted of second degree murder, assault, and firearms offenses arising from the shooting of two

727. *Id.* at 105.

728. *Id.* at 105-06.

729. *Id.*

730. *Id.* at 106.

731. *Ykimoff*, 285 Mich. App. at 106. The plaintiff also argued that the statement was admissible under the state of mind exception to the hearsay rule. *Id.*; *see* MICH. R. EVID. 803(3). The court of appeals did not address the merits of this claim, finding that it had been waived by the plaintiff's failure to properly present the claim in the plaintiff's appellate brief. *Ykimoff*, 285 Mich. App. at 106-07.

732. MICH. R. EVID. 803(3). The rule explicitly excludes from the state of mind exception "a statement of memory or belief to prove the fact remembered or believed . . . ." *Id.*

733. WEISSENBERGER, *supra* note 107, § 803.12, at 491.

734. 285 Mich. App. 314 (2009) (per curiam), *rev'd in part on other grounds*, 485 Mich. 1023, (2010). *Smelley* also involved issues of relevance, other acts evidence, and non-hearsay evidence. These aspects of the case are discussed *supra* notes 189-206 and

victims while they were driving in a car.[735] The defendant raised a number of evidentiary and other claims on appeal including, as relevant here, a claim that the trial court erred in admitting under the state of mind exception several statements made by the murdered victim.[736] During trial the prosecutor elicited from witnesses, over the defendant's objections, a number of statements indicating that the victim had gotten into an altercation with the defendant, that the defendant was trying to kill him, and that he was scared of the defendant.[737] The court of appeals agreed with the defendant that these statements were improperly admitted at trial.[738]

The court began by analyzing, and finding inapposite and unhelpful, the Michigan Supreme Court's decision in *People v. Fisher*,[739] and the Michigan Court of Appeals's decision in *People v. Ortiz*.[740] In *Fisher*, the supreme court held that a victim's statements to others regarding her plans to travel with her lover and to divorce the defendant, were admissible as showing the victim's then-existing state of mind.[741] The *Fisher* court also noted, however, that the victim's "statements that expressed fear of the defendant, or that depicted significant misconduct of the defendant tending to show him to be a 'bad person,' were inadmissible."[742] In *Ortiz*, the court of appeals concluded that statements of the victim expressing fear of the defendant and indicating that the defendant had stalked her, assaulted her, and threatened to kill her were admissible.[743] The *Smelley* court, "dismayed by the lack of relevant background facts set forth in these cases,"[744] found them unhelpful in resolving the hearsay question presented, and instead turned to the court's decision in *People v. Moorer*.[745] In *Moorer*, the court held that hearsay statements of the victim—that the defendant had a verbal confrontation with the victim and that the defendant wanted or was trying to kill him—were similar to the evidence at issue in *Smelley*, and was improperly admitted under the state of mind exception.[746] The

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accompanying text (relevance); *supra* notes 315-23 (other acts evidence); and *supra* notes 705-16 and accompanying text (non-hearsay).

735. *Smelley*, 285 Mich. App. at 315-16.

736. *Id.* at 316.

737. *Id.* at 317-19.

738. *Id.* at 325-326.

739. 449 Mich. 441 (1995).

740. 249 Mich. App. 297 (2002).

741. *See Smelley*, 285 Mich. App. at 321-23 (discussing *Fisher*, 449 Mich. at 450-51).

742. *See id.* at 323 (quoting *Fisher*, 449 Mich. at 454).

743. *See id.* (discussing *Ortiz*, 249 Mich. App. at 307-10).

744. *Id.*

745. 262 Mich. App. 64 (2004).

746. *Id.* at 73-4.

Moorer court held that the statements did not go to state of mind, but rather were statements relating to past events which were excluded from the Rule 803(3) exception.[747] The *Moorer* court distinguished *Fisher*, reasoning that unlike the statements at issue in *Moorer*, "[t]he statements in *Fisher* . . . described the intentions and plans of the declarant, not the past or presumed future actions of the defendant."[748]

With this background in mind, the *Smelley* court concluded that the hearsay evidence was improperly admitted under the state of mind exception.[749] The court explained that the victim's state of mind was not at issue in the case, and thus the evidence was used not to show the victim's state of mind, but "to demonstrate the truth of the facts asserted in [the victim's] alleged statements,"[750] namely that he and the victim had in fact fought, and that the defendant was in fact trying to kill him.[751] Thus, the victim's statements were not statements going to his state of mind allowed by Rule 803(3), but "were statements of memory or belief that were offered to prove the facts remembered or believed,"[752] which are explicitly excluded from the Rule 803(3) exception.[753] Accordingly, the trial court erred in admitting this testimony.[754]

3. Statements for the Purpose of Medical Treatment

Rule 803(4) excludes from the operation of the hearsay rule out of court statements "made for [the] purpose of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, . . . insofar as reasonably necessary to such diagnosis and treatment."[755] The Michigan Court of Appeals considered this exception in *People v. Garland*.[756] In that case, the defendant was convicted of home invasion and various counts of criminal sexual conduct.[757] The facts at trial showed that the defendant,

747. *See Smelley*, 285 Mich. App. at 324-25 (discussing *Moorer*, 262 Mich. App. at 73).
748. *See id.* at 325 (quoting *Moorer*, 262 Mich. App. at 73).
749. *Id.* at 326.
750. *Id.*
751. *Id.*
752. *Id.*
753. *Smelley*, 285 Mich. App. at 326.
754. *Id.* at 327.
755. MICH. R. EVID. 803(4).
756. 286 Mich. App. 1 (2009), *leave to appeal denied*, 486 Mich. 996 (2010). *Garland* also addressed a Confrontation Clause issue. This aspect of the case is discussed *infra* notes 810-20 and accompanying text.
757. *Garland*, 286 Mich. App. at 3-4.

the victim, and two other women were out drinking at a bar.[758] The victim became dizzy and left, returning to her apartment, where she fell asleep.[759] The victim later awoke, finding the defendant having contact with her vaginal area.[760] On appeal the defendant argued, *inter alia*, that the trial court erred in admitting a nurse's testimony concerning statements made to her by the victim.[761] The court of appeals rejected this claim.[762]

Explaining that Rule 803(4) is premised on "(1) the reasonable necessity of the statement to the diagnosis and treatment of the patient, and (2) the declarant's self-interested motivation to speak the truth to treating physicians in order to receive proper medical care,"[763] the court found that the victim's statements to the nurse were admissible.[764] The court reasoned that the victim went to the hospital for treatment on the morning immediately following the sexual assault, the nurse was the first person with whom the victim had contact, and the nurse's examination preceded and was separate from the police investigation of the assault.[765] Further, the nurse testified as to the importance of obtaining an accurate medical history to provide proper treatment.[766] Thus, "[t]he victim's statements to the nurse were reasonably necessary for her treatment and diagnosis."[767] Because "the victim had a self-interested motivation to speak the truth to the nurse in order to obtain medical treatment[,]"[768] the statements were properly admitted under Rule 803(4).

C. 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,[769] and trial court decisions regarding the manner

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758. *Id.* at 3.
759. *Id.*
760. *Id.* at 3-4.
761. *Id.* at 8.
762. *Id.* at 10.
763. *Garland*, 286 Mich. App. at 9 (citing People v. Meeboer, 439 Mich. 310 (1992)); *see also* WEISSENBERGER, *supra* note 107, § 803.18, at 500.
764. *Garland*, 286 Mich. App. at 9-10.
765. *Id.* at 9.
766. *Id.*
767. *Id.*
768. *Id.*
769. *See* WEISSENBERGER, *supra* note 107 at § 803.36; *see generally* 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

of cross-examination. Although a full treatment of the Confrontation Clause is more appropriately suited to another article in this *Survey* period, 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.[770]

In *Ohio v. Roberts*,[771] 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.[772] As to the reliability element of this test, the Court also held that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception."[773] 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."[774] The Court abrogated this rule in *Crawford v. Washington*, establishing a dichotomy between "testimonial" and "nontestimonial" hearsay.[775] 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."[776] Explaining that *Roberts* departed from this proper understanding of the Confrontation Clause,[777] the Court held

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the states through the Due Process Clause of the Fourteenth Amendment. *See* Pointer v. Texas, 380 U.S. 400, 406 (1965).

770. Because these matters are treated elsewhere in this *Survey*, the discussion below primarily does nothing more than to note the holdings of the courts' decisions, without a full discussion of the facts of the case or the reasoning of the deciding court. Apart from the cases discussed below, in *People v. Breeding*, 284 Mich. App. 471, *leave to appeal denied*, 485 Mich. 917 (2009), the court held that, although there is a limited due process right to confront witnesses in a probation revocation hearing, the Confrontation Clause itself does not apply to such proceedings and thus *Crawford* does not bar the admission of testimonial hearsay in probation revocation hearings. *Breeding*, 284 Mich. App. at 479-82. *Breeding* did not involve any discussion of the interplay between hearsay evidence and the Confrontation Clause, and thus requires no further discussion.

771. 448 U.S. 56 (1980).

772. *Id.* at 65-66. *But see id.* at 65 n.7 (noting unavailability need not always be demonstrated if, for example, the utility of confrontation is remote).

773. *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).

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

775. 541 U.S. 36, 68 (2004).

776. *Id.* at 59.

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

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."[778]

The Supreme Court further explicated the testimonial/non-testimonial distinction in *Davis v. Washington*.[779] 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[.]"[780] Rather, the Court found it sufficient to simply hold the following:

> 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 interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[781]

Further, the *Davis* Court explicitly addressed the question of "whether the Confrontation Clause applies only to testimonial hearsay,"[782] 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,[783] 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."[784] Thus, where nontestimonial hearsay is at issue, the Confrontation Clause is not implicated at all, and need not be considered.[785]

During the *Survey* period, the United States Supreme Court and the Michigan courts continued to develop the law under *Crawford*.

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778. *Id.* at 68-9. From the beginning of this subsection through this footnote is an excerpt from M. Bryan Schneider, *Evidence, 2008 Ann. Survey of Mich. Law*, 54 WAYNE L. REV. 229 (2008).

779. 547 U.S. 813 (2006).

780. *Id.* at 822.

781. *Id.*

782. *Id.* at 823.

783. *See id.* (discussing *Crawford*, 541 U.S. at 51).

784. *Id.*

785. *See* Hodges v. Commonwealth, 634 S.E.2d 680, 689 (Va. 2006).

In *Melendez-Diaz v. Massachusetts*,[786] 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.[787] The Court reasoned that the analyst certificates were the functional equivalent of affidavits and were prepared solely for the purpose of providing evidence against the defendant, and thus they were testimonial under a straightforward application of *Crawford*.[788]

The Michigan Court of Appeals distinguished *Melendez-Diaz* in *People v. Lewis*.[789] In that murder case, the trial court admitted an autopsy report that was prepared by two non-testifying medical examiners.[790] The report was admitted through the testimony of a third medical examiner.[791] The court distinguished *Melendez-Diaz* on the ground that the certificates at issue in that case amounted to affidavits, the sole purpose of which "was to serve as prima facie evidence at trial . . ."[792] The autopsy reports in *Lewis*, however, were not prepared solely for trial, but were prepared pursuant to a statutory duty applicable regardless of the existence of a criminal case.[793] Further, the court observed, unlike in *Melendez-Diaz*, the autopsy report in this case was introduced through a medical examiner who "formed independent opinions based on objective information in the autopsy report and [whose] opinions were subject to cross-examination."[794]

In *People v. Bryant*,[795] the court held that a shooting victim's statements to the police, made shortly after the shooting, identifying the defendant as the shooter were testimonial and thus barred in the absence of an opportunity to cross-examine the victim.[796] 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.[797] The court explained that the

786. 129 S. Ct. 2527 (2009).
787. *Id.* at 2532.
788. *Id.*
789. 287 Mich. App. 356 (2010).
790. *Id.* at 359.
791. *Id.*
792. *Id.* at 362-63 (citing *Melendez-Diaz*, 129 S. Ct. at 2532).
793. *Id.* at 363 (citing MICH. COMP. LAWS ANN. § 52.202(1)(a) (West 2006)). As such, the reports were admissible under the hearsay exception for public records and reports. *See* MICH. R. EVID. 803(8).
794. *Lewis*, 287 Mich. App. at 363.
795. 483 Mich. 132 (2009), *cert. granted*, 130 S. Ct. 1685 (2010).
796. *Id.* at 136.
797. *Id.* at 143-46.

victim "made these statements while he was surrounded by five police officers and knowing that emergency medical service (EMS) was on the way. Obviously, his primary purpose in making these statements to the police was not to enable the police to meet an ongoing emergency,"[798] 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."[799]

The Supreme Court has now granted *certiorari* in *Bryant*,[800] and further development of this issue is therefore expected during the next *Survey* period.

In two cases decided during the *Survey* period, the Michigan Court of Appeals considered whether statements made by a rape victim to a sexual assault nurse examiner (SANE) constituted testimonial hearsay. In *People v. Spangler*,[801] the prosecutor filed an interlocutory appeal challenging the trial court's exclusion, on confrontation grounds, of statements made by the sexual assault victim to a SANE during the course of treatment.[802] After the assault, the minor victim was taken to the hospital by her mother, and the mother signed a form authorizing a SANE to conduct a forensic examination and take photographs.[803] The SANE filled out a form recording the victim's statements identifying his abuser and describing the abuse.[804] However, the record was devoid of any evidence concerning the intake process, how the SANE was assigned, or the context surrounding the statements made by the victim to the SANE.[805] The trial court excluded the form, finding that it constituted testimonial hearsay.[806] On the prosecutor's interlocutory appeal, the court of appeals noted that "[a] majority of state courts that have considered this issue has determined that statements by a sexual abuse victim to a SANE, or similar examiner, were testimonial in nature and barred by the Confrontation Clause."[807] Based on the reasoning of these cases and the

798. *Id.* at 144.
799. *Id.* at 145-46.
800. *See* Michigan v. Bryant, 130 S. Ct. 1685 (2010).
801. 285 Mich. App. 136 (2009).
802. *Id.* at 138.
803. *Id.* at 139.
804. *Id.*
805. *Id.*
806. *Id.* at 141.
807. *Spangler*, 285 Mich. App. at 148; *see also id.* at 148-53 (discussing Hernandez v. State, 946 So. 2d 1270 (Fla. Dist. Ct. App. 2007); State v. Hooper, 176 P.3d 911 (Idaho

definition of "testimonial" hearsay set forth in *Crawford*, the *Spangler* court held:

> [I]n order to determine whether a sexual abuse victim's statements to a SANE are testimonial, the reviewing court must consider the totality of the circumstances of the victim's statements and decide whether the circumstances objectively indicated that the statements would be available for use in a later prosecution or that the primary purpose of the SANE's questioning was to establish past events potentially relevant to a later prosecution rather than to meet an ongoing emergency.[808]

Because the record on these matters was not adequately developed, the court of appeals remanded the matter to the trial court for a further determination of the admissibility of the victim's statements to the SANE.[809]

The court of appeals subsequently distinguished *Spangler* in *People v. Garland*.[810] In that case, the defendant was convicted of home invasion and various counts of criminal sexual conduct.[811] The facts at trial showed that the defendant, the victim, and two other women were out drinking at a bar.[812] The victim because dizzy and left, returning to her apartment, where she fell asleep.[813] The victim later awoke, finding the defendant having contact with her vaginal area.[814] On appeal the defendant argued, *inter alia*, that the trial court erred in admitting a nurse's testimony concerning statements made to her by the victim.[815] After rejecting this claim on the basis of the hearsay rules, the court of appeals also rejected the defendant's claim that the admission of the testimony violated his confrontation rights.[816] The court distinguished *Spangler*, finding that the record in this case was sufficient to establish "that under the totality of the circumstances of the complainant's statements, an objective witness would reasonably believe that the

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2007); *In re* Rolandis G., 902 N.E.2d 600 (Ill. 2008); Medina v. State, 143 P.3d 471 (Nev. 2006); State v. Ortega, 175 P.3d 929 (N.M. 2007)).

808. *Id.* at 154.

809. *Id.* at 156-57.

810. 286 Mich. App. 1 (2009), *leave to appeal denied*, 486 Mich. 996 (2010). *Garland* also addressed a hearsay issue. This aspect of the case is discussed *supra* notes 756-768and accompanying text.

811. *Garland*, 286 Mich. App. at 3.

812. *Id.*

813. *Id.*

814. *Id.* at 3-4.

815. *Id.* at 8.

816. *Id.* at 7-8.

statements made to the nurse objectively indicated that the primary purpose of the questions or the examination was to meet an ongoing emergency."[817] The court explained that although the nurse collects evidence and must by law turn this evidence over to the police, she was not otherwise involved in the police investigation.[818] Further, because there were no outward signs of trauma, the nurse could not properly treat the victim without obtaining a full medical history.[819] Under these circumstances, the court concluded, the primary purpose of the hearsay statements was not to provide evidence for use in a later trial but to obtain medical treatment and, therefore, the statements were not testimonial hearsay barred by the Confrontation Clause.[820]

IX. CONCLUSION

The Michigan courts were less active in issuing decisions on evidentiary decisions during the current *Survey* period than they have been in the last few *Survey* periods.[821] Most notably, the Michigan Supreme Court passed on opportunities to clarify a number of evidentiary questions under Michigan law. The next *Survey* period will hopefully provide further guidance on issues of evidence law affecting Michigan practitioners.

817. *Garland*, 286 Mich. App. at 11.
818. *Id.*
819. *Id.*
820. *Id.*
821. *See* M. Bryan Schneider, *Evidence, 2009 Ann. Survey of Mich. Law*, 55 WAYNE L. REV. 341 (2009); *see also* M. Bryan Schneider, *Evidence, 2008 Ann. Survey of Mich. Law*, 54 WAYNE L. REV. 229 (2008).