EVIDENCE

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I. INTRODUCTION AND RULES 101–106: ISSUE PRESERVATION AND REVIEW OF EVIDENTIARY RULINGS

A. General Introduction

This *Survey* Article covers developments in evidentiary law in Michigan state courts during the period from June 1, 2016 to May 31, 2017. Borrowing a page from my friend and colleague Louis Meizlish, who has authored this Article in years past, the structure of the Article mirrors that of the Rules of Evidence—*e.g.*, the rules relating to relevance starting at Rule 401 and the cases interpreting them are discussed in Part IV, etc. A section on evidentiary issues governed by statutes and court rules follows in Part XII. Each part containing any noteworthy cases begins with a brief overview before discussing the cases themselves. Only published opinions are discussed here, because only published cases constitute binding precedent.[1]

1. MICH. CT. R. 7.215(C); People v. Metamora Water Servs., Inc., 276 Mich. App. 376, 382, 741 N.W.2d 61, 65 (2007).

In order to ensure the Article primarily focuses on the facts and holdings of each case, I have attempted to minimize the appearance of any personal opinions. It is my hope that this Article is useful in your day-to-day work, whether you are a student, a practitioner, an academic, or a judge. Please enjoy!

B. Appeals of Evidentiary Rulings

Neither the manner for properly preserving an evidentiary ruling for appellate review nor the appellate standard of review has changed in years. Under Rule 103 of the Michigan Rules of Evidence, a party objecting to the *admission* of evidence is generally barred from raising the issue on appeal unless it 1) objected to the admission of the evidence on the record in the trial court and 2) clearly specified the grounds for its objection; conversely, if a party objects to the *exclusion* of evidence it proffered, then it must have either made an offer of proof or, through some other means, made the court aware of the nature of the evidence.[2] Objections must be specific, because "an objection on one ground is insufficient to preserve an appellate argument based on a different ground."[3] For example, an objection to evidence on the grounds of *relevance* under Rules 401 and 402 will not preserve an objection that the evidence is substantially more prejudicial than probative under Rule 403.

When an evidentiary issue is properly preserved, the appellate court reviews the trial court's ruling for an abuse of discretion.[4] This standard of review focuses on whether a ruling either fell within the "range of principled outcomes" or constitutes an error of law.[5] An error of law

2. MICH. R. EVID. 103(a). *Compare* People v. Standifer, 425 Mich. 543, 557, 390 N.W.2d 632, 638 (1986) ("Generally, to preserve an allegedly erroneous admission of evidence for appellate review, [a] timely objection must be made which states the specific ground of objection."), *with* People v. Webb, 458 Mich. 265, 276, 580 N.W.2d 884, 889 (1998) (noting that the defendant failed to make an offer of proof to establish the substantive nature of the testimony excluded). Moreover, as noted in a prior *Survey* Article on this topic, parties should, to the extent possible, endeavor to avoid making detailed objections in front of a jury to avoid any potential prejudice that might arise from their objections. *See* Louis F. Meizlish, *Evidence, 2015 Ann. Survey of Mich. Law*, 60 WAYNE L. REV. 687, 690–91 (2015) (citing and quoting Zaremba Equip., Inc. v. Harco Nat'l Ins. Co., 302 Mich. App. 7, 22, 837 N.W.2d 686, 696 (2013) (quoting MICH. R. EVID. 103(c))).

3. People v. Danto, 294 Mich. App. 596, 605, 822 N.W.2d 600, 606 (2011) (citation omitted).

4. People v. Hine, 467 Mich. 242, 250, 650 N.W.2d 659 (2002).

5. People v. Duncan, 494 Mich. 713, 722–23, 835 N.W.2d 399, 664 (2013); Maldonado v. Ford Motor Co., 476 Mich. 372, 388, 719 N.W.2d 809, 817 (2006).

occurs when a court "incorrectly chooses, interprets, or applies the law."[6] Stated otherwise, "[a] court necessarily abuses its discretion when it 'admits evidence that is inadmissible as a matter of law.'"[7] However, even if an appellate court determines that a court abused its discretion through an evidentiary ruling, it will not be grounds for reversal unless the objecting party shows the error was more probably than not outcome determinative.[8]

Moreover, even if an evidentiary issue is *not* properly preserved by an appropriate and timely objection, an appellate court may still review the alleged error—which is technically deemed *forfeited* by the lack of objection[9]—for the first time on appeal to determine whether it was a plain error that affected the substantial rights of the party.[10] This is a far more demanding standard of review, as the party raising the issue must show that: "1) an error occurred; 2) the error was plain (*i.e.*, clear or obvious); and 3) the error affected the party's substantial rights."[11] The phrase "affecting substantial rights" means the error was "prejudicial: It must have affected the outcome of the . . . proceedings."[12] Moreover, even if a plain error that affected the party's substantial rights occurred, a reviewing court need only reverse if the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings, or, in a criminal case, if the party raising the issue is a defendant and he or she is actually innocent.[13]

Forfeited errors, however, must be distinguished from *waived* errors. Waiver is a party's intentional relinquishment or abandonment of a known right.[14] A waived error is considered extinguished, and any later appellate review is precluded.[15] In the realm of evidentiary law, Michigan's appellate courts have held that an affirmative statement that a party does not object to the admission of a piece of evidence constitutes a waiver, and the party cannot then attempt to attack the admission of that

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6. Pierron v. Pierron, 282 Mich. App. 222, 243, 765 N.W.2d 345, 361 (2009) (quoting Vodvarka v. Grasmeyer, 259 Mich. App. 499, 508, 675 N.W.2d 847, 852 (2003)) (internal quotation marks omitted).

7. Craig v. Oakwood Hosp., 471 Mich. 67, 76, 684 N.W.2d 296, 303 (2004) (citations omitted).

8. People v. Lukity, 460 Mich. 484, 495–96, 596 N.W.2d 607 (1999); MICH. COMP. LAWS ANN. § 769.26 (West 2000).

9. People v. Grant, 445 Mich. 535, 546, 520 N.W.2d 123 (1994).

10. People v. Carines, 460 Mich. 750, 763–64, 597 N.W.2d 130 (1999).

11. *Id.*

12. *Grant*, 445 Mich. at 549, 520 N.W.2d at 129.

13. *Carines*, 460 Mich. at 766, 597 N.W.2d at 139.

14. *Id.* at 762 n.7 (quoting United States v. Olano, 507 U.S. 725, 733 (1993)).

15. People v. Carter, 462 Mich. 206, 216, 612 N.W.2d 144, 149 (2000).

evidence on appeal, even under the plain error standard.[16] Attorneys therefore must proceed carefully, lest they waive a possible evidentiary error and potentially subject themselves to a grievance or, in criminal cases, to a claim of ineffective assistance.[17]

With these standards in mind, I will now turn to the rules themselves, to several statutory rules of evidence, and to the relevant published cases released during the *Survey* period that interpret them.

II. RULES 201–202: JUDICIAL NOTICE OF FACTS AND LAW

There were no noteworthy cases during the *Survey* period discussing the rules concerning judicial notice.

III. RULES 301–302: PRESUMPTIONS

There were no noteworthy cases during the *Survey* period discussing the rules concerning presumptions.

IV. RULES 401–411: RELEVANCE AND ITS LIMITS

A. Relevance Generally

"Relevant evidence" is evidence which has "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."[18] A fact that is "of consequence"—*i.e.*, is material to the action—"need not be an element of a crime or cause of action or defense but it must, at least, be in issue in the sense that it is within the range of litigated matters in controversy."[19] As was aptly noted in a prior *Survey* Article on this topic, "[r]elevance is a low hurdle in . . . Michigan state courts . . . 'The threshold is minimal: "any" tendency is sufficient

16. *E.g.*, People v. McDonald, 293 Mich. App. 292, 295, 811 N.W.2d 507, 510 (2011) (holding that an affirmative statement that there was no objection to the admission of a doctor's notes constituted a waiver).

17. *See, e.g.*, People v. Marshall, 298 Mich. App. 607, 616–18, 616 n.2, 830 N.W.2d 414, 421–22, 421 n.2 (2012), *vacated in part on other grounds*, 493 Mich. 1020, 829 N.W.2d 876 (2013) (holding that because defense counsel stated he approved the admission of evidence, the evidentiary issue was waived and any review of the propriety of its admission was confined to determining whether counsel was ineffective for approving its admission).

18. MICH. R. EVID. 401.

19. People v. Powell, 303 Mich. App. 271, 277, 842 N.W.2d 538, 544 (2013) (quoting People v. Brooks, 453 Mich. 511, 518, 557 N.W.2d 106, 109 (1996)) (internal quotation marks omitted).

probative force.' In other words, in Michigan, 'evidence is relevant if it 'in some degree advances the inquiry.'"[20]

If evidence is deemed relevant under Rule 401, then it is admissible *unless* its admission is barred by another rule, a statute, or a constitutional provision.[21] For instance, relevant evidence may be excluded under Rule 403, which provides that "[a]lthough 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."[22]

The term "unfair prejudice refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock."[23] "'Unfair prejudice' does *not* mean 'damaging.'"[24] After all, "[a]ny relevant testimony will be damaging to some extent."[25] The Michigan Supreme Court has explained a dual conception of unfair prejudice:

> We believe that the notion of "unfair prejudice" encompasses two concepts. First, the idea of prejudice denotes a situation in which there exists a danger that marginally probative evidence will be given undue or pre-emptive weight by the jury. In other words, where a probability exists that evidence which is minimally damaging in logic will be weighed by the jurors substantially out of proportion to its logically damaging effect, a situation arises in which the danger of "prejudice" exists. Second, the idea of unfairness embodies the further proposition that it would be inequitable to allow the proponent of the evidence to use it. Where a substantial danger of prejudice exists

20. Meizlish, *supra* note 2, at 693–94 (quoting Hardrick v. Auto Club Ins. Ass'n, 294 Mich. App. 651, 668, 819 N.W.2d. 28 (2011) (quoting People v. Crawford, 458 Mich. 376, 390, 582 N.W.2d 785 (1998) and KENNETH BROUN ET AL., MCCORMICK ON EVIDENCE § 185, at 736 (6th ed. 2007))).

21. MICH. R. EVID. 402.

22. MICH. R. EVID. 403.

23. People v. Pickens, 446 Mich. 298, 337, 521 N.W.2d 797, 814–15 (1994) (quoting People v. Goree, 132 Mich. App. 693, 702–03, 349 N.W.2d 220, 225 (1984)).

24. Bradbury v. Ford Motor Co., 123 Mich. App. 179, 185, 333 N.W.2d 214, 217 (1983).

25. People v. Mills, 450 Mich. 61, 75–76, 537 N.W.2d 909, 917 (1995) (quoting Sclafani v. Peter S. Cusimano, Inc. 130 Mich. App. 728, 735–36, 244 N.W.2d 347, 350 (1983)).

> from the admission of particular evidence, unfairness will usually, but not invariably, exist.[26]

The determination of prejudicial effect is generally left to the trial court.[27] In this way, even relevant evidence can be excluded, exemplifying the exceptions outlined in Rule 402.[28]

B. Character Evidence and Other Acts Evidence

One of the most frequently contested areas of evidentiary law (along with hearsay)[29] is the admissibility of evidence that may give rise to an inference concerning an individual's character, or so-called "propensity" evidence, under Rule 404. The Rule provides:

> (a) *Character evidence generally.* Evidence 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, except:
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> > (1) *Character of the accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same; or if evidence of a trait of character of the alleged victim of the crime is offered by the accused and admitted under subdivision (a)(2), evidence of a trait of character for aggression of the accused offered by the prosecution;
> >
> > (2) *Character of the 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

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26. *Id.*

27. People v. Bahoda, 448 Mich. 261, 291, 531 N.W.2d 659, 674 (1995). Stating that "if judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." *Id.*

28. This is not, of course, to say that evidence that is relevant but excluded for one purpose may not still be admissible for another purpose. People v. Rice, 235 Mich. App. 429, 441, 497 N.W.2d 843, 850 (1999).

29. *See infra* Part VIII.

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.

(b) Other crimes, wrongs, or acts.

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

(2) The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination.[30]

To be admissible, evidence that would otherwise contravene Rule 404's prohibition on character evidence must: 1) be offered for a proper purpose under Rule 404(b), 2) be relevant under Rule 402, and 3) be

30. MICH. R. EVID. 404.

such that its probative value is not substantially outweighed by the danger of unfair prejudice under Rule 403.[31] Additionally, the court should provide a limiting instruction if one is requested.[32] The proponent initially bears the burden of demonstrating the relevance of the evidence by showing it proves a fact within one of the exceptions outlined in Rule 404(b).[33]

1. The MRE 404(b) Framework

This *Survey* period saw the Michigan Supreme Court's most significant contribution to the analysis of evidence offered under Rule 404(b) in several years.[34] In *Rock v. Crocker*,[35] plaintiff Dustin Rock fractured his right ankle in September 2008 and was treated by defendant Dr. K. Thomas Crocker, a board-certified orthopedic surgeon.[36] Dr. Crocker operated on Rock's ankle and provided postsurgical care, and in October 2008 allegedly told Rock he could start bearing weight on his leg (although Rock did not do so then).[37] The next month, a second surgeon, Dr. David Viviano, performed another surgery on Rock's ankle because, allegedly, the one performed by Dr. Crocker failed to unite all the pieces of the fracture.[38]

In June 2010, Rock filed a lawsuit alleging Dr. Crocker committed ten specific negligent acts, both during the first surgery and postsurgical care, which he asserted caused him to suffer additional medical expenses and loss of earnings and earning capacity.[39]Rock also filed an affidavit of merit from Dr. Antoni Goral, a board-certified orthopedic surgeon, who offered his opinion that Dr. Crocker breached the standard of care in two ways: first, by "not using enough screws or the proper length plate for the fracture during the surgery," and, second, by "prematurely allowing [Rock] to put weight on his leg after the surgery."[40] However, at a deposition in late 2011, Dr. Goral admitted "the length and the placement of the plate and the number of screws used did not cause any injury to

31. People v. VanderVliet, 444 Mich. 52, 55, 508 N.W.2d 114, 117 (1993).
32. *Id.*
33. People v. Crawford, 458 Mich. 376, 385 N.W.2d 785 (1998).
34. Even if, as readers will see, it was to essentially restate and reemphasize to the lower courts the proper framework for analyzing Rule 404(b) issues.
35. Rock v. Crocker, 499 Mich. 247, 884 N.W.2d 227 (2016).
36. *Id.* at 251, 884 N.W.2d at 229.
37. *Id.*
38. *Id.* at 251–52, 884 N.W.2d at 229–30.
39. *Id.* at 252, 884 N.W.2d at 230.
40. *Id.*

[Rock] because the bone had healed correctly" and "that telling [Rock] his leg could bear weight did not cause [Rock'] injuries."[41]

Subsequently, Dr. Crocker moved in limine to strike the allegations pertaining to those matters and preclude Rock from offering any evidence of the alleged breaches of the standard of care at trial.[42] Rock admitted Dr. Goral's statements did not establish proximate causation, but he argued evidence of the breaches of the standard of care was still relevant to Dr. Crocker's expertise and competency to perform the surgery.[43] The trial court denied Dr. Crocker's motion, concluding "the evidence was part of the res gestae of the claim and was relevant to the issue of [Dr. Crocker's] general competency" and "the prejudice posed by this evidence did not substantially outweigh its probative value under [Rule] 403."[44]

When Rock appealed an unrelated pretrial ruling, Dr. Crocker cross-appealed from the order denying his motion in limine to strike the two allegations of malpractice that Dr. Goral indicated did not cause Rock's injury.[45] In a published opinion,[46] the court of appeals agreed with Dr. Crocker that Rock could not seek damages for the allegations but held that evidence related to the allegations could be admitted at trial because "it may be relevant to the jury's understanding of the case."[47] The court of appeals remanded the matter, though, for the trial court to reconsider whether the evidence was admissible given the potential impact on its Rule 403 analysis stemming from the court of appeals' holding that Rock could not seek damages for the alleged violations of the standard of care.[48] The supreme court later granted leave to appeal on these issues and on an issue relating to the board-certification of expert witnesses.[49]

In its opinion, the supreme court noted that in medical malpractice cases, "drawing a causal connection between a defendant's breach of the applicable standard of care and a plaintiff's injuries is critical" given that the plaintiff bears the burden of proving his or her injury was more probably than not caused by the defendant's negligence.[50] The court then turned to the admissibility of Dr. Goral's testimony, noting that the

41. *Id.*
42. *Id.*
43. *Id.* at 252–53, 884 N.W.2d at 230.
44. *Id.* at 253, 884 N.W.2d at 230.
45. *Id.*
46. Rock v. Crocker, 308 Mich. App. 155, 863 N.W.2d 361 (2014).
47. *Id.* at 170, 863 N.W.2d at 370.
48. *Id.*
49. *Rock*, 499 Mich. at 254–55, 884 N.W.2d at 231 (quoting Rock v. Crocker, 497 Mich. 1034, 863 N.W.2d 330 (2015)).
50. *Id.* at 255, 884 N.W.2d at 232.

testimony must be relevant in order to be admissible and that the relevance contemplated by Rules 401 and 402 "is logical relevance."[51] However, the court explained, even *logically* relevant evidence may be excluded by other rules, such as Rule 404, which is "a rule of *legal* relevance, defined as a rule limiting the use of evidence that is logically relevant."[52]

Under Rule 404(b)(1), evidence of other crimes, wrongs, or acts is inadmissible to prove the character of a person if the intended purpose of introducing the evidence is to show action in conformity therewith.[53] The bar on such evidence, though, is not absolute. Evidence that would otherwise be barred by this rule *may* be admissible for "other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material."[54] This rule of admissibility extends to acts that are "contemporaneous with, or prior or subsequent to the conduct at issue in the case."[55] As the *Rock* court explained, "evidence that is logically relevant" under Rules 401 and 402 "may be excluded under [Rule] 404(b)(1) for lacking legal relevance *if it does not have a proper purpose*."[56]

The court then reiterated the longstanding and proper framework for the admission of evidence under Rule 404(b)(1). First, "[o]ther-acts evidence is only admissible under [Rule] 404(b)(1) when a party shows that it is (1) offered for a proper purpose, i.e., to prove something other than the defendant's propensity to act in a certain way, (2) logically relevant, and (3) not unfairly prejudicial under [Rule] 403."[57] Stated otherwise, there *must* be a theory of relevance other than simply showing a party's propensity to wrongdoing in order to show that he or she committed the conduct at issue in the case.[58] Second, evidence that is properly offered for a non-propensity purpose is then subject to the balancing test of Rule 403, "which permits the court to exclude relevant evidence if its 'probative value is substantially outweighed by the danger

51. *Id.* at 256, 884 N.W.2d at 232 (first citing MICH. R. EVID. 401; then citing MICH. R. EVID. 402; and then citing People v. VanderVliet, 444 Mich. 52, 60, 508 N.W.2d 114, 119 (1993)).

52. *Id.* at 256, 884 N.W.2d at 232 (quoting *VanderVliet*, 444 Mich. at 61–62, 508 N.W.2d at 120) (internal quotation marks omitted, emphasis added).

53. MICH. R. EVID. 404(b)(1).

54. *Id.*

55. *Id.*

56. *Rock*, 499 Mich. at 257, 884 N.W.2d at 232 (emphasis added).

57. *Id.* (citing People v. Knox, 469 Mich. 502, 509, 674 N.W.2d 366 (2004)).

58. *Id.* at 257, 884 N.W.2d at 232–33 (internal citations omitted).

of unfair prejudice.'"[59] Lastly, if the evidence passes the Rule 403 balancing test, "upon request, the trial court may provide a limiting instruction to the jury" to ensure that the jurors only consider the evidence for its proper purpose or purposes.[60]

The *Rock* court held that the court of appeals failed to apply the appropriate framework to the evidence at issue.[61] The court of appeals had simply agreed with the trial court, and it made no distinction between *logical* and *legal* relevance before remanding for a Rule 403 balancing test.[62] The *Rock* court recognized that Dr. Goral's proposed testimony clearly passed the *logical* relevance standards of Rules 401 and 402 "because it tends to demonstrate that [Dr. Crocker] had a propensity for negligence in treating [Rock's] injuries, albeit in incidents that were causally unrelated to [Rock's] injury;" however, this fact alone did not warrant an immediate balancing analysis under Rule 403.[63] The court of appeals missed a crucial step—*i.e.*, first determining whether the evidence was offered for a proper purpose under Rule 404(b)(1) and was therefore also *legally* relevant—given that the evidence "appears to be intended to show that [Dr. Crocker] had a propensity to breach the standard of care when he treated [Rock]."[64] Accordingly, the supreme court vacated the court of appeals opinion to the extent that it concluded the evidence may be admissible and remanded the case for the trial court "to perform the full [Rule] 404(b) analysis before engaging in [a Rule] 403 analysis to decide whether the evidence is admissible."[65]

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59. *Id.* at 258, 884 N.W.2d at 233 (quoting People v. Mardlin, 487 Mich. 609, 615–16, 790 N.W.2d 607, 612 (2010) (quoting MICH. R. EVID. 403)).

60. *Id.* at 258, 884 N.W.2d at 233 (quoting *Mardlin*, 487 Mich. at 615–16, 790 N.W.2d at 612).

61. *Id.*

62. *Id.*

63. *Id.* at 258–59, 884 N.W.2d at 233.

64. *Id.* at 259, 884 N.W.2d at 233.

65. *Id.* at 259, 884 N.W.2d at 234. A few months after *Rock* was decided, the court of appeals also addressed a basic Rule 404(b) framework issue in People v. Kelly, 317 Mich. App. 637, 895 N.W.2d 230 (2016). Like the situation presented in *Rock*, the trial court in *Kelly* had failed to apply the Rule 404(b) framework and had instead skipped directly to a Rule 403 balancing test. *Id.* at 642–45, 895 N.W.2d at 233–35. The court of appeals also rejected the trial court's overt reliance on questions of credibility, which the trial court had improperly allowed to control its relevance analysis. *Id.* at 645–47, 895 N.W.2d at 235. Because the *Kelly* opinion was not otherwise noteworthy, it is not summarized in greater detail here.

2. Use of Other Acts Evidence to Establish Indecent Exposure and Sexual Delinquency

The application of Rule 404(b) to the admission of evidence is not limited to only the purposes explicitly mentioned in the Rule itself, as the Rule's list of proper purposes is not exhaustive.[66] Consider *People v. Campbell*, in which defendant Michael Campbell was charged with six counts of indecent exposure as a sexually delinquent person.[67] Testimony established that in 2013, Campbell stood outside the apartments of five different women, exposed himself, and masturbated on six different occasions.[68] The prosecution also introduced testimony and evidence of multiple prior incidents involving Campbell, each of which resulted in a criminal conviction.[69]

Campbell testified and did not deny being present at the scene of each charged incident, but he claimed he had used an artificial penis that he shook in front of the women as a prank.[70] He denied exposing himself or masturbating.[71] The jury rejected his defense, convicted him of six counts of indecent exposure, and found he was a sexually delinquent person at the time of each offense.[72]

On appeal,[73] Campbell raised several issues, including whether he was entitled to separate trials on the issues of indecent exposure and sexual delinquency.[74] In ruling on that issue, the court of appeals noted the supreme court in *People v. Breidenbach*[75] had overruled its 1978 decision in *People v. Helzer*,[76] "which had mandated separate juries when a defendant is charged with both a primary sexual offense and the enhancement for sexually delinquent persons."[77] The determination as to whether separate juries were needed in a given trial was instead to be analyzed on a case-by-case basis.[78]

The court of appeals noted the prosecution filed a notice of intent to introduce evidence of Campbell's other crimes and acts under Rule

66. People v. Martzke, 251 Mich. App. 282, 290, 651 N.W.2d 490 (2002).
67. People v. Campbell, 316 Mich. App. 279, 281, 894 N.W.2d 72, 76 (2016) (per curiam).
68. *Id.* at 282, 894 N.W.2d at 76.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 282–83, 894 N.W.2d at 76.
73. The author served as appellate counsel for the prosecution in this case.
74. *Campbell*, 316 Mich. App. at 283, 291, 297, 894 N.W.2d at 76, 80, 84.
75. People v. Breidenbach, 489 Mich. 1, 798 N.W.2d 738 (2011).
76. People v. Helzer, 404 Mich. 410, 273 N.W.2d 44 (1978).
77. *Campbell*, 316 Mich. App. at 292, 894 N.W.2d at 81.
78. *Id.*

404(b).[79] The prosecution noted several proper purposes, including "demonstrating that the charged acts of indecent exposure were not a mistake, to show a common scheme, to rebut any claim of fabrication, and *to demonstrate that Campbell was a sexual delinquent.*"[80] Because the Rules of Evidence permitted such uses for the evidence, its admission did not preclude a joinder of the trials.[81] Quoting extensively from *Breidenbach*, the court explained the previously-mandated separate-trial policy from *Helzer* did "not take into account the practical reality that evidence of a defendant's history of sexual misbehavior will often come before the jury even when the charges are severed" because evidence of a defendant's history of sexual misconduct can be admitted under Rule 404(b) at the same time a jury hears evidence concerning the charges.[82] The court, again quoting *Breidenbach*, noted that "[j]oinder of . . . other crimes cannot prejudice the defendant more than he would have been by the admissibility of other evidence in a separate trial."[83]

In this case, the trial court's order stated one trial would be held with a single jury for the reasons stated by the prosecution, i.e., "because the alleged acts at issue demonstrated a single scheme, the acts related to sexual delinquency . . . , and two trials would require presentation of the same evidence twice, resulting in inconvenience to and harassment of the witnesses."[84] The court concluded that because there was "substantial overlap in the evidence" and Campbell's rights could be adequately protected with a limiting instruction regarding the use of certain evidence only to establish sexual delinquency, the trial court's decision to hold a single trial was proper.[85] The court similarly rejected related arguments that severance of the trials was required under the Michigan Court Rules, that failure to sever the trials violated his right to due process, and that his trial attorney was constitutionally ineffective for stipulating that separate trials were not required.[86] Ultimately, the court affirmed Campbell's convictions but remanded the case for resentencing.[87]

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79. *Id.*

80. *Id.* at 292–93, 894 N.W.2d at 81 (emphasis added).

81. *Id.* at 293, 894 N.W.2d at 81.

82. *Id.* at 293, 894 N.W.2d at 82 (quoting People v. Breidenbach, 489 Mich. 1, 11–13 798 N.W.2d 738, 745 (2011)).

83. *Campbell*, 316 Mich. App. at 293, 894 N.W.2d at 82 (quoting *Breidenbach*, 498 Mich. at 11–13, 798 N.W.2d at 745 (internal quotation marks omitted)).

84. *Id.* at 293–94, 894 N.W.2d at 82.

85. *Id.*

86. *Id.* at 294–97, 894 N.W.2d at 82–84.

87. *Id.* at 300–01, 894 N.W.2d at 85.

3. Other Acts Evidence, Election Forgery, and Political Activism

One of the more unusual cases involving a Rule 404(b) issue published during the *Survey* period—in that it involved rarely seen charges related to election forgery and false statements involving a certificate-of-recall petition—was *People v. Pinkney*.[88] Edward Pinkney was charged with five counts of election forgery and six counts of making a false statement in a certificate-of-recall petition.[89] He was convicted only of the forgery charges.[90] The case arose from an unsuccessful attempt to recall Benton Harbor Mayor James Hightower for his opposition to a city income tax.[91] A recall petition was filed on October 23, 2013, by James Cornelius, and on November 6, 2013, the Berrien County Election Commission approved the petition's language.[92] Pinkney, who had known Cornelius for several years, was present for the filing; Cornelius was a resident of Benton Harbor, while Pinkney resided in Benton Township.[93] Once the petition was approved, Pinkney, Cornelius, and several other individuals circulated petitions to gather the 393 signatures necessary to place the recall on the ballot.[94]

On January 8, 2014, Pinkney returned to the clerk's office with the signed recall petitions, but he had to contact Cornelius to come into the office and submit the petitions because he was the sponsor, and Cornelius did so that day.[95] Eventually, 402 of the 728 signatures from the 62 petitions submitted were certified, the petitions were accepted, and a recall election was scheduled for May 6, 2014.[96]

The recall, however, was never held.[97] Based on concerns raised by Hightower regarding the authenticity of the dates on the petitions, the Berrien County Sheriff's Department began an investigation.[98] After review by a detective and by a Michigan State Police forensic document examiner, it was determined that the dates on five petitions circulated by Pinkney appeared to have been altered to appear as though they were

88. People v. Pinkney, 316 Mich. App. 450, 891 N.W.2d 891 (2016).
89. *Id.* at 454, 891 N.W.2d at 894.
90. *Id.*
91. *Id.* at 454, 891 N.W.2d at 894–95. Hightower voted 'no' on the question of placing the proposed tax on the ballot when it was before the city commission, but enough members of the commission supported it to place it on the November 2013 ballot. *Id.* It did not pass. *Id.*
92. *Id.* at 454, 891 N.W.2d at 895.
93. *Id.* at 455, 891 N.W.2d at 895.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*

signed later than their original dates of November 7 and 8.[99] The alterations were critical, because under state law the signatures were invalid if the signers signed the petition more than 60 days before it was filed.[100] Pinkney was familiar with this rule, having previously filed multiple recall petitions on his own.[101]

Pinkney testified at trial and denied altering the dates on the petitions, having any motive to do so, and leading the effort to recall Hightower.[102] He claimed a woman named Venita Campbell headed the movement, collected the completed petitions each week, and held them until they were given to him on January 7 for filing.[103] Rebuttal testimony from the clerk and the detective noted there was no record of a Venita Campbell, and there had been no mention of her throughout the investigation.[104]

On appeal, Pinkney raised several issues, including an argument that other-acts evidence was admitted against him in violation of Rule 404(b).[105] The court of appeals noted that other-acts evidence cannot be admitted in order to prove a person's character and show action in conformity therewith, but it may be admissible for other purposes—such as proving motive.[106] Moreover, the evidence must be "relevant to an issue of fact that is of consequence at trial," and "the danger of unfair prejudice must not substantially outweigh the probative value of the other-acts evidence."[107]

In Pinkney's case, the court concluded each of these requirements was satisfied by the prosecution's other-acts evidence—specifically, "testimony regarding [Pinkney's] efforts in a recall campaign against [another elected official] and testimony regarding [his] public comments criticizing Hightower, Hightower's 'alliance' with Whirlpool[108], and

99. *Id.* at 455–57, 891 N.W.2d at 895–96.

100. *Id.* at 458, 891 N.W.2d at 896.

101. *Id.* at 458–59, 891 N.W.2d at 896–97.

102. *Id.* at 459–60, 891 N.W.2d at 897.

103. *Id.* at 460, 891 N.W.2d at 897.

104. *Id.*

105. *Id.* at 461–62, 891 N.W.2d at 898. Pinkney also argued that his convictions should be reversed because: 1) MCLA section 168.937 does not create the substantive offense of election forgery, 2) there was insufficient evidence to support his convictions, and 3) the trial court improperly instructed the jury that he could be convicted under an aiding-and-abetting theory. *Id.* The court of appeals rejected each of these claims. *Id.* at 462–74, 891 N.W.2d at 898.

106. *Id.* at 474–75, 891 N.W.2d at 905.

107. *Id.* at 475, 891 N.W.2d at 905.

108. Whirlpool Corporation was, according to Hightower, the primary target of the proposed income tax that spurred the later recall effort against him. *Id.* at 454, 891 N.W.2d at 894.

various other actions."[109] First, the evidence was introduced in order to establish Pinkney's motive.[110] Motive, the court noted, "is always relevant" in a criminal prosecution even though it is not an essential element of the crime.[111] Thus, second, "the testimony had the tendency to make the existence of a fact of consequence more or less probable [under Rule 401] because it directly addressed [Pinkney's] motive in altering or aiding and encouraging the alteration of the dates on the recall petitions."[112] Third, and finally, the evidence was highly probative because it showed Pinkney had a motive to alter the dates, thus providing evidence of his identity as the person who did so.[113] Establishing identity is another appropriate use for other-acts evidence.[114] The court rejected Pinkney's contention that the probative value of the evidence was "marginal" when compared to his allegedly unpopular political views.[115] Moreover, the court noted the jury was properly and repeatedly instructed that it could only consider the challenged evidence for motive purposes, and Pinkney made no effort to overcome the presumption that the jurors followed their instructions.[116]

The court also addressed a related challenge to what Pinkney argued was the improper admission of his own cross-examination testimony about his political activism unrelated to the Hightower recall, including "his radio show, his recall efforts in the local community, his speaking engagements across the country, and his search for justice and equality in general."[117] He argued this evidence was both substantively inadmissible under Rule 404(b)(1) and procedurally inadmissible under Rule 404(b)(2).[118] However, the court was unable to discern exactly how the testimony created a "character-to-conduct" inference.[119] The court noted that the prosecution may introduce logically relevant evidence of a defendant's other acts so long as that "evidence does not generate an

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109. *Id.* at 475, 891 N.W.2d at 905.

110. *Id.*

111. *Id.* (quoting People v. Unger, 278 Mich. App. 210, 223, 749 N.W.2d 272, 286 (2008)) (internal quotation marks omitted).

112. *Id.*

113. *Id.* at 476, 891 N.W.2d at 905.

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

115. *Pinkney*, 316 Mich. App. at 476, 891 N.W.2d at 905. The court stated that "the record simply reflects otherwise" in addressing Pinkney's contention, without further elaboration. *Id.*

116. *Id.* (quoting People v. Abraham, 256 Mich. App. 265, 279, 662 N.W.2d 836, 846 (2003)).

117. *Id.* at 476, 891 N.W.2d at 906.

118. *Id.*

119. *Id.* (quoting People v. Jackson, 498 Mich. 246, 262, 869 N.W.2d 253, 262 (2015)).

intermediate inference regarding his or her character."[120] Moreover, Pinkney once again failed to note the jury was repeatedly instructed that it could not consider his stature or his activities in the community in a negative light.[121]

Finally, the court also briefly addressed Pinkney's arguments that the other-acts evidence was improper under the First Amendment or that it violated his right to due process. The court concluded that while the First Amendment[122] undoubtedly protects a citizen's right to free speech, it does not prohibit the use of speech to establish the elements of a crime, to prove motive, or to prove intent.[123] Therefore, so long as the conduct at issue was relevant, not unfairly prejudicial, and otherwise admissible, it was properly admitted even if it was otherwise entitled to First Amendment protection.[124] The court reiterated that the evidence at issue was "highly relevant and minimally prejudicial;" thus, there was no First Amendment violation.[125] For similar reasons, the court rejected Pinkney's due process challenge and also noted there was "'no clearly established supreme court precedent which holds that a state violates due process by permitting propensity evidence in the form of other bad acts evidence.'"[126] Accordingly, his convictions were affirmed.[127]

4. Other-Acts Evidence Involving Multiple Types of Conduct

A common situation that occurs when a party seeks to admit other-acts evidence under Rule 404(b) arises when some of the evidence of a prior act or acts falls within the scope of one of the Rule's proper purposes, while other aspects of the evidence serve only to raise an improper propensity inference, such as in *People v. Bass*.[128] Defendant

120. *Id.* at 476–77, 891 N.W.2d at 906 (internal quotations omitted).

121. *Id.* at 477, 891 N.W.2d at 906.

122. U.S. CONST. amend. I.

123. *Pinkney*, 316 Mich. App. at 477, 891 N.W.2d at 906 (quoting Wisconsin v. Mitchell, 508 U.S. 476, 489 (1993)).

124. *Id.*

125. *Id.*

126. *Id.* at 477–78, 891 N.W.2d at 906 (quoting Bugh v. Mitchell, 329 F.3d 496, 512 (6th Cir. 2003)).

127. *Id.* at 478–79, 891 N.W.2d at 907. Pinkney sought leave to appeal in the supreme court, which ordered oral argument on whether to grant his application or take other action related to two issues, including whether the trial court abused its discretion by admitting under Rule 404(b) evidence of Pinkney's political and community activities other than the mayoral recall effort to show motive. People v. Pinkney, 500 Mich. 990, 894 N.W.2d 592 (2017). No order or opinion has yet been issued by the supreme court as of March 12, 2018.

128. People v. Bass, 317 Mich. App. 241, 893 N.W.2d 140 (2016).

Walter Bass III was convicted of first-degree premeditated murder, felony murder, felon in possession of a firearm, possession of a firearm during the commission of a felony, and mutilation of a human body in the March 2013 disappearance and murder of Evelyn Gunter, with whom Bass had an "intimate, romantic relationship."[129] Gunter's badly-burnt remains were discovered in the garage of an abandoned Detroit house on March 12, 2013.[130] Gunter was last seen by her grandson on March 10, and in the early morning hours of March 11, her daughter received a text message from Gunter's phone number stating she was "going to Chicago to help a friend" and would return the next night.[131] Based on a text message conversation that occurred thereafter, Gunter's daughter suspected Gunter had not sent the messages.[132] Gunter's daughter had been introduced to Bass, who called himself "Tiko," by her mother in December 2012.[133] After Gunter's body was discovered on March 12, an autopsy revealed she had been shot in the head behind the ear before her remains were burned, and she was bound in copper wire.[134] A significant amount of circumstantial evidence eventually implicated Bass, including his apparent possession and use of Gunter's car, cell phone, and possibly one of her credit cards after her death, as well as contradictory statements he made to the police and Gunter's family members.[135]

At trial, the court permitted the prosecution to introduce evidence regarding Bass's sexual assault and attempt to murder another woman, CB, some seventeen years before he allegedly killed Gunter.[136] Both CB and a retired detective, to whom Bass gave a signed statement admitting the assault testified, at trial.[137] CB explained that when she was a nineteen-year-old college student, she had known Bass for several years and considered him a friend.[138] One evening in October 1996, Bass came to her house; they watched television and he performed oral sex on her.[139] After she made him stop, they watched television before he abruptly left and returned.[140] CB began feeling uneasy, went to her bedroom, and locked herself inside.[141] Bass came to the door, and he kept

129. *Id.* at 245, 893 N.W.2d at 147.
130. *Id.* at 245, 247–48, 893 N.W.2d at 147–48.
131. *Id.* at 246, 893 N.W.2d at 147.
132. *Id.*
133. *Id.*
134. *Id.* at 247–49, 893 N.W.2d at 148–49.
135. *Id.* at 247, 249–55, 893 N.W.2d at 148–51.
136. *Id.* at 255, 893 N.W.2d at 152.
137. *Id.* at 256, 893 N.W.2d at 152.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 256–57, 893 N.W.2d at 152.

asking if anything was wrong and whether he would have to "get" her out of the room.[142]

Eventually, CB came out, thinking "that it was 'just [her] nerves.'"[143] Bass was standing in the hallway, and as she walked past him he stabbed her in the back, grabbed her from behind, and began slicing her neck with a knife.[144] He continued stabbing her, and when she broke loose he grabbed her again and started slicing her neck again.[145] He then dragged her to the basement, where she tried to play dead until he poured a liquid that smelled like gasoline on her.[146] She coughed, and Bass hit her in the jaw and asked, "Why won't you die, bitch?"[147] He then sexually assaulted her before wrapping her up in a carpet or similar object.[148] She heard him slip and fall, and he then unwrapped her and put her on a nearby couch.[149] Shortly thereafter, CB's mother returned home, and Bass fled.[150] The police and an ambulance were called, and CB reported what happened.[151] Bass was subsequently questioned by the police and provided a signed statement admitting to stabbing CB; however, he verbally denied sexually assaulting her and claimed they had consensual sex earlier.[152]

On appeal, Bass challenged the admission of this other-acts evidence.[153] The court of appeals noted, as in the other cases discussed *supra*, that other-acts evidence: 1) must be offered for a proper purpose, 2) must be relevant to some fact of consequence at trial, and 3) cannot be substantially more unfairly prejudicial than probative.[154] The court especially focused on the balancing required under Rule 403, explaining that the rule does not bar prejudicial evidence, but rather evidence that is unfairly so.[155] "Evidence is unfairly prejudicial when there exists a

142. *Id.* at 257, 893 N.W.2d at 152.
143. *Id.* at 257, 893 N.W.2d at 152–53.
144. *Id.* at 257, 893 N.W.2d at 153.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* at 257–58, 893 N.W.2d at 153.
153. *Id.* at 255, 893 N.W.2d at 152.
154. *Id.* at 259, 893 N.W.2d at 154 (quoting People v. Ackerman, 257 Mich. App. 434, 440, 669 N.W.2d 818, 823 (2003)).
155. *Id.*

danger that marginally probative evidence will be given undue or preemptive weight by the jury."[156]

The court concluded that while the trial court treated CB's testimony as if it only involved a single prior action, there were in fact "two distinct prior bad acts: attempted murder and rape."[157] The former was of logical relevance in this case, while the latter was not.[158] Specifically, the evidence of Bass's attempt to murder CB was logically relevant and was offered for two proper purposes: first, to show his identity as the person who shot and killed Gunter before trying to burn her body and, second, to show his scheme, plan, or system in committing the charged offenses.[159] Contrary to Bass's argument, there were "a number of notable similarities" between the two attacks, including 1) the fact both victims were attacked from behind, 2) both victims were women Bass had known for a substantial time, 3) both victims were women with whom he had some sexual relationship, 4) he poured a liquid that smelled like gasoline on CB, the same substance that was used as an accelerant to burn Gunter's body, and 5) both victims were wrapped or bound in some fashion.[160] These similarities showed both the legal and logical relevance of the evidence, thus satisfying the first two steps of the Rule 404(b) framework.[161]

The court found the question of whether the evidence should have been excluded by the balancing test of Rule 403 to be "a closer question," given that the testimony about the assault on CB was certainly "highly prejudicial."[162] However, because Bass's identity as the perpetrator was one of the key issues at trial—which he admitted on appeal—the similarities between the prior assault and Gunter's murder had a more significant probative value than they otherwise might.[163] Because a court's decision on a close evidentiary question ordinarily cannot constitute an abuse of discretion, the court concluded the testimony concerning the attempted murder was properly admitted.[164]

The sexual assault testimony was, however, a different matter. The court discerned no apparent relevance to any fact of consequence related

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156. *Id.* (quoting People v. Crawford, 458 Mich. 376, 398, 582 N.W.2d 785, 796 (1998)).

157. *Id.* at 259–60, 893 N.W.2d at 154.

158. *Id.* at 260–63, 893 N.W.2d at 154–55.

159. *Id.* at 260, 893 N.W.2d at 154.

160. *Id.*

161. *Id.* at 260–61, 893 N.W.2d at 154.

162. *Id.* at 261, 893 N.W.2d at 155.

163. *Id.*

164. *Id.* (quoting People v. Cameron, 291 Mich. App. 599, 608, 806 N.W.2d 371, 376 (2011)).

to Gunter's murder.[165] Bass was not charged with criminal sexual conduct ("CSC"), and there was no evidence Gunter was sexually assaulted.[166] Thus, the "only logical purpose for the introduction of the sexual-assault evidence was the improper character purpose, i.e., proof that [Bass] is a bad person and therefore probably committed the charged offenses."[167] The court was especially concerned with the danger of unfair prejudice under Rule 403, given the evidence's lack of any apparent probative value.[168] This analysis would, of course, have been "much different" if Bass was charged with a sexual offense against Gunter.[169] However, the jurors' knowledge Bass was a rapist "did nothing to help [them] decide whether he committed the charged offenses."[170] "Instead, without any attendant benefit, the evidence invited jurors to make the impermissible character inference—to decide that if [Bass] would sexually assault CB, a teenage girl he knew well, he is just the sort of 'bad' person who might kill his girlfriend and burn her body."[171]

Therefore, the court concluded that the sexual assault evidence was admitted in error.[172] However, reversal was not warranted because the error was not outcome determinative in light of the overwhelming circumstantial evidence of Bass's guilt and the court's instruction to the jury forbidding the jurors from considering the evidence for character purposes.[173] After addressing several other issues, the court affirmed.[174]

V. RULE 501: PRIVILEGES

There were no noteworthy cases during the *Survey* period discussing the rule concerning privileges.

165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* at 262, 893 N.W.2d at 155.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.* at 262–63, 893 N.W.2d at 155–56.
174. *Id.* at 281, 893 N.W.2d at 165.

VI. RULES 601–615: WITNESSES

A. Witnesses Generally

As a general rule, the Michigan Rules of Evidence imbue judges with broad latitude to oversee the conduct of those appearing before them to ensure the fair and prompt administration of justice.[175] The rules governing the appearance and interrogation of witnesses provide a perfect example. For instance, while the Rules provide that "every person is competent to be a witness" by default, they also grant a court the authority to question a person and determine whether he or she has either sufficient physical or mental capacity or the requisite sense of obligation to testify truthfully and understandably.[176] The rules that follow Rule 601 provide courts with the necessary roadmap to exercise their discretion in a competent, lawful manner.

B. The Trial Court, the Interrogation of Witnesses, and the Presentation of Evidence

The only published Michigan case during the *Survey* period relating to this subset of rules addressed Rule 611, which directs courts to "exercise reasonable control over the mode and order" of interrogating witnesses and presenting evidence, with an overall goals of: 1) making the interrogation and presentation effective for determining the truth, 2) avoiding wasting time, and 3) protecting witnesses from harassment or embarrassment.[177] However, when a court exercises this control, the parties may not always believe it is doing so *reasonably*.

In *People v. Biddles*,[178] Clifford Biddles and his cousin, Charles Johnson, were charged with second-degree murder, assault with intent to commit murder, possession of a firearm during the commission of a felony, and felon in possession of a firearm for the shooting death of Timothy Kirby and the assault of Kirby's nephew, Christopher Johnson.[179] Evidence showed the victims were inside an apartment in the

175. *See* MICH. R. EVID. 102 ("These rules are intended to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."); *see also* People v. Conley, 270 Mich. App. 301, 307, 715 N.W.2d 377, 382 (2006) (noting that it is well-established that a court has wide discretion and power to control the conduct of proceedings).

176. MICH. R. EVID. 601.

177. MICH. R. EVID. 611(a).

178. People v. Biddles, 316 Mich. App. 148, 896 N.W.2d 461 (2016).

179. *Id.* at 150–51, 896 N.W.2d at 465.

complex where they lived, while Biddles and Johnson were with a group "partying" outside when Kirby heard someone say they had been stabbed.[180] When the victims investigated, they encountered Biddles and asked him what was happening.[181] Victim Johnson later recounted that Biddles responded by asking if the victims "got a beef" and signaling to codefendant Johnson, who then approached, brandished a handgun, and shot at the victims.[182]

Both men were tried together, but midway through the trial Johnson pleaded guilty as charged and testified for Biddles.[183] Johnson admitted he approached the victims after they spoke to Biddles, pulled out his gun, and fired three or four shots, killing Kirby.[184] He denied Biddles "motioned or signaled to him," noting Biddles appeared to be in shock after the shooting.[185] Biddles was acquitted of all the charges except for felon in possession of a firearm, based on evidence that he was seen holding a gun after the shooting.[186]

On appeal, Biddles argued some of the trial judge's comments to defense counsel during cross-examination of the officer in charge deprived him of a fair trial.[187] The court of appeals framed the issue as one of judicial misconduct.[188] To sustain this claim, Biddles had to demonstrate the trial court's conduct pierced the veil of judicial impartiality, which occurs when the totality of the circumstances show "it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party."[189] The factors a reviewing court must consider include the nature of the challenged conduct, the judge's tone and demeanor, the scope of the conduct within the context of the length and complexity of the trial, the extent to which the judge's conduct was directed at one side more than the other, and whether any curative instructions were given.[190]

The court of appeals first examined a remark by the trial judge to defense counsel immediately after a prosecution objection to one of

180. *Id.* at 151, 896 N.W.2d at 465.
181. *Id.*
182. *Id.*
183. *Id.* at 151 n.1, 896 N.W.2d at 465 n.1.
184. *Id.* at 151, 896 N.W.2d at 465.
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.* at 151–52, 896 N.W.2d at 465 (quoting People v. Jackson, 292 Mich. App. 583, 598, 808 N.W.2d 541, 552 (2011)).
189. *Id.* at 152, 896 N.W.2d at 465 (quoting People v. Stevens, 498 Mich. 162, 171, 869 N.W.2d 233, 242 (2015)).
190. *Id.* at 152, 896 N.W.2d at 466 (quoting *Stevens*, 498 Mich. at 172, 869 N.W.2d at 242).

defense counsel's questions was sustained.[191] Defense counsel asked, "May we approach on something before I get to this area just in case you—[,]" and the court interjected, "Just before you get a spanking."[192] The court noted that "[a]lthough this comment would have been better left unsaid, the judge seemed to be acknowledging defense counsel's reason for approaching the bench."[193] In the line of questioning preceding this exchange, the trial court had sustained the prosecutor's objections and intervened at least nine times to try explaining to defense counsel why his questions "were improper and needed to be rephrased."[194] While the judge made the challenged statement in a "jesting manner," the "clear intent" was to convey that defense counsel could approach the bench to hopefully "avoid being interrupted and corrected yet again."[195] Given this context, the court could not conclude the statement influenced the jury.[196]

The court next examined another series of exchanges, which included the judge thwarting counsel's attempts to ask the officer in charge: 1) "if he had made 'a deal' with a witness," 2) if Biddles was charged because he was untruthful, and 3) "when the arrest warrant was issued."[197] The court noted that, while a defendant has a constitutional right to cross-examine his accusers,[198] a trial court has wide latitude under Rule 611(a) to impose reasonable limits on cross-examination to ensure relevancy or limit harassment, prejudice, confusion of the issues, and repetitiveness.[199] The judge's remarks simply were not of the kind that would have unduly influenced the jury, because "the record shows that the trial judge appropriately exercised her authority to control the trial and prevent excessive and improper questioning of the officer."[200] The trial court had "aptly noted" the officer could not testify to matters of which he lacked personal knowledge[201] and interrupted various questions that either called for speculation or were repetitive and argumentative.[202] The court noted Biddles offered no "explanation, argument, or authority indicating how any of the evidentiary objections

191. *Id.*
192. *Id.* at 152–53, 896 N.W.2d at 466.
193. *Id.* at 153, 896 N.W.2d at 466.
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. U.S. CONST., amend. VI.
199. *Biddles*, 316 Mich. App. at 153–54, 896 N.W.2d at 466 (citing and quoting MICH. R. EVID. 611(a)).
200. *Id.* at 154, 896 N.W.2d at 466–67.
201. MICH. R. EVID. 602.
202. *Biddles*, 316 Mich. App. at 154, 896 N.W.2d at 467.

were improper and not in accordance with [Rule] 611(a)," and he failed to note many of the judge's interruptions resulted from defense counsel "talk[ing] back to the judge" or ignoring the court's instructions.[203]

Finally, the court examined a question from the judge—"[W]hy do you drag things out?"—after defense counsel asked the officer in charge, "Did you testify in the case," "[a]nd you sat there in the witness chair," and "[a]s a witness?"[204] When counsel then asked, "Can I just be me," the judge noted the exchange with the officer was becoming argumentative and that the Rules of Evidence do not permit argumentative questioning.[205] Defense counsel denied being argumentative.[206] The court explained that Biddles did not acknowledge the fact of either the "unnecessary and inane questions" or the "improper and disrespectful response to the judge's ruling and statements."[207]

Ultimately, the court concluded the totality of the circumstances showed the trial court's clear focus was "on enforcing the rules of evidence."[208] The judge's comments were not meant to "pierce the veil of judicial impartiality and were unlikely to unduly influence the jury."[209] The judge also had explained to the jury her duty to ensure the trial ran efficiently and fairly, and the jury was instructed to decide the case based solely on the evidence and disregard any opinion the jurors might believe the court held.[210] Finally, the court noted Biddles was acquitted of all but one charge, thus "seriously calling into question" his claim that judicial bias improperly influenced the jury.[211] The court then addressed several sentencing issues before affirming Biddles' conviction and remanding for resentencing.[212]

VII. RULES 701–707: OPINIONS AND EXPERT TESTIMONY

There were no noteworthy cases during the *Survey* period discussing the rules concerning opinions and expert testimony.

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203. *Id.*
204. *Id.* at 154–55, 896 N.W.2d at 467.
205. *Id.* at 155, 896 N.W.2d at 467.
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.* at 156, 896 N.W.2d at 467.
212. *Id.* at 156–67, 896 N.W.2d at 467–74. In a separate opinion concurring in part and dissenting in part, Judge Ronayne Krause noted she agreed "fully" with the majority's resolution of Biddles' challenge to the trial court's conduct. *Id.* at 168, 896 N.W.2d at 474 (Ronayne Krause, J., concurring in part and dissenting in part).

VIII. RULES 801–806: HEARSAY

A. Hearsay Generally

Hearsay is an unsworn, out-of-court statement made by a declarant and offered in evidence to prove the truth of the matter it asserts.[213] Hearsay is inadmissible except to the extent the Rules of Evidence otherwise permit.[214] The Rules establish both a series of specific exemptions, *i.e.*, statements that are not hearsay by definition,[215] and a series of general exceptions, *i.e.*, statements that are hearsay but are nonetheless admissible in certain circumstances.[216] If a statement is "not offered for the truth of its contents, [then] it is not hearsay."[217]

1. General Hearsay Challenges and the Rule 803 Exceptions

Some cases involving hearsay challenges are fairly straightforward. Consider *People v. Shaw*,[218] in which Barry Shaw was convicted of nine counts of first-degree CSC.[219] These charges arose when the complainant, at age twenty-three, reported to the Lansing Police that her stepfather, Shaw, had sexually molested her on multiple occasions when she was between the ages of eight and sixteen.[220]

Two of the issues addressed by the court of appeals in *Shaw* related to hearsay, the first of which was entwined in a claim of ineffective assistance of counsel. Shaw claimed his trial attorney was ineffective for failing to object to alleged hearsay testimony from five different witnesses who recounted the complainant's statements detailing the

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213. MICH. R. EVID. 801(c); *see also* People v. Poole, 444 Mich. 151, 158–59, 506 N.W.2d 505, 509 (1993), *overruled in part on other grounds* People v. Taylor, 482 Mich. 368, 378, 759 N.W.2d 361 (2008).

214. MICH. R. EVID. 802; *see also* People v. Duncan, 494 Mich. 713, 724, 835 N.W.2d 399, 405 (2013).

215. MICH. R. EVID. 801(d); *see also, e.g.*, People v. Malone, 445 Mich. 369, 376–77, 518 N.W.2d 418, 421 (1994) (discussing the hearsay exemptions in the Michigan Rules of Evidence).

216. MICH. R. EVID. 803; MICH. R. EVID. 803A; MICH. R. EVID. 804; *see also, e.g.*, *In re* Yarbrough, 314 Mich. App. 111, 115 n.1, 885 N.W.2d 878, 880 n.1 (2016) (noting that "multiple exceptions to the hearsay rule permit the admission of certain out-of-court statements" and citing to Rules 803 and 804).

217. People v. Mesik, 285 Mich. App. 535, 540, 775 N.W.2d 857, 862 (2009) (on remand). The statement must still meet other evidentiary requirements before it is admissible, such as relevance. *See supra* Part IV.A.

218. People v. Shaw, 315 Mich. App. 668, 892 N.W.2d 15 (2016).

219. *Id.* at 671, 892 N.W.2d at 19.

220. *Id.*

earlier abuse by Shaw.[221] Shaw claimed this testimony was particularly damaging because it bolstered the complainant's credibility "in a case that turned on credibility."[222]

The court of appeals' majority[223] first turned to the testimony of the complainant's sister and two cousins, each of whom testified the complainant told them Shaw had sexually touched her.[224] One of the cousins and the sister also testified about specific incidents, as relayed by the complainant.[225] The prosecution conceded the testimony was hearsay, with no applicable exception or exemption.[226] Thus, the court concluded the attorney's failure to object meant that "defense counsel's performance fell below an objective standard of reasonableness."[227]

The court next addressed the testimony of Dr. Stephen Guertin, a pediatrician who was qualified at trial as an expert in child sexual abuse.[228] Dr. Guertin conducted a forensic physical examination of the complainant seven years after the last instance of abuse, and at trial, he recounted the complainant's detailed statements about the abuse.[229] The prosecution argued any objection to this testimony by Shaw's trial counsel would have been futile because it was admissible as a statement made for the purpose of medical treatment or diagnosis—an exception to the hearsay rule.[230] Specifically, Rule 803(4) provides that, regardless of whether the declarant is available to testify or not:

> Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source

221. *Id.* at 672, 892 N.W.2d at 20. A defendant alleging ineffective assistance must show: 1) the attorney's performance fell below an objective standard of reasonableness under prevailing professional norms, and 2) there is a reasonable probability that, but for the error, the result of the proceedings would have been different. (citing Strickland v. Washington, 466 U.S. 668, 687–89, 694 (1984); People v. Vaughn, 491 Mich. 642, 669, 821 N.W.2d 288, 306 (2012).

222. *Shaw*, 315 Mich. App. at 672, 892 N.W.2d at 20.

223. Judge Kathleen Jansen dissented. *Id.* at 690–98, 892 N.W.2d at 28–33 (Jansen, J., dissenting).

224. *Id.* at 673, 892 N.W.2d at 21.

225. *Id.*

226. *Id.* at 673–74, 892 N.W.2d at 21.

227. *Id.* at 674, 892 N.W.2d at 21.

228. *Id.* at 673–74, 892 N.W.2d at 21.

229. *Id.* at 674, 892 N.W.2d at 21.

230. *Id.* (citing MICH. R. EVID. 803(4)).

> thereof insofar as reasonably necessary to such diagnosis and treatment [are not excluded by the hearsay rule].[231]

This exception is grounded in the rationale that the declarant has a self-interested motivation to speak truthfully to receive proper care and the reasonable necessity of the statement to his or her diagnosis and treatment.[232] There is no need for an injury to be readily apparent, and, generally, in sexual assault cases injuries may be latent—*e.g.*, sexually transmitted diseases, psychological damage, etc.—thus necessitating a more robust recounting of the circumstances of the assault.[233] In this case, however, the court of appeals concluded Dr. Guertin's testimony did not fall under the Rule 803(4) hearsay exception given the substantial time that had passed since the alleged incidents, thus minimizing the likelihood treatment was required.[234] Additionally, the complainant was specifically referred to Dr. Guertin by the police for investigative purposes only.[235] Thus, the testimony was hearsay, and trial counsel's failure to object to it fell below an objective standard of reasonableness.[236]

Finally, the court addressed the testimony of Detective Elizabeth Reust, the primary investigating officer, who also testified in detail about the complainant's statements to her and also about statements made to her by Dr. Guertin, describing the complainant's statements to him.[237] The detective also testified about her investigation, in which she "confirmed numerous background facts" reported by the complainant using out-of-court sources and "corroborated" what the complainant said.[238] The court concluded there were no applicable hearsay exceptions to the detective's testimony recounting the complainant's statements or

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231. MICH. R. EVID. 803(4).

232. *Shaw*, 315 Mich. App. at 674, 892 N.W.2d at 21 (quoting People v. Meeboer, 439 Mich. 310, 322, 484 N.W.2d 621, 626 (1992)).

233. *Id.* at 674–75, 892 N.W.2d at 21 (quoting People v. Mahone, 294 Mich. App. 208, 215, 816 N.W.2d 436 (2011)).

234. *Id.* at 675, 892 N.W.2d at 21–22.

235. *Id.* The complainant had seen a different physician for gynecological services during the period after the abuse ended but before the investigation began, but the doctor she saw was not called to testify. *Id.*

236. *Id.* at 675–76, 892 N.W.2d at 22. The prosecution argued that the trial attorney's testimony at an evidentiary hearing showed that counsel strategically allowed the admission of the statements in the hope of pointing out variations in the complainant's statements. *Id.* The court rejected this argument, stating that the doctor's report was available to the attorney before trial and that it "reveals the absence of any significant inconsistencies." *Id.*

237. *Id.* at 676, 892 N.W.2d at 22.

238. *Id.* at 676, 892 N.W.2d at 23.

those of Dr. Guertin and that she had improperly advised the jury that the complainant was credible through her testimony about her investigation.[239] Because there was no basis to allow this testimony, the court concluded the trial attorney's performance fell below an objective standard of reasonableness.[240]

Ultimately, the court concluded that there was a reasonable probability that, but for the trial attorney's failure to object to these various instances of testimony, the outcome of the trial would have been different.[241] The case, the court explained, turned largely on the complainant's credibility given the amount of time that had passed, the lack of other witnesses, and the lack of other circumstantial proofs.[242] Absent any objections, "the jury heard the complainant's version of events more than five times. And in the case of [Dr.] Guertin and [Det.] Reust, the hearsay was offered with what amounted to an official stamp of approval."[243] The court again noted Det. Reust's testimony regarding how she "corroborated a large number of incidental details related to her by the complainant by consulting out-of-court sources," which the court believed "was clearly intended to bolster the complainant's credibility through references to hearsay."[244] Moreover, the court noted that Dr. Guertin testified that he believed the complainant based on her medical history and his physical findings, even though his own testimony showed there were viable alternative explanations for those findings.[245] Accordingly, the court concluded Shaw met both prongs of the test to show ineffective assistance of counsel.[246]

2. The Intersection of the Hearsay Rules, Impeachment, and Other-Acts Evidence

The second hearsay issue in *Shaw* stemmed from testimony by Officer Kasha Osborn, which was admitted over a defense objection, and related to a statement allegedly made to the officer by the complainant's brother.[247] The officer testified the brother told her about an incident that occurred at the family's home when he was twelve or thirteen years old, in which Shaw came downstairs partly undressed "acting very angry

239. *Id.*
240. *Id.* at 676–77, 892 N.W.2d at 23.
241. *Id.* at 677–78, 892 N.W.2d at 23.
242. *Id.* at 677, 892 N.W.2d at 23.
243. *Id.*
244. *Id.*
245. *Id.* at 678, 892 N.W.2d at 23–24.
246. *Id.*
247. *Id.* at 682, 892 N.W.2d at 25.

toward the complainant and saying she was 'in trouble.'"[248] The brother also said that, during that incident, Shaw became "heated," grabbed the complainant's mother by the neck, and threatened to kill her.[249] At trial, the brother denied having any memory of the incident, and he claimed he did not remember telling the police about it.[250] Officer Osborn was called to testify as to the contents of the brother's statement.[251] Shaw's attorney objected on hearsay grounds and was overruled, and on appeal Shaw also claimed the testimony violated Rules 404(b) and 403.[252]

The trial court had overruled Shaw's hearsay objection on the basis that the statement was a prior inconsistent statement offered for impeachment purposes.[253] The court of appeals' majority recognized that when a witness claims not to remember making a prior inconsistent statement, he may be impeached with extrinsic evidence of his doing so.[254] However, the court noted, the purpose of impeachment with extrinsic evidence is to prove that the witness *made* the statement, rather than to prove its *content*.[255] Accordingly, testimony from a witness who is presenting extrinsic proof should focus on matters such as the time, place, circumstances, and subject matter of the statement, without delving into its contents.[256] The court further recognized that "a prosecutor may not use an elicited denial as a springboard for introducing substantive evidence under the guise of rebutting the denial."[257] Stated differently, "[a] prosecutor cannot use a statement that directly tends to inculpate the defendant under the guise of impeachment when there is no other testimony from the witness for which his credibility is relevant to the case."[258]

The *Shaw* court concluded there was "nothing to suggest that the *content* of the brother's statement to Osborn was needed to impeach his testimony" denying he made the statement, and he offered no other

248. *Id.*
249. *Id.*
250. *Id.* at 683, 892 N.W.2d at 26.
251. *Id.* The majority opining that, given what it characterized as the relative insignificance of the brother's other testimony and the fact that he had not witnessed the sexual abuse, there was "little doubt that the prosecution's purpose in calling him as a witness was to have him describe the incident later described by [Officer] Osborn." *Id.*
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.* at 684, 892 N.W.2d at 27–28 (emphasis omitted) (quoting People v. Stanaway, 446 Mich. 643, 692–93, 521 N.W.2d 557, 581 (1994)).
258. *Id.* at 684–85, 892 N.W.2d at 27 (quoting People v. Kilbourn, 454 Mich. 677, 682, 563 N.W.2d 669, 671 (1997)) (internal quotation marks omitted).

testimony that made his credibility relevant.[259] The prosecutor, the court explained, had simply and improperly used his denial as a "springboard" to introduce substantive evidence "under the guise of rebutting the denial."[260] The court held that the officer's testimony concerning the substance of the statement should not have been admitted and that the error was compounded further by the trial court's failure to give a limiting instruction.[261] Accordingly, the court concluded the testimony was improperly admitted, and given the other errors the court had identified, it could not conclude the error was harmless.[262]

B. Unavailability and the Rule 804 Hearsay Exceptions

Rule 804 provides a series of hearsay exceptions that are applicable only in a limited context—namely, when the declarant who made (or allegedly made) the statement is "unavailable."[263] The term "unavailability" is one that carries a specific definition under Rule 804, and it includes situations in which the declarant:

> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
>
> (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
>
> (3) has a lack of memory of the subject matter of the declarant's statement; or
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by

259. *Id.* at 685, 892 N.W.2d at 27.

260. *Id.*

261. *Id.* at 685–87 (holding also that the portion of the alleged statement concerning the physical attack and threat against the complainant's mother was improperly admitted under Rule 404(b)).

262. *Id.* at 687.

263. MICH. R. EVID. 804.

> process or other reasonable means, and in a criminal case, due diligence is shown.[264]

The rule further provides that a declarant is *not* considered "unavailable" if any of the aforementioned scenarios occurred "due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying."[265] The hearsay exceptions themselves include such statements as former testimony, statements made under a belief of impending death, statements against interest, statements of personal or family history, deposition testimony, and statements by a declarant made unavailable by an opponent, and also include a residual exception for other scenarios that may arise.[266]

1. The Unavailability of Unavailability Outside of Rule 804

Courts must always be mindful not to inadvertently transpose the language of two evidentiary rules, or a swift appellate reversal is sure to follow. Consider *People v. Benson*,[267] in which the Michigan Supreme Court, in a brief order,[268] vacated an order of the Michigan Court of Appeals where that court held that the investigative subpoena testimony of two witnesses was admissible under Rule 801.[269] The supreme court held that the court of appeals erred in its analysis of Rule 801(d)(1)(A),[270] which concerns the admission of prior inconsistent statements, when it considered "whether the witnesses were unavailable, rather than whether their prior statements were inconsistent."[271] The court explained that while a witness's unavailability is relevant if the

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264. MICH. R. EVID. 804(a).

265. *Id.*

266. MICH. R. EVID. 804(b).

267. People v. Benson, 500 Mich. 964, 892 N.W.2d 370 (2017).

268. A Michigan Supreme Court order is "binding precedent if it constitutes a final disposition of an application and contains a concise statement of the applicable facts and reasons for the decision." DeFrain v. State Farm Mut. Auto. Ins. Co., 491 Mich. 359, 369–70, 817 N.W.2d 504, 510–11 (2012). These requirements may be met by reference to another opinion. *Id.*

269. *Benson*, 500 Mich. at 964, 892 N.W.2d at 370.

270. The rule provides that a statement is not hearsay if

> [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition . . . .

MICH. R. EVID. 801(d)(1)(A).

271. *Benson*, 500 Mich. at 964, 892 N.W.2d at 370.

proponent of a statement seeks admission under Rule 804, it is simply not relevant under Rule 801.[272]

2. Hearsay Unavailability Versus Confrontation Clause Unavailability

During the *Survey* period, the court of appeals also addressed issues related to the unavailability of a witness under Rule 804. One ongoing issue concerning unavailable witnesses stems from the close link between unavailability for hearsay purposes and unavailability under the Sixth Amendment's Confrontation Clause.[273]

Consider *People v. Sardy*,[274] in which the Michigan Supreme Court directed the Michigan Court of Appeals to consider two issues involving application of the Confrontation Clause.[275] The court of appeals had issued a prior opinion affirming all of defendant Ghassan Sardy's convictions.[276] Sardy was convicted of child abusive sexual activity, using a computer to commit a crime, and two counts of second-degree CSC.[277] The first two convictions stemmed from videos filmed on Sardy's iPhone and stored on his iMac and an external hard drive, while the latter convictions were based on the victim's testimony.[278] However, the victim's testimony was taken at Sardy's preliminary examination and admitted at trial after the trial court ruled that the victim was unavailable due to a lack of memory.[279] The victim took the stand at trial and gave some foundational testimony, but she could not recall any matters related to the charges.[280] Sardy was allowed to cross-examine her, but the court limited his questions to the subject matter of the direct examination and precluded him from exploring the victim's accusations or her "then-current lack of recall or memory."[281]

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272. *Id.* On remand, the court of appeals reached the same conclusion it had in its prior order (using a different rationale) and reversed a May 2016 order of the trial court that quashed the general information. The Supreme Court denied a new defense application. People v. Benson, 501 Mich. 902, 902 N.W.2d 418 (2017).

273. U.S. CONST. amend. VI.

274. People v. Sardy, 318 Mich. App. 558, 899 N.W.2d 107 (2017) (on remand).

275. *Id.* at 560–61, 899 N.W.2d at 108.

276. People v. Sardy, 313 Mich. App. 679, 884 N.W.2d 808 (2015), *vacated*, 500 Mich. 877, 889, N.W.2d 644 (2016), *remanded to* 318 Mich. App. 558, 899 N.W.2d 107 (2017).

277. *Id.* at 560, 899 N.W.2d at 108.

278. *Id.* at 561, 899 N.W.2d at 108.

279. *Id.* at 561–62, 899 N.W.2d at 108–09.

280. *Id.* at 562, 899 N.W.2d at 108–09.

281. *Id.*

On appeal, Sardy argued that the trial court violated his confrontation rights by admitting the preliminary examination testimony; he asserted the victim was not unavailable as was required to admit the testimony and noted that she had not been properly sworn before giving the testimony.[282] In its initial opinion, the court of appeals held that the victim was unavailable for confrontation purposes, that Sardy had a full and fair opportunity to cross-examine her during the preliminary examination, and the failure to place her under oath at the examination did not warrant reversal.[283] Sardy had not argued that his confrontation rights were violated by the court's decision to limit his cross-examination of the victim at trial; rather, that issue was presented to the court sua sponte on remand.[284]

On remand, the court of appeals recognized that the victim was in fact "available" for purposes of the Confrontation Clause—despite her alleged lack of memory—because when a declarant appears at trial for cross-examination, "the Confrontation Clause does not place any constraints on the use of a prior testimonial statement, and . . . does not bar the admission of a prior testimonial statement 'so long as the declarant is present at trial to defend or explain it.'"[285] Because the victim was physically present at trial and *could* have been cross-examined about the CSC offenses and her memory loss, she was "available" under the Sixth Amendment.[286] The Confrontation Clause, the court noted, only guarantees the *opportunity* for effective cross-examination, not that cross-examination *will* be effective or successful.[287] Importantly, the court explained that there may be instances in which a witness is considered "available" under the Confrontation Clause while he or she is simultaneously deemed "unavailable" for hearsay purposes under Rule 804(a).[288] In its prior opinion, the court noted that it had recognized that the provisions of Rule 804(a) *may* be "employed to determine unavailability under the Confrontation Clause as well."[289] Accordingly, while the victim may have been unavailable under Rule

282. *Id.*

283. *Id.* (citing People v. Sardy, 313 Mich. App. 679, 691–711, 884 N.W.2d 808, 815–25.)

284. *Id.* at 562–63, 899 N.W.2d at 109.

285. *Id.* at 563, 899 N.W.2d at 109 (quoting Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004)).

286. *Id.* at 564, 899 N.W.2d at 110.

287. *Id.* at 564–65, 899 N.W.2d at 110 (quoting United States v. Owens, 484 U.S. 554, 559–60 (1986)).

288. *Id.* at 565, 899 N.W.2d at 110 (quoting MICH. R. EVID. 804(a)(3)) (noting that a declarant is unavailable for hearsay purposes when he or she "has a lack of memory of the subject matter of the declarant's statement").

289. *Id.* at 565 n.4, 899 N.W.2d at 111 n.4.

804(a) for hearsay purposes, the court held that she was available for confrontation and that the trial court therefore improperly limited the cross-examination.[290] The court vacated Sardy's second-degree CSC convictions but affirmed his other convictions, which were independently established, and remanded for resentencing.[291]

3. Unavailability and the Witness Who Has Never Testified

A brief but nonetheless interesting argument concerning the concept of unavailability under Rule 804 arose in *People v. Everett*.[292] Donnie Everett was convicted of one count of second-degree murder, three counts of assault with intent to commit murder, two counts of assault with intent to do great bodily harm less than murder, felon in possession of a firearm, and possession of a firearm during the commission of a felony.[293] The shootings that resulted in the murder and assault with intent to commit murder charges occurred during an argument between one of the victims of the lesser assault counts and her former friend.[294] Evidence introduced at trial showed that Everett brought a gun to the scene and fired several shots after the argument grew into a larger altercation.[295] He then fled and gave a backpack containing his gun to a neighbor after making statements that he had shot a woman and her daughter.[296]At trial, "the prosecution presented alternative theories" that Everett acted "as either a principal or an aider and abettor" because there was evidence of multiple shooters.[297]

Everett's girlfriend, Brittany Dawning, was initially listed as a witness because she was at the scene.[298] Her witness detainer was later dismissed by the trial court at the prosecution's request and over Everett's objection.[299] On appeal, Everett argued Dawning was an endorsed witness whom the prosecution was obligated to produce by law,[300] while the prosecution argued Dawning was "an alternative witness, meaning that the prosecution never guaranteed she would be called" and could therefore remove her from the witness list without a

290. *Id.* at 565–66, 899 N.W.2d at 110–11.
291. *Id.* at 566–67, 899 N.W.2d at 111.
292. People v. Everett, 318 Mich. App. 511, 899 N.W.2d 94 (2017).
293. *Id.* at 514, 899 N.W.2d at 98.
294. *Id.* at 514–15, 899 N.W.2d at 98.
295. *Id.* at 515, 899 N.W.2d at 98
296. *Id.*
297. *Id.*
298. *Id.* at 515, 899 N.W.2d at 98–99.
299. *Id.* at 515–16, 899 N.W.2d at 98–99.
300. *Id.* (citing MICH. COMP. LAWS ANN. § 767.40a(3) (West 2010)).

showing of good cause.[301] "Alternatively, the prosecution argue[d] . . . that there was good cause for deleting Dawning from the witness list and that, in any event," Everett could not show prejudice from the removal.[302]

The Michigan Court of Appeals agreed with Everett that Dawning was improperly removed from the witness list because the controlling statute made no provision for "alternative witnesses."[303] However, Everett was not prejudiced by the trial court's non-compliance with the statute for two reasons.[304]

First, the prosecution did present evidence to show good cause for the removal, such as its exercise of due diligence to locate Dawning, even though the trial court ultimately had not ruled on that issue.[305] Second, and more importantly, there was no indication as to what testimony Dawning would have offered, so the court could not conclude her testimony would have benefitted Everett.[306] Everett argued in general terms that the jury was unable to assess Dawning's credibility and demeanor, and he analogized his case to several cases that "discussed the prosecution's exercise of due diligence in producing a witness."[307] The court of appeals, however, found this analogy unpersuasive because each case Everett cited discussed the due diligence requirement "in the context of the Confrontation Clause and whether the prosecutor could introduce prior testimony of the respective witnesses under MRE 804(b)(1)."[308] In those cases, a witness who gave prior testimony did not appear at trial, and "the jury was presented with past testimony from the witness and left unable to assess the witness's demeanor first-hand."[309] In this case, Dawning *never* appeared at *any* prior proceeding, and the jury therefore did not receive *any* evidence from her.[310] Thus, the court concluded there was "no merit to [Everett's] suggestion that prejudice arose because the

301. *Id.* at 516, 899 N.W.2d at 99.

302. *Id.*

303. *Id.* at 516–23, 899 N.W.2d at 99–103.

304. *Id.* at 523–24, 899 N.W.2d at 102–03 (first quoting People v. Elston, 462 Mich. 751, 762, 614 N.W.2d 595, 601 (2000); and then quoting People v. Duenaz, 306 Mich. App. 85, 104–05, 854 N.W.2d 531, 544 (2014)).

305. *Id.* at 524, 899 N.W.2d at 103.

306. *Id.* at 525, 899 N.W.2d at 103.

307. *Id.* at 525 n.7, 899 N.W.2d at 104 n.7 (first citing People v. Bean, 457 Mich. 677, 580 N.W.2d 390 (1998); then citing People v. Dye, 431 Mich. 58, 427 N.W.2d 501 (1988); and then citing People v. James, 192 Mich. App. 568, 481 N.W.2d 715 (1992)).

308. *Id.* (emphasis added).

309. *Id.*

310. *Id.*

jury could not evaluate Dawning's credibility."[311] The court also rejected Everett's other arguments before affirming his convictions.[312]

4. Unavailability Caused by the Proponent of a Hearsay Statement

As noted previously, even if a declarant otherwise meets the requirements for unavailability under Rule 804(a), the declarant is *not* unavailable if the unavailability stems from the "procurement or wrongdoing of the proponent of the statement for the purpose of preventing" the declarant from testifying.[313] The Michigan Court of Appeals recently considered a claim arising under this provision of Rule 804(a) in *People v. Lopez*.[314]

Devaun Lopez and Jarriel Reed stood trial for the shooting death of victim Terry Johnson in Saginaw.[315] Johnson's mother was present and immediately believed that her son's ex-girlfriend was responsible.[316] However, a police investigation cleared the girlfriend and unearthed evidence tying Lopez and Reed to the shooting, including casings identical in caliber, color, and brand to those found near the scene of a drive-by shooting committed a week earlier.[317] Police suspected one Dennis Hoskins was the shooter in that incident, accompanied by Lopez and Reed.[318] A witness in Johnson's neighborhood also picked Lopez out of a line-up as appearing most like a man she saw running after the shooting, though she could not definitively identify him.[319] A friend of Reed's also told the police that Reed admitted to killing Johnson.[320]

However, the core evidence linking Lopez to Johnson's murder came from Hoskins, who, during his preliminary examination, testified that he faced an assault charge arising from the drive-by shooting incident and that Lopez testified against him in that case.[321] Eventually, Hoskins agreed to provide information incriminating Lopez and Reed; and he testified that both men had admitted to participating in Johnson's murder, with Lopez as the shooter.[322] He claimed Reed mistook Johnson for a man who shot Reed's brother years earlier, and both Lopez and Reed had

311. *Id.*
312. *Id.* at 525–31, 899 N.W.2d at 103–07.
313. MICH. R. EVID. 804(a).
314. People v. Lopez, 316 Mich. App. 704, 892 N.W.2d 493 (2016).
315. *Id.* at 707, 892 N.W.2d at 494.
316. *Id.*
317. *Id.* at 707–08, 892 N.W.2d at 494–95.
318. *Id.* at 708, 892 N.W.2d at 495.
319. *Id.*
320. *Id.*
321. *Id.*
322. *Id.*

"openly discussed various details of Johnson's killing," including the caliber of the gun used.[323]

A week before the trial was set to begin, the prosecution moved to declare Hoskins unavailable as a witness and admit his preliminary examination testimony under Rule 804(b)(1).[324] Under this Rule, if a declarant is unavailable, then his or her "[t]estimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered . . . had an opportunity or similar motive to develop the testimony by direct, cross, or redirect examination" is not excluded by the hearsay rule.[325] The prosecution's motion stated that a voicemail left for the prosecutor by Hoskins' attorney advised that Hoskins was no longer willing to testify.[326] Yet, when the court considered the motion the day before trial, Hoskins asserted he did want to testify before a court officer took him out of the courtroom.[327]

The next morning, the prosecutor referenced an off-the-record discussion, noting that it had come to his attention that Hoskins made comments to Lopez and Reed as he was being led from the courtroom the day before that indicated he may have intended to perjure himself or give testimony inconsistent with his prior testimony.[328] The prosecutor asked the court to summon Hoskins and advise him of his Fifth Amendment rights if he did intend to perjure himself.[329] The prosecutor also noted that Reed's attorney had accused the prosecutor of threatening or intimidating Hoskins the previous day and that Reed's attorney was the first to advise Hoskins he could face perjury charges.[330] The prosecutor explained he had followed up with Hoskins by noting he was not threatening him but that he could be charged with perjury if he testified inconsistently with his prior testimony.[331] Reed's attorney took issue with the prosecutor's account and explained that the prosecutor also told Hoskins he would be facing life in prison if convicted of perjury, and Lopez's attorney interjected to note that he had heard that

323. *Id.*
324. *Id.* at 709, 892 N.W.2d at 495.
325. MICH. R. EVID. 804(b)(1).
326. *Lopez*, 316 Mich. App. at 709, 892 N.W.2d at 495.
327. *Id.*
328. *Id.*
329. *Id.* The prosecution cited a prior unpublished opinion of the Michigan Court of Appeals in support of its request. People v. Daniels, No. 184692, 1997 WL 33344581 (Mich. Ct. App. July 11, 1997).
330. *Lopez*, 316 Mich. App. at 710, 892 N.W.2d at 495–96.
331. *Id.*

statement.[332] One of the investigating officers, who had been present, denied hearing any threats.[333] Because neither Hoskins nor his attorney was present, the court decided to revisit the issue later.[334]

Hoskins arrived to testify on the third day of trial, and his attorney was present.[335] Hoskins' attorney indicated that his client was invoking his Fifth Amendment[336] right and refusing to answer questions that might subject him to a perjury charge.[337] When asked by the court if he heard and understood his attorney, Hoskins replied: "Yes. The prosecutor's told me—they threatened me with life in prison."[338] Hoskins affirmed he was exercising his Fifth Amendment right and declined to testify.[339]

The prosecution renewed its motion to have Hoskins declared unavailable and admit his prior testimony.[340] Reed's attorney asked that the record reflect that Hoskins chose not to testify due to a threat of life imprisonment, that the jury should be instructed that the prosecution had a duty to produce a witness who was rendered unavailable by the prosecution's actions, and that the jury should be instructed it could infer Hoskins' testimony would have been damaging to the prosecution's case.[341] Reed's attorney also objected to the admission of the prior testimony due to his inability to cross-examine a transcript or to impeach Hoskins with evidence produced after that testimony occurred.[342] "Lopez's attorney further requested that the jury be advised of Hoskins' recent conviction and the court agreed."[343] Hoskins' prior testimony was later played for the jury.[344]

The next day, the prosecution called Hoskins' attorney to testify.[345] On cross-examination, Reed's attorney elicited information concerning Hoskins' decision to invoke his Fifth Amendment right.[346] Lopez's attorney also solicited testimony that Hoskins had been charged with three counts of assault with intent to commit murder, which carried a possible life sentence, but that he ultimately pleaded to lesser charges

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332. *Id.* at 710, 892 N.W.2d at 496.
333. *Id.* at 710–11, 892 N.W.2d at 495–96.
334. *Id.* at 711, 892 N.W.2d at 496.
335. *Id.*
336. U.S. CONST. amend. V.
337. *Lopez*, 316 Mich. App. at 711, 892 N.W.2d at 496.
338. *Id.*
339. *Id.*
340. *Id.*
341. *Id.* at 711–12, 892 N.W.2d at 496.
342. *Id.* at 712, 892 N.W.2d at 497.
343. *Id.*
344. *Id.*
345. *Id.*
346. *Id.* at 712–13, 892 N.W.2d at 497.

that carried a four-year maximum.[347] On redirect examination, the prosecution presented Hoskins' prior plea agreement, in which he had agreed to testify and which gave him advance warning of the consequences of perjury.[348] Hoskins' attorney also testified that Hoskins did not tell him that he was threatened by the prosecutor before taking the stand and refusing to testify.[349] Later, on the final day of trial, Reed's attorney moved to strike Hoskins' testimony by arguing that he was not unavailable under Rule 804(a) and that the prosecutor had caused Hoskins' absence by threatening him, thus "vitiating the applicability of the [Rule] 804(b) hearsay exceptions."[350] The prosecutor again denied making threats, and the court ultimately denied the motion but noted that Hoskins had stated that he felt threatened, which was why he was not testifying.[351] Lopez was ultimately convicted of first-degree premeditated murder, conspiracy, and several weapons charges.[352]

On appeal, Lopez argued that Hoskins' prior testimony was improperly admitted because he was not unavailable as defined by Rule 804(a); specifically, he argued the prosecutor had behaved wrongly by "threatening" Hoskins with a perjury prosecution and thereby "procured" Hoskins' unavailability with those threats.[353] The Michigan Court of Appeals noted that Rule 804(a) states that a declarant is not considered unavailable as a witness if he or she refuses to testify "due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying."[354]

The court first examined several cases in which various courts determined reversal was warranted due to threats or perceived threats to witnesses.[355] In *Webb v. Texas*,[356] the United States Supreme Court reversed the conviction of a defendant when the trial court, on its own, admonished the sole defense witness about the dangers of perjury without doing so to any other witness.[357] The *Webb* Court concluded this conduct "effectively drove that witness off the stand" and deprived the defendant of his right to due process.[358] Similarly, in *People v. Pena*,[359] a

347. *Id.* at 713, 892 N.W.2d at 497.
348. *Id.*
349. *Id.*
350. *Id.* at 714, 892 N.W.2d at 498.
351. *Id.*
352. *Id.*
353. *Id.* at 715, 892 N.W.2d at 498.
354. *Id.* (quoting MICH. R. EVID. 804(a)).
355. *Id.* at 715–19, 892 N.W.2d at 498–300.
356. Webb v. Texas, 409 U.S. 95 (1972).
357. *Id.* at 95–97.
358. *Id.* at 98.
359. People v. Pena, 383 Mich. 402, 175 N.W.2d 767 (1970).

plurality of the Michigan Supreme Court stated that a prosecutor's decision to send a letter to three defense witnesses quoting verbatim the perjury statute was wrongfully threatening.[360] Two additional justices concurred and opined that the matter should be remanded for the trial court to determine if the witnesses actually were intimidated before a new trial should be granted.[361] Finally, in *People v. McIntosh*,[362] the Michigan Court of Appeals remanded for the trial court to conduct a hearing at which the prosecution would bear the burden of showing it was "not intentionally or negligently responsible" for the decision of a witness who had testified against the defendant at the preliminary examination not to testify at trial.[363] Shortly after the witness had changed her mind about testifying, the prosecution charged her with conspiracy to commit armed robbery and felony murder.[364] When the prosecution sought to use her prior testimony, the trial court improperly placed the burden of proving why she was unavailable on the defendant without allowing him to ask why she refused to testify.[365]

Returning to Lopez's case, the Michigan Court of Appeals explained that unlike in both *Pena* and *McIntosh*, a remand to determine why Hoskins refused to testify was unnecessary because the trial court had already noted Hoskins stated he was not testifying because he felt threatened.[366] The court held that because "the prosecutor's threats procured Hoskins' unavailability," a new trial was required.[367] The court rejected the prosecution's argument that Hoskins was simply "advised" of the possibility of a perjury prosecution and not "threatened."[368] The court opined that the prosecutor's statements "exceeded mere advisement and crossed into the realm of threat and intimidation" because Hoskins faced life imprisonment if convicted of perjury.[369] The court recognized that, "[w]hile a prosecutor may inform a witness that false testimony may result in a perjury charge, the circumstances" in this case belied the assertion that Hoskins was merely advised of that possible consequence.[370] Hoskins had not yet testified at trial, and it was not known with any degree of certainty whether he actually planned to recant

360. *Id.* at 405–06, 175 N.W.2d at 768 (plurality opinion).
361. *Id.* at 407, 175 N.W.2d at 767–68 (Adams, J., concurring).
362. People v. Pena, 142 Mich. App. 314, 370 N.W.2d 337 (1985).
363. *Id.* at 322, 328, 370 N.W.2d at 342, 344–45.
364. *Id.* at 323, 370 N.W.2d at 342.
365. *Id.* at 323–24, 370 N.W.2d at 342–43.
366. People v. Lopez, 316 Mich. App. 704, 719–20, 892 N.W.2d 493, 500–01 (2016).
367. *Id.* at 720, 892 N.W.2d at 500.
368. *Id.* at 720, 892 N.W.2d at 500–01.
369. *Id.*, 892 N.W.2d at 501.
370. *Id.*

his prior testimony.[371] The court explained it would have been more appropriate to address the issue with the trial court outside of Hoskins' presence and allow the court to use its discretion to address the issue.[372]

The court further explained that because Hoskins had his own attorney, the prosecutor had no obligation to advise him of the risks from committing perjury.[373] The court also concluded that the situation did not merit a warning because the prosecutor "had only a hunch that Hoskins would deviate from his preliminary examination statements."[374] The court found the situation analogous to *Pena*, because the information was conveyed "to coerce or intimidate rather than merely to inform."[375] The court also drew support for its conclusion that a new trial was required from *State v. Feaster*,[376] in which the New Jersey Supreme Court held that a prosecutor improperly communicated to the attorney of a key prosecution witness from the defendant's trial that there would be "considerations" if the witness recanted his trial testimony during a postconviction relief hearing.[377] The *Lopez* court found *Feaster*'s reasoning persuasive,[378] noting that if there were a falsehood to be revealed it could reasonably be expected to be exposed through the adversarial process.[379]

In this case, the court concluded that there was no reasonable basis for the prosecutor to suspect Hoskins would lie while testifying, especially when the prosecutor did not personally hear the statements Hoskins supposedly made to Lopez and Reed.[380] Construing Rule 804(a), the court held that the trial court's finding that the prosecutor procured Hoskins' unavailability was the basis for its ruling.[381] The court explained that "[t]he trial court recognized that Hoskins refused to testify due to the prosecutor's threat, yet failed to connect its finding with the rule's command that 'procurement' of a witness's absence nullifies the

371. *Id.*

372. *Id.* (quoting People v. Callington, 123 Mich. App. 301, 307, 333 N.W.2d 260, 263 (1983)).

373. *Id.* at 721, 892 N.W.2d at 501.

374. *Id.*

375. *Id.*

376. State v. Feaster, 877 A.2d 229 (N.J. 2005).

377. *Lopez*, 316 Mich. App. at 721, 892 N.W.2d at 501 (quoting *Feaster*, 877 A.2d at 240).

378. *Feaster*, 877 A.2d at 244–25. Here the witness was acting as defense witness when alleged threats or intimidation occurred, even though he had been prosecution witness at trial. *Id.*

379. *Lopez*, 316 Mich. App. at 722–23, 892 N.W.2d at 502 (citing and quoting *Feaster*, 184 N.J. at 258–61).

380. *Id.* at 723, 892 N.W.2d at 502.

381. *Id.* at 723–24 , 892 N.W.2d at 502–03.

witness's unavailability."[382] Thus, Hoskins' preliminary examination testimony should have either been excluded or stricken.[383] Given that the prosecution relied heavily on Hoskins' prior testimony and the evidence against Lopez was "thin at best" without it, the court concluded the error was not harmless.[384] The court noted that on retrial, Hoskins could elect to testify; however, if he maintained his silence, his prior testimony would be inadmissible.[385]

IX. RULES 901–903: AUTHENTICATION AND IDENTIFICATION

There were no noteworthy cases during the *Survey* period discussing the rules concerning authentication and identification.

X. RULES 1001–1008: CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

There were no noteworthy cases during the *Survey* period discussing the rules concerning the contents of writings, recordings, and photographs.

XI. RULES 1101–1102: MISCELLANEOUS RULES

There were no noteworthy cases during the *Survey* period discussing the miscellaneous evidentiary rules.

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382. *Id.* at 724, 892 N.W.2d at 503.

383. *Id.*

384. *Id.* at 724–25, 892 N.W.2d at 503.

385. *Id.* at 725, 892 N.W.2d at 503. Notably, the court of appeals did not discuss Rule 804(a)'s requirement that the procurement or wrongdoing of the proponent of a statement must be done "for the purpose of preventing the witness from attending or testifying" and whether the prosecution's "procurement" of Hoskins' absence was done for that purpose. MICH. R. EVID. 804(a). The prosecution sought leave to appeal in the Michigan Supreme Court, which granted oral argument on whether to grant the application or take other action. People v. Lopez, 500 Mich. 937, 889 N.W.2d 501 (2017). The court directed the parties to submit supplemental briefs on two issues:

> (1) whether prior testimony is admissible under [MICH. R. EVID.] 804(b)(1) where the proponent of the statement has caused the declarant to be unavailable under [MICH. R. EVID.] 804(a), regardless of any intent by the proponent to cause unavailability; and (2) if some form of intent is required, what standards should apply when determining whether the proponent's actions were intended to cause the declarant to be unavailable.

Id. No order or opinion resolving the application has been entered as of March 12, 2018.

XII. EVIDENTIARY MATTERS GOVERNED BY STATUTES OR COURT RULES

A. Statutes, Court Rules, and Evidentiary Ruling Generally

The Michigan Constitution grants the Michigan Supreme Court exclusive authority to promulgate rules regulating practice and procedure in Michigan's courts.[386] If the legislature attempts to usurp that authority by statute, then a rule enacted by the supreme court will prevail over the statute.[387] However, the legislature may nonetheless validly enact certain laws that affect evidentiary issues, because the court "is not authorized to enact court rules that establish, abrogate, or modify the substantive law."[388] The Michigan Supreme Court has long recognized that not all evidentiary rules are procedural, and therefore the legislature may properly enact *substantive* rules of evidence as opposed to *procedural* rules of evidence.[389] Such rules are those enacted as a result of policy considerations "over and beyond matters involving the orderly dispatch of judicial business . . . ."[390] The Legislature has created many such rules.

B. The Rape-Shield Statute

One longstanding substantive rule of evidence is Michigan's rape-shield statute, which is designed to preclude the admission of evidence concerning sexual assault victims' prior sexual conduct in most circumstances.[391]

1. The Rape-Shield Statute and the "Source of Injury"

One of the cases discussed in Part VIII, *supra*, also addressed an issue arising under the rape-shield statute.[392] In *Shaw*, *supra*, Shaw also alleged his trial attorney was ineffective for failing to present evidence of an alternative source for the victim's injuries.[393] Specifically, Shaw asserted his attorney should have discovered and presented testimony

386. MICH. CONST. art. 6, § 5.

387. *E.g.*, People v. Watkins, 491 Mich. 450, 472–73, 818 N.W.2d 296, 308–09 (2012) (noting when a rule of evidence will prevail over a statute with which it irreconcilably conflicts).

388. *Id.* (quoting McDougall v. Schanz, 461 Mich. 15, 27, 597 N.W.2d 148, 154 (1999)).

389. *Id.* at 473–74, 818 N.W.2d at 308–09.

390. *McDougall*, 461 Mich. at 31, 597 N.W.2d at 156.

391. MICH. COMP. LAWS ANN. § 750.520j(1) (West 2017).

392. *See supra* Part VIII.A.1.

393. People v. Shaw, 315 Mich. App. 668, 678–81, 892 N.W.2d 15, 23–25 (2016).

that the complainant was sexually active with her boyfriend, with whom she had lived, and that their sexual activity included consensual vaginal and anal sex.[394] Shaw argued such evidence would have explained physical findings made by Dr. Guertin during his examination and that, without it, the jury could only have concluded sexual abuse caused the complainant's injuries.[395]

During an evidentiary hearing, the complainant's boyfriend was called to testify that he and the complainant engaged in the aforementioned sexual activities.[396] Shaw's trial attorney testified he did not question the boyfriend about the sexual activity at trial because he believed such testimony was barred by the rape-shield statute; the trial court agreed the testimony would have been barred.[397]

Michigan's rape-shield statute 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 [MICH. COMP. LAWS ANN. 750.520b through MICH. COMP. LAWS ANN. 750.520g] 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.
> >
> > (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.[398]

The court of appeals noted that the statute has been interpreted to allow a defense attorney to introduce evidence of "specific instances of sexual activity . . . to show the origin of a physical condition when evidence of that condition is offered by the prosecution to prove one of

394. *Id.* at 678–79, 892 N.W.2d at 23–24.

395. *Id.* at 679, 892 N.W.2d at 24.

396. *Id.* The court of appeals noted the trial court had barred the actual testimony, believing that it was prohibited, even as an offer of proof, by the rape-shield statute. *Id.* at 679 n.7, 892 N.W.2d at 24 n.7. The court concluded that decision was erroneous. *Id.*

397. *Id.* at 679, 892 N.W.2d at 24.

398. MICH. COMP. LAWS ANN. § 750.520j(1) (West 2004).

the elements of the crime charged . . . ."[399] Under the statute, the court concluded, evidence of an alternate explanation for Dr. Guertin's physical findings regarding the victim's hymen and an anal fissure "would have been admissible under the exception to the rape-shield statute."[400] The trial attorney's failure to question the complainant's boyfriend about their prior sexual activities therefore fell below an objective standard of reasonableness.[401]

The court also concluded there was a reasonable probability of a different outcome at trial because, absent such testimony, "there was no likely explanation, other than [Shaw's] guilt, to explain" Dr. Guertin's physical findings.[402] Dr. Guertin "essentially testified that the hymenal changes were consistent with those of either a sexually active adult woman or an abused child," and it was thus "highly relevant" that the complainant was sexually active and living with her boyfriend well before Dr. Guertin examined her.[403] Accordingly, Shaw's trial attorney was also found ineffective with regard to this issue.[404]

2. The Rape-Shield Statute and Evidence of a Lack of Other Sexual Partners, Pregnancy, and Abortion

Several months after *Shaw*, the court of appeals again considered a rape-shield issue, this time examining the interplay between the rape-shield statute and Rule 404. In *People v. Sharpe*,[405] Lovell Sharpe was charged with one count each of first-degree, third-degree, and fourth-degree CSC against the complainant, DM, when she was age thirteen or

399. *Shaw*, 315 Mich. App. at 680, 892 N.W.2d at 24 (quoting People v. Mikula, 84 Mich. App. 108, 115, 269 N.W.2d 195, 197–98 (1978)) (internal quotation marks omitted).

400. *Id.*

401. *Id.*

402. *Id.* at 680–81, 892 N.W.2d 24–25.

403. *Id.* at 681, 892 N.W.2d at 25 (concluding that the same rationale applied to the proffered testimony about consensual anal sex, "because the complainant testified that she had not had anal sex other than [Shaw's] forcible penetration").

404. *Id.* The prosecution sought leave to appeal in the Michigan Supreme Court. The application was denied. People v. Shaw, 500 Mich. 941, 891 N.W.2d 226 (2017). Justice Zahra, joined by Justice Young, dissented and argued that the court should grant leave in order to address the court of appeals' interpretation of the rape-shield statute. *Id.* at 941–43, 891 N.W.2d at 226–28 (Zahra, J., dissenting from the denial of leave). The dissent noted that it appeared the court of appeals' majority had expanded the "source of disease" exception to include a "source of injury" exception, which was not within the statute's plain language. *Id.* at 943, 891 N.W.2d at 226–28 (citing MICH. COMP. LAWS ANN. § 750.520j(1)(b) (West 2004)).

405. People v. Sharpe, 319 Mich. App. 153, 899 N.W.2d 787 (2017).

fourteen.[406] DM knew Sharpe personally from his relationship with her mother—he fathered two of her half-siblings—and the incidents allegedly occurred in 2013 or 2014.[407] The first incident "occurred when [Sharpe] stayed with DM and her siblings while DM's mother was hospitalized," while the second occurred at Sharpe's home.[408] Both incidents involved vaginal penetration and touching.[409]

DM discovered she was pregnant during an October 2014 hospital visit.[410] Before that time, DM "was unaware of how a woman became pregnant, and [hospital] staff had to explain the process to her."[411] When Sharpe learned about the pregnancy from DM's mother, "they agreed that DM needed to get an abortion."[412] Sharpe provided half the money for the procedure, which DM underwent in November 2014, with no expectation of repayment.[413] DM refused to tell her mother how she became pregnant until after her relationship with Sharpe ended months later.[414]

DM testified during a preliminary hearing that she had not had any boyfriends when she was fourteen and that no one besides Sharpe had penetrated her.[415] Her mother gave similar testimony and stated that she had no reason to believe DM had been sexually active with anyone but Sharpe.[416]

Later, the prosecution moved to pierce the rape-shield and admit evidence at trial that between the time of the incidents and the abortion, the only person with whom DM had sexual contact with was Sharpe.[417] The prosecution argued this evidence was admissible under the rape-shield exceptions and Rule 404(a)(3) as evidence of "the source or origin of semen, pregnancy, or disease,"[418] which would corroborate DM's account of the assaults and help the jury decide whether Sharpe was the person who penetrated and impregnated her.[419] The defense argued that evidence of DM's virginity was inadmissible under prior case law, that

406. *Id.* at 157, 899 N.W.2d at 790.
407. *Id.* There has not yet been a conviction. This appeal was interlocutory.
408. *Id.* at 157–58, 899 N.W.2d at 790.
409. *Id.*
410. *Id.* at 158, 899 N.W.2d at 790.
411. *Id.*
412. *Id.*
413. *Id.*
414. *Id.*
415. *Id.*
416. *Id.* at 158, 899 N.W.2d at 790–91.
417. *Id.* at 158–59, 899 N.W.2d at 791.
418. MICH. R. EVID. 404(a)(3).
419. *Sharpe*, 319 Mich. App. at 159, 899 N.W.2d at 791.

evidence of her pregnancy and abortion was irrelevant, and that all of the evidence was extremely prejudicial.[420]

The trial court noted the case would come down to DM's credibility and stated it would have been "helpful to have the DNA from the aborted fetus," which could have pointed to another perpetrator.[421] The court then agreed with the defense that the prejudicial nature of the evidence outweighed its probative value and therefore denied its admission.[422] The court clarified that the prosecutor could ask DM whether she had become pregnant during the time Sharpe allegedly sexually assaulted her, but under Rule 404(a)(3), there were to be no questions relating to the abortion or her lack of other sexual partners.[423] Both the prosecution and the defense appealed the trial court's order granting the motion in part and denying it in part.[424]

The Michigan Court of Appeals began its analysis with a review of the text of both Rule 404(a)(3) and the rape-shield statute.[425] Under Rule 404(a)(3), "[i]n a prosecution for [CSC], 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" is admissible, contrary to the general prohibition of using evidence of a person's character or trait of character to prove action in conformity therewith on a particular occasion.[426] Similarly, as outlined in the discussion of *Shaw*,[427] the rape-shield statute permits evidence of specific instances of a victim's sexual conduct in a CSC prosecution in limited circumstances—specifically, "[e]vidence of the victim's past sexual conduct with the actor" and "[e]vidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease"—if it is material to a fact at issue in the case and its "inflammatory or prejudicial nature does not outweigh its probative value[.]"[428] The court noted the rule and the statute differ: the former "addresses the admission of *character* evidence," while the latter "deals with the admission of evidence dealing with instance of a victim's sexual *conduct*."[429] Yet, both permit the same general types of evidence, *i.e.*,

420. *Id.*
421. *Id.*
422. *Id.*
423. *Id.* at 159–60, 899 N.W.2d at 791.
424. *Id.* at 157, 899 N.W.2d at 790.
425. *Id.* at 161–63, 899 N.W.2d at 792–93.
426. *Id.* at 161, 899 N.W.2d at 792 (quoting MICH. R. EVID. 404(a)(3)).
427. *See supra* Section VIII.
428. *Sharpe*, 319 Mich. App. at 161–62, 899 N.W.2d at 792 (quoting MICH. COMP. LAWS ANN. § 750.520j (West 2004)).
429. *Id.* at 162, 899 N.W.2d at 792 (emphasis in original).

"(1) evidence of the victim's past sexual conduct with the 'actor' under [the rape-shield statute] or 'the defendant' under [Rule 403(a)(3)], and (2) evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease."[430] The court noted that under both the rule and the statute, "[t]he second exception is not limited to sexual activity with the defendant" and encompasses *any* sexual activity that "shows the source or origin of semen, pregnancy, or disease."[431]

The court noted that the purpose of the rape-shield statute is "to exclude evidence of a victim's sexual conduct with persons *other than the defendant*,"[432] "which [was] historically used by defendants charged with CSC involving an adult in an effort to prove . . . consent."[433] The statute has been applied with equal force in cases involving child victims, even though consent is not a relevant defense with such victims.[434] The statute, however, does not bar evidence concerning sexual subjects of the complainant if that evidence falls outside the statute's scope.[435]

The court then addressed the arguments raised on appeal. First, the court rejected Sharpe's argument that the trial court improperly allowed the prosecution to elicit testimony from DM about how she became pregnant.[436] Sharpe argued two points: first, he argued the evidence was inadmissible under Rule 404(a)(3), and second, he would be unfairly prejudiced without DNA or forensic evidence showing he caused the pregnancy.[437] The court rejected both arguments.

First, the court concluded the prosecution did not intend to introduce the pregnancy evidence to prove DM acted in conformity with some character trait when the incidents occurred.[438] Because DM's pregnancy was not character evidence offered to prove she "acted in conformity therewith," it was not precluded by Rule 404(a).[439] Moreover, the rape-shield did not prohibit the evidence because it was "relevant to corroborate DM's account of vaginal penetration" and explained why DM delayed in disclosing the assault.[440] Such evidence, the court

430. *Id.* at 162, 899 N.W.2d at 792–93 (first quoting MICH. COMP. LAWS ANN.§ 750.520j (West 2001); and the quoting MICH. R. EVID. 404(a)(3)).

431. *Id.* at 162, 899 N.W.2d at 793.

432. *Id.* at 163, 899 N.W.2d at 793 (emphasis in original) (quoting People v. Arenda, 416 Mich. 1, 10, 330 N.W.2d 814, 816 (1982)).

433. *Id.* (quoting People v. Duenaz, 306 Mich. App. 85, 92, 854 N.W.2d 531, 538 (2014)).

434. *Id.* (quoting *Duenaz*, 306 Mich. App. at 92, 854 N.W.2d at 538).

435. *Id.* (quoting People v. Ivers, 459 Mich. 320, 328 587 N.W.2d 10, 14 (1998)).

436. *Id.* at 163–65, 899 N.W.2d at 793–94.

437. *Id.* at 163–64, 899 N.W.2d at 793.

438. *Id.* at 164, 899 N.W.2d at 794.

439. *Id.* at 164–65, 899 N.W.2d at 794 (quoting MICH. R. EVID. 404(a)).

440. *Id.* at 165, 899 N.W.2d at 794 (citations omitted).

concluded, was "clearly admissible" under the rape-shield's statutory exception for "[e]vidence of the victim's past sexual conduct with the actor."[441]

Second, the court concluded Sharpe would not be unfairly prejudiced by the pregnancy evidence despite a lack of DNA or other forensic evidence to show he caused the pregnancy.[442] While a trial court considering the admission of evidence under the rape-shield exceptions must exclude otherwise admissible evidence whose "inflammatory or prejudicial nature . . . outweigh[s] its probative value,"[443] Sharpe "mischaracterized the probative and prejudicial value of the evidence [of DM's pregnancy]."[444] The court considered evidence of a positive pregnancy test as "highly probative because it provides objective proof that corroborates the complainant's claims that she was vaginally penetrated by [Sharpe]" and noted that "[w]ith the evidence of the pregnancy, the proof of [Sharpe's] guilt rests on more than a one-on-one credibility contest."[445] The court did not "see how this evidence is unduly prejudicial," especially when "DM's testimony that [Sharpe] was the only person with whom she had sexual contact is admissible and has the same type of probative indicia as would DNA or forensic evidence from the aborted child."[446] Thus, the trial court's order allowing the pregnancy evidence was proper.[447]

Next, the court turned to the prosecution's argument that the trial court erroneously barred it from eliciting testimony that DM's only sexual contact was with Sharpe.[448] First, the court noted the trial court relied on Rule 404(a) when it excluded evidence about DM's lack of other sexual partners.[449] The court recognized it had previously held that a "defendant's right to a fair trial was violated by the prosecutor's repeated references to the complainant's virginity as circumstantial proof that the victim did not consent to the sexual conduct at issue,"[450] and Rule 404(a)(3) "'preclude[s] the use of evidence of a victim's virginity as circumstantial proof of the victim's current unwillingness to consent

441. *Id.* (quoting MICH. COMP. LAWS ANN. § 750.520j(1) (West 2001)).
442. *Id.* at 166, 899 N.W.2d at 794.
443. *Id.* (quoting MICH. COMP. LAWS ANN. § 750.520j(1) (West 2001)).
444. *Id.*, 899 N.W.2d at 794–95 (quoting MICH. COMP. LAWS ANN. § 750.520j(1) (West 2001) (internal quotation marks omitted).
445. *Id.* at 166, 899 N.W.2d at 795.
446. *Id.* at 167, 899 N.W.2d at 795.
447. *Id.*
448. *Id.*
449. *Id.*
450. *Id.* (quoting People v. Bone, 230 Mich. App. 699, 702–04, 584 N.W.2d 760, 761–62 (1998)).

to a particular sexual act.'"[451] However, in the same prior case, the court recognized that evidence introduced for another relevant purpose was not inadmissible simply because it also tended to show that the victim was a virgin.[452]

In this case, the prosecution, was not attempting to introduce evidence of DM's lack of sexual activity with other partners to prove she acted in conformity with some character trait when the abuse occurred, such as by using the evidence to show that her "previous virginity supported an alleged lack of consent, or that she regularly got pregnant and then had abortions."[453] Rather, the evidence was meant to substantiate the victim's claim and "prove by the process of elimination, that she was, in fact, sexually penetrated and impregnated by [Sharpe]."[454] The court held that the trial court erred by relying on Rule 404(a)(3) to exclude this evidence because it was not the type of evidence prohibited by the rule.[455]

Second, the court concluded rape-shield also did not bar the same evidence.[456] The court noted the rape-shield's plain language "does not bar evidence concerning a victim's *lack* of specific instances of sexual conduct."[457] Moreover, even if the evidence of DM's prior virginity did refer to specific instances of her sexual conduct "by essentially constituting the inverse of sexual activity," the statute "permits '[e]vidence of specific instances of sexual activity showing the source or origin of . . . pregnancy.'"[458] Because evidence of DM's pregnancy was admissible, "her insistence that she never had sexual relations with anyone except [Sharpe] is highly relevant to her claim that [Sharpe] vaginally penetrated and impregnated her and, accordingly, committed the charged offenses."[459] Thus, the court held, because the rape-shield statute allows evidence relating to "specific instances of sexual activity to show the origin of a complainant's pregnancy, it was also reasonable to conclude that DM should be allowed to testify there was no other possible source or origin for her pregnancy because no one but Sharpe had sexually penetrated her.[460]

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451. *Id.* (quoting *Bone*, 230 Mich. App. at 702, 584 N.W.2d at 761).
452. *Id.* (quoting *Bone*, 230 Mich. App. at 702 n.3, 584 N.W.2d at 761 n.3).
453. *Id.* at 168, 899 N.W.2d at 795–96.
454. *Id.* at 168, 899 N.W.2d at 796.
455. *Id.*
456. *Id.*
457. *Id.* (citation omitted) (emphasis in original).
458. *Id.* at 169, 899 N.W.2d at 796 (alterations in original) (quoting MICH. COMP. LAWS ANN. § 750.520j(1) (West. 2001)).
459. *Id.*
460. *Id.*

The court further concluded the evidence was not rendered inadmissible due to "its potentially inflammatory or prejudicial effect,"[461] given that "the objective evidence of DM's pregnancy and evidence of [her] lack of sexual partners [was] highly probative of whether [Sharpe had in fact vaginally penetrated her]."[462] Because the testimony at issue involved a *lack* of sexual partners, it was minimally prejudicial given the purpose of the rape-shield and the purpose of the evidence itself: "Under the circumstances of the instant case, the evidence is only prejudicial to the extent that it makes more likely the fact that [Sharpe] actually committed the offenses, and 'relevant evidence is inherently prejudicial.'"[463]

Finally, the court turned to the prosecution's argument that the trial court erroneously barred any evidence of DM's abortion, which the court had prohibited under Rule 404(a)(3).[464] This evidence, however, was not character evidence and was not being offered to prove propensity.[465] The court of appeals concluded the trial court's decision to bar the evidence under Rule 404(a)(3) was erroneous.[466] Additionally, the court explained that while evidence of the abortion "would constitute '[e]vidence of specific instances of the victim's sexual conduct' prohibited under [the rape-shield statute],"[467] it nonetheless fell "within the [statute's] exception for evidence of the victim's past sexual conduct with the actor . . . by providing further objective evidence" of DM's pregnancy stemming from Sharpe's alleged sexual penetrations of her.[468]

The court also rejected Sharpe's claim that the evidence of the abortion was irrelevant, instead concluding it was "highly relevant to the charges against him, especially in the context of this case."[469] The evidence of the pregnancy and abortion corroborated both the fact that DM was vaginally penetrated and that she became pregnant, and evidence of the abortion was especially significant "given [DM's] mother's testimony that [Sharpe] paid for half of the abortion" with "no

461. *Id.* (first citing MICH. R. EVID. 403; and then citing, MICH. COMP. LAWS ANN. § 750.520j(1) (West 2001)).

462. *Id.*

463. *Id.* at 170, 899 N.W.2d at 796–97 (quoting People v. Mills, 450 Mich. 61, 75, 537 N.W.2d 909, 917, *modified,* 450 Mich. 1212, 539 N.W.2d 504 (1995)) (quotation marks in original).

464. *Id.* at 171, 899 N.W.2d at 797.

465. *Id.*

466. *Id.*

467. *Id.* (quoting MICH. COMP. LAWS ANN. § 750.520j(1) (West 2001)) (alterations in original).

468. *Id.* (internal quotations omitted).

469. *Id.* at 172, 899 N.W.2d at 797–98 (citations omitted).

expectation of repayment."[470] The court explained that a reasonably jury could reasonably infer Sharpe's financial contribution demonstrated a consciousness of guilt and a desire to dispose of evidence that could lead to a conclusion that he committed the assault that caused the pregnancy.[471] The court likewise rejected the notion that the abortion evidence was inadmissible because it would be impermissibly prejudicial, noting that the "prevalence of abortion in today's society" did not make the evidence "so inflammatory as to render it inadmissible."[472] The court found no basis to conclude that the mere fact an abortion occurred would improperly appeal to a jury's sympathies.[473] Thus, the court concluded the evidence was improperly excluded.[474]

Accordingly, the court reversed the trial court's order to the extent it denied the prosecution's motion.[475]

C. MCLA 768.27a and the Proper Use of Other-Acts Evidence for Propensity Purposes

Unlike the general prohibition on the use of other-acts evidence to show only an actor's character, which was discussed previously,[476] the Michigan Legislature has enacted a substantive rule of evidence to permit the introduction of other-acts evidence for *any* relevant purpose—including propensity—in cases involving sexual assault against a

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470. *Id.*

471. *Id.* (citing People v. Unger, 278 Mich. App. 210, 226, 749 N.W.2d 272, 288 (2008)).

472. *Id.* at 173, 899 N.W.2d at 798 (citing State v. Stanton, 353 S.E.2d 385, 389 (N.C. 1987)).

473. *Id.*

474. *Id.*

475. *Id.* at 173–74, 899 N.W.2d at 798–99. The Michigan Supreme Court granted Sharpe's application for leave to appeal (Docket. No.155747), and directed the parties to address:

> [W]hether evidence related to the complainant's pregnancy, abortion, and lack of other sexual partners was within the scope of the rape-shield statute . . . i.e., whether this evidence constituted "[e]vidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, [or] reputation evidence of the victim's sexual conduct . . ."; (2) if the evidence was within the scope of the rape-shield statute, whether it was nonetheless admissible under one of the exceptions set forth [in subsection (1) of the rape-shield statute]; and (3) if the evidence was not within the scope of the rape-shield statute, whether it was admissible under general rules governing the admissibility of evidence, see [Rule] 402 and [Rule] 403.

People v. Sharpe, 501 Mich. 899, 901 N.W.2d 899 (2017) (mem) (quoting MICH. COMP. LAWS ANN. § 750.520j (West 2001)) (some internal citations omitted). Oral argument is scheduled for April 2018.

476. *See supra* Part IV(B).

child.[477] That rule, enacted by statute at MCLA 768.27a, was at issue in *People v. Solloway*.[478]

Timothy Solloway was charged with one count of first-degree CSC and two counts of failing to comply with the Sex Offenders Registration Act ("SORA").[479] In July 2013, Solloway sexually assaulted his nine-year-old son, MM, by anally penetrating MM with his penis.[480] MM disclosed the incident two days later.[481] While investigating, the police learned Solloway had previously been convicted of fourth-degree CSC and was required to register under the SORA.[482] Solloway was ultimately convicted as charged; he denied the sexual assault, but admitted to facts supporting the other charges.[483]

On appeal, Solloway raised several issues, including challenging the admission of other-acts evidence relating to his prior CSC conviction.[484] This evidence, however, was not admitted under Rule 404(b).[485] Instead, it was admitted pursuant to MCLA 768.27a, which, in criminal prosecutions for certain offenses, allows the admission of evidence that a defendant committed certain offenses against a minor "for its bearing on any matter to which it is relevant."[486] The statute, in short, "allows the prosecution to offer evidence of another sexual offense committed by the defendant against a minor without having to justify its admission under [Rule] 404(b)."[487] Both first-degree and fourth-degree CSC are among the offenses within the statute's purview.[488]

In this case, Solloway's nephew testified that when he was nine years old and living in the same home as Solloway, Solloway inappropriately touched him.[489] The nephew explained that Solloway entered his room at night, woke him up by getting on top of him, and

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477. *E.g.*, People v. Bailey, 310 Mich. App. 703, 721, 873 N.W.2d 855, 864 (2015) (citing People v. Watkins, 491 Mich. 450, 485–90, 818 N.W.2d 296, 314–17 (2012)) (noting "propensity evidence admitted under MCLA 768.27a is considered to have probative value and therefore to be relevant"); People v. Duenaz, 306 Mich. App. 85, 99, 854 N.W.2d 531, 541 (2014) (citation omitted) ("Evidence relevant because it shows propensity is admissible under [MICH. COMP. LAWS ANN. §] 768.27a whereas evidence relevant only because it show[s] propensity is excluded by [Rule] 404(b).").

478. People v. Solloway, 316 Mich. App. 174, 891 N.W.2d 255 (2016).

479. *Id.* at 178, 891 N.W.2d at 261.

480. *Id.*

481. *Id.* at 179, 891 N.W.2d at 261.

482. *Id.* at 179–80, 891 N.W.2d at 261–62.

483. *Id.* at 180, 891 N.W.2d at 262.

484. *Id.* at 191–92, 891 N.W.2d at 268.

485. *Id.* at 192, 891 N.W.2d at 268.

486. *Id.* (quoting MICH. COMP. LAWS ANN. § 768.27a (West Supp. 2018)).

487. *Id.*

488. *Id.* (citation omitted).

489. *Id.*

rubbed "against him in 'an up down motion, penis to penis.'"[490] Solloway threatened to beat him if he told anyone.[491]

Solloway conceded the evidence was "relevant to matters at trial."[492] The court of appeals noted that under the statute "evidence is relevant, and therefore admissible, when offered to show the defendant's propensity to commit the charged crime."[493] Thus, evidence of Solloway's prior sexual offense against his nephew made it more probable that he sexually assaulted MM.[494] Notably, both MM and the nephew "were related to [Solloway] and were nine years old" when the respective offenses occurred.[495] The court also explained the evidence was "relevant to MM's credibility" because the fact that Solloway committed the prior offense made it more likely MM's allegations were truthful.[496] The evidence was therefore "relevant and had a high probative value."[497]

Solloway largely argued that "the evidence should have been excluded under [Rule] 403 because of its prejudicial nature."[498] Evidence that is admissible under MCLA 768.27a may still be excluded under Rule 403.[499] However, when a court conducts a Rule 403 balancing test for evidence a party seeks to admit under the statute, the propensity inference must be weighed "*in favor of* the evidence's probative value rather than its prejudicial effect."[500] The Michigan Supreme Court has previously provided an "illustrative list of considerations" for courts conducting a Rule 403 balancing test in this type of case,[501] which include:

> (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the frequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of

490. *Id.* at 192–93, 891 N.W.2d at 268.
491. *Id.* at 193, 891 N.W.2d at 268.
492. *Id.*
493. *Id.* at 193, 891 N.W.2d at 268–69 (citing People v. Watkins, 491 Mich. 450, 470, 818 N.W.2d 296, 307 (2012)).
494. *Id.* at 193, 891 N.W.2d at 269.
495. *Id.*
496. *Id.*
497. *Id.*
498. *Id.*
499. *Id.* (citing People v. Watkins, 491 Mich. 450, 481, 818 N.W.2d 296, 313 (2012)).
500. *Id.* at 194, 891 N.W.2d at 269 (quoting *Watkins*, 491 Mich. at 487, 818 N.W.2d at 316).
501. *Id.*

need for evidence beyond the complainant's and the defendant's testimony.[502]

The Michigan Court of Appeals therefore evaluated Solloway's argument against the other-acts evidence with these considerations in mind.[503] Ultimately, the court concluded that none of the considerations weighed against the admission of the nephew's testimony, and several weighed strongly in its favor.[504] First, even Solloway admitted there was some similarity between the conduct involved in the two acts, but he argued this similarity was what made the other-acts evidence so prejudicial.[505] However, the court explained this fact weighed in favor of its admission.[506] Both children were close in age when they were assaulted, both were related to Solloway, the offenses occurred when they lived with him, and the acts both involved Solloway entering the bedroom, climbing on top of each child, and inappropriate touching them.[507] The court explained that the fact Solloway engaged in penetration with MM, but not with his nephew, did not make the acts so dissimilar as to warrant exclusion under Rule 403.[508]

Additionally, the court considered the twelve-year gap between the incidents, but found that given their similarity, the temporal divide did not preclude admission of the evidence.[509] Likewise, the fact that the nephew testified Solloway touched him inappropriately multiple times showed the other acts were not an infrequent occurrence, which would have weighed in favor of exclusion.[510] There were also no intervening acts that weighed against admission.[511] Furthermore, the court found there was no basis to argue that the evidence of the other acts was unreliable.[512] Solloway never argued his nephew was an unreliable witness, and his reliability was supported by Solloway's guilty plea to fourth-degree CSC for the prior assault.[513]

As to the final consideration, the need for evidence beyond the victim's and the defendant's testimony, the court concluded that it did

502. *Watkins*, 491 Mich. at 487–88, 818 N.W.2d at 316.
503. *Solloway*, 316 Mich. App. at 194, 891 N.W.2d at 269.
504. *Id.* at 194–96, 891 N.W.2d at 269–70.
505. *Id.* at 194, 891 N.W.2d at 269.
506. *Id.*
507. *Id.* at 194–95, 891 N.W.2d at 269.
508. *Id.* at 195, 891 N.W.2d at 269.
509. *Id.* at 195, 891 N.W.2d at 269–70.
510. *Id.* at 195, 891 N.W.2d at 270.
511. *Id.*
512. *Id.* at 195–96, 891 N.W.2d at 270.
513. *Id.*

not preclude admission of the other-acts evidence.[514] The court did note physical evidence of sexual abuse was offered at trial, which could warrant a finding that the other acts evidence was unnecessary.[515] However, conversely, there were no eyewitnesses because of the manner in which the crime occurred, and Solloway offered alternative explanations for the physical evidence.[516] Given these facts, the court concluded there in fact was a need for evidence beyond testimony from MM and Solloway.[517] Accordingly, the court held that the evidence was properly admitted because all of the aforementioned considerations weighed "heavily in favor of [its] admissibility . . . ."[518]

D. The Michigan Court Rules, the Probate Code, and the Admission of Video-Recorded Forensic Interviews

Not all of the rules pertaining to the admission of evidence enacted by the Michigan Supreme Court are found within the Rules of Evidence. One such rule involves the admission and proper uses of video-recorded forensic interviews of children during proceedings to terminate parental rights, which was at issue in the case of *In re Martin*,[519] in which two parents appealed from a lower court's order terminating their parental rights to their young son.[520] The proceedings against the father stemmed from an allegation that he engaged in "an act of penile-anal penetration against the child."[521] A medical record, which contained the child's accusation made to a doctor, was admitted into evidence; however, no medical personnel testified.[522] Additionally, the petitioner—the Michigan Department of Health and Human Services ("MDHHS")—also relied on a DVD of a video-recorded forensic interview in which the child also made the accusation against the father.[523] Neither the child nor the forensic interviewer ever testified.[524] The proceedings against the mother resulted from an allegation that she "performed a sexual act with a male stranger for money in front of the child."[525] This was discovered by FBI

514. *Id* at 196, 891 N.W.2d at 270.
515. *Id.*
516. *Id.* Solloway argued that the injuries "resulted from [MM's] bowel movements and that [Solloway's] semen was on the white blanket because he masturbated on it." *Id.*
517. *Id.*
518. *Id.*
519. *In re* Martin, 316 Mich. App. 73, 896 N.W.2d 452 (2016).
520. *Id.* at 77, 896 N.W.2d at 454.
521. *Id.*
522. *Id.* at 77, 896 N.W.2d at 454–55.
523. *Id.* at 77–78, 896 N.W.2d at 455.
524. *Id.* at 78, 896 N.W.2d at 455.
525. *Id.*

agents, who were investigating the stranger for attempting to have sex with an unrelated minor.[526] MDHHS also alleged the mother "was prepared to commit a sexual act on [her] child in the presence of the same stranger" for compensation.[527] The trial court ultimately concluded it had jurisdiction over the child through the actions of both parents, that there were statutory grounds for termination of both parents' rights, and that termination was in the child's best interests.[528]

On appeal, both parents argued the trial court erred by admitting the video of the forensic interview.[529] The court of appeals noted that MCR 3.972(C)(2)(a) provides that during an adjudication trial,[530] "a statement by a child under the age of 10 concerning and describing an act of sexual abuse performed on the child by another person may be admitted into evidence 'through the testimony of a person who heard the child make the statement,'" regardless of whether the child is available or not, "but only if the court finds at a hearing before trial 'that the circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness.'"[531] However, in this case, the forensic interviewer never testified at all, and only the video was admitted.[532] Thus, the child's statement was not properly admitted under the court rule.[533]

The court next examined MCLA 712A.17b, a Probate Code statute governing the use of video-recorded forensic interviews involving witnesses under the age of sixteenth in cases relating to the alleged abuse or neglect of that witness.[534] Under the statute, recorded statements are to be admitted "at all proceedings *except* the adjudication stage" instead of the witness' live testimony.[535] The court noted that in this case, the trial court watched the recording of the interview at a pretrial hearing and determined that both MCR 3.972(C)(2)(a) and MCLA 712A.17b(5)

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526. *Id.*

527. *Id.* at 78–79, 896 N.W.2d at 455. Although the act was planned, there is no indication it ever occurred. *Id.* at 79, 896 N.W.2d at 455.

528. *Id.* at 79–80, 896 N.W.2d at 455–56.

529. *Id.* at 80, 896 N.W.2d at 456.

530. The adjudication trial is the proceeding at which the court determines whether it has jurisdiction over the child. MICH. COMP. LAWS ANN.§ 712A.2(b) (West Supp. 2018) (statute effective Jan. 14, 2015–June 11, 2018).

531. *Martin*, 316 Mich. App. at 80, 896 N.W.2d at 456 (citations omitted) (quoting MICH. CT. R. 3.972(C)(2)(a)). The pretrial hearing referenced in the court rule is colloquially referred to as a tender-years hearing. *E.g.*, *id.* at 81, 896 N.W.2d at 456 ("[T]he trial court conducted a tender-years hearing and watched the DVD.").

532. *Id.* at 80, 896 N.W.2d at 456.

533. *Id.*

534. MICH. COMP. LAWS ANN. § 712A.17b (West 2017).

535. *Martin*, 316 Mich. App. at 81, 896 N.W.2d at 456 (emphasis in original) (quoting § 712A.17b).

allowed for the DVD's admission, and the court then essentially relied on the video when it concluded it had jurisdiction over the child due to the father's actions.[536] The court concluded this was erroneous in two respects: first, MCLA 712A.17b(5) did not permit the court to consider the recording substantively for adjudication purposes, and second, even if there were adequate indicia of trustworthiness, the trial court could not rely on MCR 3.972(C)(2)(a) because the forensic interviewer never testified.[537]

MCLA 712A.17b(5) and MCR 3.972(C)(2)(a), the Michigan Court of Appeals explained, "work in tandem."[538] The court rule forces MDHHS to produce for adjudication purposes "any witness claiming that a child victim made statements of abuse heard by the witness if petitioner wishes to rely on such statements in its case."[539] Doing so provides parents with an opportunity for cross-examination.[540] The statute then mandates the admission of the video at any proceedings "*other than* one at the adjudication stage."[541] The proper procedure thus entails: "[H]aving the forensic interviewer testify at the adjudication stage, assuming compliance with MCR 3.972(C)(2)(a), followed by substantive consideration of the forensic interview displayed on the DVD at the termination stage, assuming compliance with MCL[A] 712.17b."[542] This does not preclude the trial court from viewing the recording during the pretrial tender-years hearing to determine whether the circumstances of the interview provide adequate indicia of trustworthiness to permit the interviewer's testimony at trial.[543] The trial court erred here by simply using the video-recording substantively in its adjudication.[544] Because the adjudication was based on the video, the court remanded for new, proper proceedings for the father.[545]

536. *Id.* at 81–82, 896 N.W.2d at 456–57.
537. *Id.* at 82, 896 N.W.2d at 457.
538. *Id.*
539. *Id.*
540. *Id.*
541. *Id.* (citing MICH. COMP. LAWS ANN. § 712A.17b (West Supp. 2018)) (emphasis added).
542. *Martin*, 316 Mich. App. at 82, 896 N.W.2d at 457.
543. *Id.* at 83, 896 N.W.2d at 457.
544. *Id.*
545. *Id.* at 83, 896 N.W.2d at 458. Any error related to the video's admission with respect to the mother was deemed harmless because it was irrelevant to the allegations against her. *Id.* at 84–85, 896 N.W.2d at 458.

E. The Disclosure of a Teacher's Employment History, the Admission of Evidence Thereof in Actions Under the Michigan Civil Rights Act, and the Meaning of "Liability"

While the Michigan Legislature has clearly enacted substantive rules of evidence with an especially significant impact on criminal proceedings, it has also enacted such rules that affect matters of civil litigation as well. One such statute, contained in Michigan's Revised School Code,[546] was recently addressed by the Michigan Supreme Court in *Hecht v. National Heritage Academies, Inc.*[547]

In *Hecht*, plaintiff Craig Hecht was employed by defendant National Heritage Academies, Inc. ("the Company") as a teacher at Linden Charter Academy in Flint.[548] Hecht was fired in November 2009 for "racially insensitive comments" he made in front of a library aide, a paraprofessional, and his students.[549] After his termination, he began substitute teaching while again seeking full-time employment as a teacher. However, when prospective employers requested his employment records from National Heritage Academies as required by law, the Company disclosed the reason for his firing and his conduct during the investigation, which was also required by law.[550] Due to these disclosures, Hecht was unable to obtain a full-time teaching job, and he eventually went to work as a machine operator at a considerably lower salary than he previously earned.[551] In February 2010, Hecht filed a lawsuit alleging his employment was terminated based on his race in violation of Michigan's Civil Rights Act ("CRA").[552] He claimed—and at trial presented evidence showing—the Company applied different rules to white and black employees who "engaged in racial banter."[553]

Before trial, the Company moved to preclude Hecht "from presenting evidence of its mandatory disclosures of [his] unprofessional conduct to other schools."[554] The Company argued that 1) MCLA 380.1230b (a provision of the Michigan's Revised School Code) required such disclosures, and 2) the same law "immunized the disclosing school

546. MICH. COMP. LAWS ANN. § 380.1 et seq. (West 2013).
547. Hecht v. Nat'l Heritage Academies, Inc., 499 Mich. 586, 886 N.W.2d 135 (2016).
548. *Id.* at 592, 866 N.W.2d at 138.
549. *Id.* at 592–96, 886 N.W.2d at 138–40.
550. *Id.* at 596–97, 886 N.W.2d at 140–41.
551. *Id.* at 597, 886 N.W.2d at 141.
552. *Id.* at 598, 886 N.W.2d at 142.
553. *Id.* at 598–600, 866 N.W.2d at 142–43.
554. *Id.* at 597, 886 N.W.2d at 141.

from civil liability for the disclosures."[555] The Company asserted Hecht should be precluded from admitting evidence of the disclosures or other related information to establish liability.[556] In response, Hecht argued "the statute only shielded [the Company] from *liability* stemming *directly from the disclosures*," such as through a defamation suit.[557] Hecht claimed he was not seeking to use the disclosures to establish liability, but rather to show his "*future damages* resulting from the alleged employment discrimination because the disclosures to prospective school employers precluded him from obtaining another teaching position."[558] The trial court ultimately allowed evidence of the disclosures at trial.[559]

At trial, in addition to the evidence that the Company applied different rules to white and black employees who "engaged in racial banter,"[560] Hecht testified about his difficulty finding teaching employment and how he was "quickly let go" from long-term substitute teaching positions when schools learned the details of the allegations against him.[561] He also made arguments relating to the disclosures during closing arguments.[562] The jury returned a verdict in Hecht's favor, finding he had proven race was a factor in his termination and awarding "$50,120 in past economic loss and $485,000 in future economic loss."[563] The trial court later denied the Company's post-trial motion for a new trial, which included an argument that a new trial was warranted due to the erroneous admission of evidence concerning the disclosures.[564]

A split panel of the court of appeals affirmed, concluding, among many other things, that the decision to allow presentation of the disclosure evidence was proper.[565] The Michigan Supreme Court then granted the company's application for leave to appeal on three issues, only the third of which is relevant here: "[W]hether the Court of Appeals erred . . . when it held that the trial court did not abuse its discretion in admitting evidence of the defendant employer's disclosures, which were

555. *Id.* at 597–98, 886 N.W.2d at 141 (citing MICH. COMP. LAWS ANN. § 380.1230b (West 2013)).
556. *Id.* at 598, 886 N.W.2d at 141.
557. *Id.* (emphasis in original).
558. *Id.* (emphasis in original).
559. *Id.*
560. *Id.* at 598–600, 866 N.W.2d at 142–43.
561. *Id.* at 600, 866 N.W.2d at 143.
562. *Id.* at 601, 866 N.W.2d at 143.
563. *Id.* at 601–02, 866 N.W.2d at 143.
564. *Id.* at 602, 866 N.W.2d at 143.
565. *Id.* at 603, 866 N.W.2d at 144.

mandated by MCL[A] 380.1230b, to the plaintiff's prospective employers."[566]

The court began its analysis by noting all relevant evidence is admissible unless otherwise precluded by a constitutional provision, a statute, an evidence rule, or a rule adopted by the court.[567] The statute at issue here, MCLA 380.1230b, "is such a statute."[568] The statute provides that before a school hires an applicant, it must require the applicant to sign a statement: 1) authorizing his or her current or former employers to disclose "any unprofessional conduct by the applicant" and make available all of the documents in the applicant's personnel record related to such conduct, and 2) releasing the current or former employer, as well as any employees acting on their behalf, "from any liability for providing" the information.[569] The school must then request the information from the applicant's current or former employers along with a copy of the signed statement.[570] The current or former employers then 1) has 20 days to provide the information and 2) are "immune from civil liability for the disclosure" if they act in good faith—which is presumed unless they "knew the information disclosed was false or misleading," they "disclosed the information with reckless disregard for the truth," or "the disclosure was specifically prohibited by state or federal statute."[571] In other words, as the *Hecht* court explained, the statute "does three important things pertinent to this appeal."[572] First, "it *requires* the applicant's current or former employer or employers to disclose to another school district any unprofessional conduct by the applicant."[573] Second, "it *requires* an applicant for a teaching job to '[r]elease[] the current or former employer, and employees acting on behalf of the current or former employer, from any liability for providing the information.'"[574] Third, and finally, "it provides that an employer who

566. *Id.* at 603–04, 866 N.W.2d at 144–45. The court also granted leave on two issues relating to whether the jury's verdict finding a violation of the CRA was supported by the totality of the evidence presented, which the Michigan Supreme Court ultimately concluded it was. *Id.* at 605–17, 886 N.W.2d at 146–52.

567. *Id.* at 618, 886 N.W.2d at 152 (quoting MICH. R. EVID. 402) (first citing Waknin v. Chamberlain, 467 Mich. 329, 333, 653 N.W.2d 176, 178 (2002); and then citing People v. Layher, 464 Mich. 756, 761, 631 N.W.2d 281, 284 (2001)).

568. Hecht v. Nat'l Heritage Academies, Inc., 499 Mich. 586, 618, 886 N.W.2d 135, 152 (2016).

569. MICH. COMP. LAWS ANN. § 380.1230b(1) (West 2013).

570. *Id.* § 380.1230b(2).

571. *Id.* § 380.1230b(3).

572. *Hecht*, 499 Mich. at 619–20, 886 N.W.2d at 153.

573. *Id.* at 620, 886 N.W.2d at 153 (emphasis in original).

574. *Id.* (emphasis and alterations in original).

discloses information in good faith 'is immune from civil liability for the disclosure.'"[575]

However, the court noted the statute does *not* provide a definition of the term "liability."[576] Hecht did not claim that "[the Company's] disclosures were false or misleading, recklessly disregarded the truth, or otherwise violated state or federal law."[577] He contended, though, that "liability" for purposes of MCLA 380.1230b:

> [R]efers to the *claim* for which a plaintiff is seeking recovery. In other words, [Hecht] argues he is not precluded from presenting evidence of the mandatory disclosure because he did not sue for the disclosure itself—he sued for a violation of the CRA and presented evidence of the adverse impact of the disclosure to establish future damages.[578]

In other words, Hecht argued the statute precludes only a direct action for the disclosure—such as a defamation claim—while evidence of the disclosures is admissible in a case such as his.[579] The Company, however, argued Hecht's position would "eviscerate" the statute's protections and contravene the Legislature's intent "as evidenced by the broad language of the immunity it provide[s]."[580]

The court first consulted dictionary definitions of the term "liability," noting that:

> *Black's Law Dictionary* (10th ed) defines "liability" as "1. The quality, state, or condition of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment . . . . 2. A financial or pecuniary obligation in a specified amount . . . ." More relevant, it further defines "civil liability" as "1. Liability imposed under the civil, as opposed to the criminal, law. 2. The quality, state, or condition of being *legally obligated for civil damages*."[581]

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575. *Id.*
576. *Id.*
577. *Id.* (citing MICH. COMP. LAWS ANN.§ 380.1230b(3) (West 2013)).
578. *Id.* at 620–21, 886 N.W.2d at 153–54 (emphasis in original).
579. *Id.* at 621, 886 N.W.2d at 154.
580. *Id.*
581. *Id.* at 621–22, 886 N.W.2d at 154 (quoting *Liability*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

The court held that, using these definitions, "it is clear that the statute is sufficient in scope to preclude admission of the disclosure evidence" because admitting the evidence "for the purpose of assessing damages *allowed the jury to impose against [the company] legal obligations arising from the disclosure.*"[582] Thus, the court concluded the trial court must enforce the expansive grant of immunity against civil liability provided by the statute and exclude the evidence.[583]

The court further noted that it had previously interpreted the term "liability" within the context of other liability-limiting statutes "in a manner generally consistent" with the Company's position.[584] First, in *Hannay v. Transportation Department*,[585] "[the court] held that the phrase 'liable for bodily injury' contained in the vehicle exception to governmental immunity means being '*legally responsible for damages flowing from* a physical or corporeal injury to the body.'"[586] While the court in *Hannay* "interpreted the statutory phrase to permit recovery of economic and noneconomic damages arising from 'bodily injury,'"[587] there was no such limiting language included in MCLA 380.1230b, which requires a job applicant to release a current or former employer from "*any* liability" while granting immunity from "civil liability."[588] Applying the definition of "liability" used in *Hannay*, the court concluded the Company was not "'legally responsible for damages flowing from' the mandatory disclosure."[589]

Second, in the case of *In re Bradley Estate*,[590] the court interpreted a statute granting government agencies immunity from tort liability to

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582. *Id.* at 622, 886 N.W.2d at 154–55 (emphasis added) (citation omitted).

583. *Id.* at 622, 886 N.W.2d at 155.

584. *Id.* at 623, 886 N.W.2d at 155.

585. Hannay v. Transp. Dep't, 497 Mich. 45, 860 N.W.2d 67 (2014).

586. Hecht v. Nat'l Heritage Academies, Inc., 499 Mich. 586, 623, 886 N.W.2d 135, 155 (2016) (emphasis in original) (quoting *Hannay*, 497 Mich. at 51, 860 N.W.2d at 72).

587. *Hannay*, 497 Mich. at 51, 860 N.W.2d at 72 (quoting *Hecht*, 499 Mich. at 623, 886 N.W.2d at 155).

588. *Id.* (quoting MICH. COMP. LAWS ANN. § 380.1230b (West 2013)).

589. *Id.* at 623–24, 886 N.W.2d at 155 (quoting *Hannay*, 497 Mich. at 51, 860 N.W.2d at 72).

590. *In re* Bradley Estate, 494 Mich. 367, 835 N.W.2d 545 (2013). In *Bradley*, the petitioner obtained a court order to have her brother taken into protective custody by the respondent sheriff's department due to mental health concerns. *Id.* at 372–73, 835 N.W.2d at 548. The department failed to execute the order, and the brother committed suicide nine days later. *Id.* at 373, 835 N.W.2d at 548. The petitioner sued for wrongful death as personal representative for the estate, but the claim was dismissed on governmental immunity grounds. *Id.* at 373–74, 835 N.W.2d at 549. She then filed a petition for civil contempt in the probate court rather than appealing, arguing that the court's order had been violated and that the sheriff's misconduct constituted contempt, from which petitioner could be indemnified for damages. *Id.* at 374, 835 N.W.2d at 549.

mean that such agencies "were immune from 'all legal responsibility arising from a noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages.'"[591] The court explained that *Bradley* held that the term "liability" "'refers to liableness, i.e., 'the state or quality of being liable.' To be 'liable' means to be 'legally responsible[.]'"[592] Thus, "'[c]onstruing the term liability along with the term 'tort,' it becomes apparent that the Legislature intended 'tort liability' to encompass legal responsibility arising from a tort.'"[593] The *Hecht* court found that *Bradley* supported a construction of the mandatory disclosure statute that should have precluded the disclosure evidence in this case.[594] While Hecht's claim arose under the CRA, the court concluded the evidence of and arguments relating to the mandatory disclosures allowed the jury to impose a legal responsibility on the company arising from the disclosures—precisely what the statute prohibits.[595] The label attached to the action simply "does not control" because the statute "clearly provides" that "no liability—meaning 'all legal responsibility arising from a . . . civil wrong'—may come from the disclosures."[596] The court noted the "main difference" between *Bradley* and *Hecht* was the broader scope of the immunity granted by MCLA 380.1230b—it "provide[s] blanket protection from all civil liability" rather than just limiting the type of liability from which a school is immune.[597]

Accordingly, the court concluded Hecht was improperly permitted to offer the disclosure evidence because it allowed the jury "to attribute liability to [the Company] flowing from the disclosure."[598] "The fact that the liability here [was] expressed in terms of damages [Hecht] suffered as a result of the disclosures [did] not negate the fact that [the Company

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The probate court denied the sheriff's motion for summary disposition, concluding that governmental immunity did not apply. *Id.* at 374–75, 835 N.W.2d at 549. The case reached the court of appeals, which held that the governmental tort liability act did not immunize the department from "tort-like" damages stemming from the contempt suit, despite the fact that the underlying facts "could have also established a tort cause of action." *Id.* at 375–76, 835 N.W.2d at 550.

591. *Hecht*, 499 Mich. at 625, 886 N.W.2d at 156 (quoting *Bradley*, 494 Mich. at 385, 835 N.W.2d at 555).

592. *Id.* at 625–26, 886 N.W.2d at 156 (quoting *Bradley*, 494 Mich. at 385, 835 N.W.2d at 555).

593. *Id.* at 626, 886 N.W.2d at 156 (quoting *Bradley*, 494 Mich. at 385, 835 N.W.2d at 555).

594. *Id.*

595. *Id.* (quoting MICH. COMP. LAWS ANN.§ 380.1230b (West 2013)).

596. *Id.* (quoting *Bradley*, 494 Mich. at 385, 835 N.W.2d at 555).

597. *Id.* at 626–27, 886 N.W.2d at 157 (citing MICH. COMP. LAWS ANN.§ 380.1230b (West 2013)).

598. *Id.* at 627, 886 N.W.2d at 157.

was] being held civilly liable for the statutorily mandated disclosures."[599] The jury's future damages award was thus "tainted" by the error, and the court vacated the award and remanded for further proceedings.[600]

XIII. CONCLUSION

Every year, both the Michigan Supreme Court and Michigan Court of Appeals receive thousands of case filings, and all of which must be reviewed and disposed of by an opinion or order.[601] The published cases summarized in this Article are, of course, only a small sample of a far wider universe of cases decided by both courts during the *Survey* period, which includes thousands of unpublished Michigan Court of Appeals opinions[602] and a comparable (or greater) number of orders from both courts denying applications for leave to appeal.[603] The published cases discussed above, as well as similar cases interpreting other areas of law, serve as guideposts for lower courts, practitioners, academics, and students. As attorneys, we are bound by the cases' holdings as we

599. *Id.* at 627–28, 886 N.W.2d at 157.

600. *Id.* at 628, 886 N.W.2d at 157–58. Justice McCormack, joined by Justice Bernstein, concurred with the majority's analysis of the issues related to the sufficiency of the evidence to establish Hecht's claim but dissented from the analysis of the evidentiary issue. *Id.* at 629–35, 886 N.W.2d at 158–61 (McCormack, J., concurring in part and dissenting in part). The dissent would have held that disclosing Hecht's conduct "did not create additional legal responsibility for which [the company] was on the hook; rather, it was the alleged illegal act of discharging [Hecht] based on his race that gave rise to all [the company's] liability, i.e., its legal responsibility arising from a wrongful action." *Id.* at 631, 886 N.W.2d at 159. "Introducing evidence of [the company's] disclosures of [Hecht's] conduct merely assisted the jury in determining the appropriate *remedy* for the discriminatory discharge." *Id.* Stated differently, "evidence of the disclosures helped the jury determine the appropriate amount of damages for which [the company] was legally responsible because of its discriminatory conduct." *Id.* (citation omitted). Because the "statutory immunity is tied to the liability and not the remedy," the dissent agreed with Hecht that the statute only provides immunity when the liability arises from some injury caused by the disclosures itself. *Id.* at 632, 886 N.W.2d at 160.

601. *See Clerk's Page – The Work of the Court*, MICHIGAN COURTS: ONE COURT OF JUSTICE, http://courts.mi.gov/courts/michigansupremecourt/clerks/pages/statistics.aspx (last visited Dec. 5, 2017); *About the Court*, MICHIGAN COURTS: ONE COURT OF JUSTICE, http://courts.mi.gov/courts/michigansupremecourt/about-supreme-court/pages/default.aspx (last visited Dec. 5, 2017).

602. *See* MICH. CT. R. 7.215(C)(1) (noting unpublished opinions do not constitute binding precedent under the rule of stare decisis).

603. Both courts may either grant or deny an application for leave to appeal, or take other action. MICH. CT. R. 7.205(E)(1); MICH. CT. R. 7.305(H)(1).

practice,[604] but a good-faith argument to extend, modify, or reverse those holding should never be discouraged.[605]

The cases discussed in this Article illustrate that the law is fluid and often contentious, especially in the areas of relevance and hearsay, where the fact-intensive circumstances of each case can dictate very different results.[606] This *Survey* period is not the first to make this point,[607] and, judging by the cases, it is unlikely to be the last. All practitioners—new and old, lawyers and judges—should remain mindful of the rules, "lest your trial become the less-than-overwhelming victory that does not survive appeal."[608] After all, presumably no one—be it a lawyer or a judge—likes to be on the losing side of an appellate reversal.

It is my hope that you have enjoyed this Article, and I look forward to hearing any thoughts you as readers may have on these cases or my analyses of them.

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604. *E.g.*, MICH. R. PROF. COND. 3.3(a)(2) (noting that a lawyer may not fail to disclose to a tribunal controlling legal authority in the jurisdiction that the lawyer knows to be directly adverse to the position of his or her client and not disclosed by opposing counsel).

605. MICH. R. PROF. COND. 3.1 ("A lawyer may offer a good-faith argument for an extension, modification, or reversal of existing law.").

606. *See supra* Parts IV and VIII.

607. *See* Meizlish, *supra* note 2, at 806.

608. *Id.*