EVIDENCE

M. BRYAN SCHNEIDER†

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† Law Clerk to the Honorable Paul J. Komives, United States Magistrate Judge. B.A., 1992, Michigan State University; J.D., 1995, Wayne State University.

I. INTRODUCTION

This Article discusses significant developments in the law of evidence during the *Survey* period.[1] The Article focuses primarily on published decisions of the Michigan Court of Appeals and the Michigan Supreme Court. To the extent they discuss significant issues of Michigan evidence law, however, unpublished decisions and decisions by the federal courts are also discussed. During the *Survey* period, the Michigan courts issued a number of important rulings on evidentiary issues, most significantly in the areas of relevance, expert evidence and hearsay.

II. PUBLIC DISCLOSURE OF EXCLUDED EVIDENCE

Although not a pure evidence issue, in *Maldonado v. Ford Motor Company*[2] the Michigan Supreme Court issued an interesting decision regarding a trial court's power to prohibit the public dissemination of evidence which has been excluded from trial.[3] In *Maldonado*, the plaintiff brought a sexual harassment claim against Ford based on the actions of her supervisor, Daniel Bennett.[4] Prior to trial, Ford moved to exclude evidence of Bennett's previous indecent exposure conviction, and the trial court granted Ford's motion.[5] After Ford had received a directed verdict in another case involving Bennett's conduct, and before a scheduled settlement conference in Maldonado's case, counsel for Maldonado issued a press release detailing Bennett's indecent exposure conviction and the trial court's ruling excluding that conviction from evidence.[6] Subsequently, Bennett's indecent exposure conviction was expunged.[7]

Several months later, and about two months prior to trial, the trial court held a hearing regarding other evidentiary issues. Plaintiff's counsel invited the media to attend the hearing and despite the trial judge's closure of the hearing to the press, counsel invited the press to wait outside so that he could discuss the details of the hearing.[8] Immediately after the hearing, the trial judge met with all counsel.[9] Bennett's counsel argued that plaintiff's counsel's references to Bennett's conviction violated the Michigan statute criminalizing the

1. The *Survey* period covers cases decided between June 1, 2006 and May 31, 2007.
2. 476 Mich. 372, 719 N.W.2d 809 (2006).
3. Because *Maldonado* does not raise a pure evidence issue and involves issues more appropriately considered matters of civil procedure and professional responsibility, its reasoning is only briefly touched on in this Article.
4. *Maldonado*, 476 Mich. at 377, 719 N.W.2d at 811.
5. *Id.*
6. *Id.* at 378, 719 N.W.2d at 812.
7. *Id.* at 377-79, 719 N.W.2d at 811-12.
8. *Id.* at 379-80, 719 N.W.2d at 813.
9. *Id.* at 380, 719 N.W.2d at 813.

publication of an expunged conviction.[10] The trial judge concluded that it would be redundant to order plaintiff's counsel to follow the law, indicating that he believed counsel would do so.[11] Nevertheless, counsel immediately met with the media and referred to Bennett's prior conviction, and did so again at a public rally.[12] After a number of other public disclosures of Bennett's conviction by the plaintiff and her counsel,[13] the defendants moved to dismiss the case. Although that motion was denied, the plaintiff and her counsel continued to issue public statements either referencing Bennett's conviction or suggesting that the trial judge was biased.[14] At a hearing on the day trial was to begin, the trial court again heard defendant's motion to dismiss.[15] After supplemental briefing, the trial court granted the motion to dismiss, concluding that the plaintiff and her counsel had engaged in a pattern of misconduct designed to taint the jury pool.[16]

The plaintiff appealed to the Michigan Court of Appeals, which affirmed in part and reversed in part the trial court's decision.[17] The court of appeals recognized that the trial court had the inherent authority to order dismissal as a sanction, but concluded that there was insufficient evidence in the record to determine whether the plaintiff and her counsel had actually tainted the jury pool.[18] The court of appeals therefore remanded the matter for an evidentiary hearing.[19] The defendants thereafter appealed to the Michigan Supreme Court, which reversed the court of appeals and reinstated the trial court's dismissal of the case.[20]

The supreme court began by noting that a trial court has inherent authority, deriving from the judicial power, to sanction litigants and attorneys for unethical conduct.[21] This power includes the power to dismiss an action,[22] and is buttressed by the Michigan Constitution's vesting of the judicial power in the judicial branch, and the Michigan Court Rules provision allowing a court to dismiss an action based on a plaintiff's failure to follow the court's orders.[23] Based on this authority, the supreme court concluded that the trial court did not abuse its

10. *Maldonado*, 476 Mich. at 379-80, 719 N.W.2d at 812-13 (discussing MICH. COMP. LAWS ANN. § 780.623(5) (West 1998)).

11. *Id.* at 380, 719 N.W.2d at 813.

12. *Id.* at 380-81, 719 N.W.2d at 813-14.

13. *Id.* at 381-85, 719 N.W.2d at 814-15.

14. *Id.* at 385-86, 719 N.W.2d at 816.

15. *Id.* at 385, 719 N.W.2d at 815.

16. *Maldonado*, 476 Mich. at 386-87, 719 N.W.2d at 816.

17. *Id.*

18. *Id.* at 387, 719 N.W.2d at 817.

19. *Id.*

20. *Id.* at 404-05, 719 N.W.2d at 826.

21. *Id.* at 389, 719 N.W.2d at 818.

22. *Maldonado*, 476 Mich. at 389, 719 N.W.2d at 826.

23. *See id.* at 389-91, 719 N.W.2d at 818-19 (discussing MICH. CONST. art. III, § 2 (1963), and MICH. CT. R. 2.504(B)(1)).

discretion in dismissing the plaintiff's case. The court noted that instead of accepting the trial court's ruling regarding the admissibility of Bennett's prior conviction, "plaintiff and her counsel engaged in a concerted and wide-ranging campaign in the weeks before various scheduled trial dates to publicize the details of the inadmissible evidence through the mass media and other available means."[24] Further, the trial judge warned the parties that he would dismiss the case if plaintiff or her counsel continued to refer to Bennett's conviction, and it was apparent from the record that both plaintiff and her counsel knew the import of the judge's warning.[25] Finally, counsel's actions violated several rules of professional conduct.[26] For these reasons, the trial court did not abuse its discretion in dismissing the plaintiff's claims based on her and her counsel's repeated public references to Bennett's prior criminal conviction, which had been ruled inadmissible at trial.[27]

III. PRESUMPTIONS AND INFERENCES

"It has been aptly observed that 'presumption' is the slipperiest member of the family of legal terms, except its first cousin, 'burden of proof.'"[28] Generally, there are three types of "presumptions," only one of which is truly a presumption.[29] The confusingly named "conclusive" or "mandatory" presumption operates to establish irrefutably a party's claim or defense, and cannot be rebutted by any evidence. "These legal rules are not really presumptions as the term is ordinarily understood, but substantive principles expressed in the language of presumptions."[30] The "mandatory presumption," also referred to as the "rebuttable presumption" and the "presumption of law," is the term which "refer[s] to the true presumption."[31] This term describes a device that sometimes requires the trier of fact to draw a particular conclusion on the basis of certain facts. If the "basic facts" are established, the trier must find the "presumed fact," at least in the absence of evidence tending to disprove it ("counterproof"). In effect, presumptions have at least the effect of

24. *Id.* at 392, 719 N.W.2d at 819.

25. *See id.* at 393-95, 719 N.W.2d at 820-21.

26. *See id.* at 396-98, 719 N.W.2d at 821-22.

27. In reaching its decision, the court rejected the plaintiff's argument that the prohibition on referencing Bennett's conviction violated her First Amendment rights. *See id.* at 398-403, 719 N.W.2d at 822-25. This aspect of the case is beyond the scope of this Article. Justices Cavanagh, Kelly, and Weaver dissented from the court's decision.

28. 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 61, at 308 (2d ed. 1994) (citing JOHN W. STRONG, MCCORMICK ON EVIDENCE § 342 (5th ed. 1999) [hereinafter "MCCORMICK"]).

29. *See id.* § 66, at 322-23; MCCORMICK, *supra* note 28, § 342.

30. *Id.*; MCCORMICK, *supra* note 28, § 342.

31. *Id.*; MCCORMICK, *supra* note 28, § 342.

shifting the burden of production to the party who would be disadvantaged by a finding of the presumed fact.[32]

The third presumption, called variably the "permissive presumption" or the "presumption of fact," but more accurately described as simply the "inference," "refer[s] to conclusions that are permitted but not required."[33] During the *Survey* period, the Michigan courts issued a number of decisions dealing with presumptions and inferences.

A. Presumptions

In two cases during the *Survey* period, the Michigan Supreme Court considered rebuttable presumptions that it concluded erected a high hurdle for the opposing party, requiring clear and convincing evidence before the presumption may be overcome, in distinction to the normal rule regarding the overcoming of presumptions, which requires merely credible and competent evidence.[34]

In *Reed v. Breton*,[35] the court considered the statutory presumption set forth in the Dram Shop Act.[36] Subsection (2) of the statute prohibits a retail licensee of alcoholic beverages from furnishing such beverages to a minor or a visibly intoxicated person.[37] Subsection (3) provides a civil cause of action against a licensee to any person who is injured by a minor or visibly intoxicated person served by a licensee in violation of subsection (2).[38] Put succinctly, "[u]nder the dramshop act, a tavern which, by an unlawful sale, 'contributes' to a particular intoxication is liable for damages caused during that intoxication by the intoxicated person."[39] However, the Act also provides a rebuttable presumption of non-liability to a licensee that is not the last to serve the intoxicated person:

> There shall be a rebuttable presumption that a retail licensee, other than the retail licensee who last sold, gave, or furnished

32. *Id.* at 320; *see also* MCCORMICK, *supra* note 28, § 342.

33. *Id.* at 323. Such inferences occur in almost any case when the jury draws inferences from the evidence based on its own views of the testimony. *See id.* "Inference" is generally used more formally to the specific type of inference that "the judge mentions to the jury in formal instructions–a conclusion permissible on the basis of the evidence, to which the judge openly draws the jury's attention." *Id.*; *see also* MCCORMICK, *supra* note 28, § 342. A jury is free to accept or reject the judge's invitation to draw the inference, and the judge's instruction on the inference alters neither the burden of production nor the burden of proof. *See* County Ct. of Ulster County, N.Y. v. Allen, 442 U.S. 140, 157 (1979).

34. *See* Krisher v. Duff, 331 Mich. 699, 705, 50 N.W.2d 332, 336 (1951).

35. 475 Mich. 531, 718 N.W.2d 770 (2006).

36. MICH. COMP. LAWS ANN. § 436.1801 (West 2001).

37. MICH. COMP. LAWS ANN. § 436.1801(2) (West 2001).

38. MICH. COMP. LAWS ANN. § 436.1801(3) (West 2001).

39. Mason v. Lovins, 24 Mich. App. 101, 114, 180 N.W.2d 73, 80 (1970).

> alcoholic liquor to the minor or the visibly intoxicated person, has not committed any act giving rise to a cause of action under subsection (3).[40]

The effect of this statutory presumption was at issue in *Reed*.

In *Reed*, the plaintiff brought a dram shop action against, *inter alia*, two bars which had served alcohol to Breton, who in turn had killed the plaintiff's decedent in an automobile accident while intoxicated.[41] One of the defendants, Beach Bar, moved for summary disposition on the basis that there was no genuine issue of material fact with respect to whether it was the last bar to serve Breton alcohol.[42] Beach Bar argued that it was therefore entitled to a presumption of non-liability, and that the plaintiff had failed to overcome this presumption.[43] The trial court agreed, and granted Beach Bar's motion for summary disposition.[44] Specifically, the trial court rejected the plaintiff's argument that the presumption was overcome by the testimony of the plaintiff's experts, who opined that based on Breton's age, weight, and blood alcohol concentrations he must have been visibly impaired at the time he was served by the Beach Bar.[45] The trial court agreed that this evidence may have shown Breton's visible intoxication, but that this circumstantial evidence was not the type of unequivocal, credible evidence sufficient to overcome the statutory presumption.[46] The plaintiff appealed, and the Michigan Court of Appeals reversed the trial court's ruling.[47]

The court of appeals agreed that there was a lack of genuine issue of material fact with respect to whether Beach Bar was the last to serve Breton, and thus that Beach Bar was entitled to the statutory presumption.[48] The question for the court, therefore, was whether "the circumstantial evidence of Mr. Breton's visible intoxication when served at defendant's bar is sufficient to rebut the statutory presumption of nonliability."[49] To answer this question, the court turned to Rule 301, which provides the general rule governing the operation of presumptions in civil cases:

> In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party

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40. MICH. COMP. LAWS ANN. § 436.1801(8) (West 2001).
41. *Reed*, 475 Mich. at 534, 718 N.W.2d at 772.
42. *Id.* at 535, 718 N.W.2d at 773.
43. *Id.*
44. *Id.* at 535-36, 718 N.W.2d at 773.
45. *Id.* at 536, 718 N.W.2d at 773.
46. *Id.*
47. *Reed*, 475 Mich. at 536, 718 N.W.2d at 773.
48. *Reed v. Breton*, 264 Mich. App. 363, 369, 691 N.W.2d 779, 784 (2004), *rev'd*, 475 Mich. 531, 718 N.W.2d 770 (2006).
49. *Id.*

> against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.[50]

The court of appeals explained that under this rule, "the function of a presumption is solely to place the burden of producing evidence on the opposing party."[51] Thus, the opposing party may make the presumption "disappear" by producing "credible or competent evidence to the contrary."[52]

Turning to the specific presumption under the Dram Shop Act at issue in the case, the court of appeals rejected, for two reasons, the trial court's imposition of a heightened pleading requirement, which required the plaintiff to show positive, unequivocal evidence that Breton was intoxicated when served by Beach Bar.[53] First, the court noted that this heightened requirement had been applied by the Michigan Supreme Court only to statutes creating presumptions in automobile accident statutes because in such cases (a) the improperly operated automobile becomes a dangerous instrumentality and (b) the only witnesses to testify to the owner's knowledge or negligence are the owner and his acquaintances.[54] In Dram Shop Act cases, on the contrary, it is the level of intoxication that creates liability, not any dangerous instrumentality, and other persons are competent to offer evidence as to the state of the intoxicated person's inebriation at the time he was served by the defendant.[55] Thus, in the court of appeals' view, "the policy reasons for applying the heightened burden of production to rebut the presumption in owner's liability cases are inapplicable" to dram shop cases.[56] Second, the court noted that "the statute itself does not delineate a higher burden of production to rebut the presumption it creates."[57] Relying on two general principles of statutory construction–the principle that a court "presume[s] that the Legislature knows of and intends to legislate in harmony with existing law"[58] and the principle that "nothing may be read into a statute that is not within the manifest intent of the Legislature

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50. MICH. R. EVID. 301.

51. *Reed*, 264 Mich. App. at 371, 691 N.W.2d at 785 (internal quotation omitted).

52. *Id.*

53. *See id.* at 372, 691 N.W.2d at 786.

54. *Id.* at 373-74, 691 N.W.2d at 786-87 (discussing, *inter alia*, Bieszck v. Avis Rent-A-Car Sys., 459 Mich. 9, 583 N.W.2d 691 (1998); *Krisher*, 331 Mich. 699, 50 N.W.2d 332 (1951)).

55. *See id.* at 374, 691 N.W.2d at 787.

56. *Id.*

57. *Reed*, 475 Mich. at 374, 691 N.W.2d at 787.

58. State Bar of Mich. v. Galloway, 124 Mich. App. 271, 277, 335 N.W.2d 475, 477-78 (1983); *see also* Morissette v. United States, 342 U.S. 246, 263 (1952).

as derived from the act itself"[59]–the court concluded that "the Legislature intended the general standard for rebutting presumptions provided in MRE 301 to apply in this situation."[60] Applying its rule, the court of appeals concluded that the plaintiff had presented sufficient evidence to rebut the Dram Shop Act presumption and that the trial court had erred in granting summary disposition to Beach Bar because the plaintiff had presented circumstantial evidence, through eyewitness and expert deposition testimony, that Breton was visibly intoxicated when he was served alcohol by Beach Bar.[61]

The Beach Bar appealed to the Michigan Supreme Court, which reversed the court of appeals. The Supreme Court rejected the court of appeals' application of the general Rule 301 standard of "competent and credible evidence" to overcome a presumption to the statutory language of the Dram Shop Act.[62] The court found Rule 301 inapplicable because, under the Dram Shop Act, the plaintiff already bore the burden of establishing a *prima facie* case of liability against the Beach Bar under subsection (3), which requires the same quantum of "credible and competent" evidence required by Rule 301 to overcome a presumption.[63] In other words, subsection (3) already incorporates the standard of Rule 301, and to give the statutory presumption no other effect than requiring the plaintiff to establish a *prima facie* case "prevents [a] defendant from receiving the protection that the Legislature granted in § 801(8). Requiring the same evidence to make out a dramshop claim and to rebut an additional presumption is tantamount to no test at all."[64] Relying on a canon of construction that the court of appeals ignored–that a court "should avoid construing a statute in such a way that renders any part of it nugatory"[65]–the court concluded that "some difference must exist between the proofs required under § 801(8) and those required under § 801(3)."[66] Assuming that the legislature was familiar with the standard of proof generally applicable in the law–beyond a reasonable doubt, clear and convincing evidence, and preponderance of the evidence–the supreme court concluded that the clear and convincing evidence standard should apply, because the reasonable doubt standard applies only in criminal cases and the preponderance of the evidence standard would

59. Omne Fin., Inc. v. Shacks, Inc., 460 Mich. 305, 311, 596 N.W.2d 591, 594 (1999).

60. *Reed*, 264 Mich. App. at 375, 691 N.W.2d at 787.

61. *Id.*

62. *Reed*, 475 Mich. at 539, 718 N.W.2d at 774-75.

63. *Id.*, 718 N.W.2d at 775.

64. *Id.* at 539-40, 718 N.W.2d at 775 (footnote omitted).

65. Sweatt v. Dep't of Corrections, 468 Mich. 172, 183, 661 N.W.2d 201, 207 (2003) (plurality opinion).

66. *Reed*, 475 Mich. at 540, 718 N.W.2d at 775.

leave the statutory presumption with no effect.[67] Thus, the court concluded, in a civil action under the Dram Shop Act:

> [A] plaintiff, in addition to making out a *prima facie* case proven by a preponderance of the evidence under § 801(3), must also, when a defendant is not the last establishment to serve the allegedly intoxicated person, present clear and convincing evidence to rebut and thus overcome the presumption of § 801(8).[68]

Applying this standard, the supreme court concluded that the trial court had properly granted summary judgment. The court reasoned that while circumstantial evidence may suffice to show "visible intoxication," such evidence must be evidence of actual, visible intoxication.[69] The factors relied upon by the plaintiff's expert–such as blood alcohol level and time spent drinking–cannot "alone demonstrate that a person was *visibly* intoxicated because [they] do[] not show what behavior, if any, person *actually manifested* to a reasonably observer."[70] At most, the plaintiff's evidence showed that Breton was actually intoxicated; it did not, however, show that he was visibly intoxicated. In the absence of such evidence, the Beach Bar was entitled to summary disposition.[71]

Justice Kelly dissented. In her view, the statutory presumption in the Dram Shop Act did not abrogate the general common law rule that a presumption may be overcome by any credible and competent evidence.[72] In Justice Kelly's view, the majority presented "no valid legal justification to change the common-law standard or to manufacture a special enhanced standard for this statute."[73] She also rejected the majority's view that her interpretation rendered the statutory presumption nugatory, arguing on the contrary that the majority "in the name of preventing the presumption from becoming 'meaningless' is giving it strength that the Legislature did not give it."[74] The majority rejected this reasoning, concluding that it was "inconsistent with the Legislature's purposeful differentiation between the last bar to serve a visibly intoxicated patron and the bar that served the patron earlier,"[75] and thus that the failure "to acknowledge the distinction between these licensees disregards the plain language of the statute."[76]

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67. *Id.* at 540-41, 718 N.W.2d at 775-76.
68. *Id.* at 541, 718 N.W.2d at 776.
69. *Id.* at 542, 718 N.W.2d at 776.
70. *Id.* at 542-43, 718 N.W.2d at 776 (emphasis in original).
71. *See id.* at 543, 718 N.W.2d at 777.
72. *Reed*, 475 Mich. at 550-52, 718 N.W.2d at 780-81 (Kelly, J., dissenting).
73. *Id.* at 552, 718 N.W.2d at 781.
74. *Id.*
75. *Id.* at 540 n.8, 718 N.W.2d at 775 n.8.
76. *Id.* at 541-42, 718 N.W.2d at 776.

In *Barnes v. Jeudevine*,[77] the Michigan Supreme Court considered the evidence necessary to overcome the presumption that a child born or conceived during marriage is an issue of the marriage. In *Barnes*, the plaintiff, who purported to be the father of the defendant's child, filed an action to determine paternity under the Paternity Act.[78] At the time the child was conceived, the defendant was married to another man.[79] The defendant's husband served the defendant with a divorce complaint, but the defendant did not inform her husband that she was pregnant.[80] The defendant did not appear in the divorce proceedings, and a default judgment of divorce was entered, which included language that there were no children born or expected to be born of the marriage.[81] Four months after the divorce became final; the defendant gave birth to the child, listing the plaintiff as the child's father.[82] The plaintiff and the defendant also signed affidavits of parentage stating that plaintiff was the father of the child.[83] The plaintiff and the defendant lived together for over four years, until their relationship ended.[84]

After the termination of their relationship, the defendant did not permit the plaintiff to see the child.[85] The plaintiff therefore filed a paternity action against the defendant seeking to establish his rights as the biological father, citing the divorce judgment, the birth certificate, and the affidavits of parentage in support of his claim.[86] The defendant did not admit or deny the plaintiff's claim of paternity, but did dispute that the child was born out of wedlock, noting that she was married at the time the child was conceived and claiming that she signed the birth certificate and affidavit of parentage under duress.[87] The trial court granted the defendant's motion for summary disposition, concluding that the plaintiff lacked standing to sue under the Paternity Act because the child was conceived during defendant's marriage and no court had determined that the child was not the issue of the marriage, as required by section 1 of the Act.[88] On appeal, the Michigan Court of Appeals disagreed and reversed, concluding that the statement in the default judgment of divorce that no children were or were expected to be born of

77. 475 Mich. 696, 718 N.W.2d 311 (2006).
78. MICH. COMP. LAWS ANN. §§ 722.711-.730 (West 2002 & Supp. 2007).
79. *Barnes*, 475 Mich. at 699, 718 N.W.2d at 312.
80. *Id.*
81. *Id.* at 699-700, 718 N.W.2d at 312.
82. *Id.* at 700, 718 N.W.2d at 312.
83. *Id.*
84. *Id.*
85. *Barnes*, 475 Mich. at 700, 718 N.W.2d at 312
86. *Id.*
87. *Id.* at 700-01, 718 N.W.2d at 312-13.
88. *Id.* at 701, 718 N.W.2d at 313. Section 1 of the Act, in relevant part, defines a "[c]hild born out of wedlock" as "a child that the court has determined to be a child born or conceived during a marriage but not the issue of the marriage." MICH. COMP. LAWS ANN. § 722.711(a) (West 2002).

the marriage constituted a determination that the child was not an issue of the marriage.[89] The defendant thereafter appealed to the Michigan Supreme Court.

The supreme court reversed, reinstating the trial court's grant of summary disposition. The court concluded that the previous default judgment of divorce did not constitute a prior determination that the child was not the issue of the marriage.[90] The court reasoned that the issue was not contested in the divorce proceedings, and that a determination required by the Act must "be an affirmative finding regarding the child's paternity in a prior legal proceeding that settled the controversy between the mother and the legal father."[91] Although much of the court's discussion focuses on the language of the Paternity Act, the court found much support for its conclusion in the common law "'presumption that children born or conceived during a marriage are the issue of that marriage,'" a presumption which "'is deeply rooted in our statutes and case law.'"[92] This presumption has been described as being "'as old as the common law'" and "'one of the strongest presumptions in the law.'"[93] For this reason, "[t]he presumption of legitimacy can be overcome only by a showing of clear and convincing evidence."[94] This presumption, which can only be overcome by clear and convincing evidence, "underscored" the supreme court's conclusion that there had not been a prior determination that the child was not the issue of the defendant's prior marriage.[95] The court also concluded that the birth certificate and affidavits of parentage did not alter this conclusion, because notwithstanding those documents no court had determined that the child was conceived out-of-wedlock.[96]

Justices Kelly, Markman, and Cavanagh dissented, sensibly in the author's view. Justice Kelly opined that the majority's decision evidenced "a rigid adherence to wooden strictures such as the presumption of legitimacy even where, as here, the purposes of the presumption are not served."[97] In her view, the divorce decree, birth

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89. *Id.*

90. The court has interpreted the Paternity Act to require a determination that the child was born out of wedlock to precede the paternity action itself. *See id.* at 703, 718 N.W.2d at 314 (discussing Girard v. Wagenmaker, 437 Mich. 231, 242-44, 470 N.W.2d 372, 377-78 (1991)).

91. *Barnes*, 475 Mich. at 705, 718 N.W.2d at 315.

92. *Id.* at 703, 718 N.W.2d at 314 (quoting *In re* KH, 469 Mich. 621, 634, 677 N.W.2d 800, 806 (2004)).

93. *In re KH*, 469 Mich. at 635, 677 N.W.2d at 806 (quoting People v. Case, 171 Mich. 282, 284, 137 N.W. 55, 56 (1912)); *see also* Michael H. v. Gerald D., 491 U.S. 110, 124-26 (1989).

94. *Barnes*, 475 Mich. at 703, 718 N.W.2d at ˆ 4 (citing *In re KH*, 469 Mich. at 634 n.24, 677 N.W.2d at 806 n.24).

95. *Id.* at 706, 718 N.W.2d at 315.

96. *Id.* at 706-07, 718 N.W.2d at 316.

97. *Id.* at 710-11, 718 N.W.2d at 318 (Kelly, J., dissenting).

certificate, and affidavits of parentage were sufficient to constitute clear and convincing evidence to overcome the presumption of legitimacy and allow the plaintiff to obtain genetic testing to determine paternity.[98] Further, without an amendment of the judgment of divorce, that judgment was binding and conclusive.[99] Any other conclusion allows the defendant to rely on a presumption which "likely would have been rebutted already but for her deception of her husband and of the divorce court."[100]

Justice Markman likewise concluded that the majority's decision denied the plaintiff–"who no one disputes is the biological father of the child at issue–the right to be the father of the child he has raised for over four years."[101] In his view, the majority's decision left "this child without a father," while at the same time it "render[ed] a default judgment in this case meaningless; . . . condone[d] and encourage[d] gamesmanship by a party to a child custody proceeding; and . . . allow[ed] a party to prevail, in significant part because of that party's own delinquency in failing to participate in an earlier judicial proceeding."[102] Justice Markman found that the default judgment of divorce satisfied the statutory requirement because it was based on the testimony of the defendant's husband at the divorce proceeding that his wife was not at that time pregnant, and could not have been entered without a conclusion by the court that there were no children which were the issue of the marriage.[103] The defendant's failure to appear in the divorce proceeding amounted to an admission of all the facts alleged in the complaint for divorce. "It is difficult to imagine evidence more 'clear and convincing of a fact than one party's assertion of that fact under oath and the opposing party's admission of that fact."[104]

The dissent's position, as a matter of logic and policy, is certainly correct. While it is true that the presumption of legitimacy is long-standing and particularly strong, the policies underlying that presumption have weakened considerably in modern times. In particular, the difficulties in establishing paternity have been abrogated by genetic testing which makes the determination of paternity relatively simple and accurate. This modern trend is reflected in the Uniform Parentage Act, which thus far has been adopted in only a minority of jurisdictions.[105] The Act retains the common law presumption of legitimacy, but also

98. *Id.* at 711-12, 718 N.W.2d at 318.
99. *See id.* at 712, 718 N.W.2d at 318.
100. *Barnes*, 475 Mich. at 714, 718 N.W.2d at 319.
101. *Id.* at 714, 718 N.W.2d at 319 (Markman, J., dissenting).
102. *Id.* at 714, 718 N.W.2d at 319-20.
103. *Id.* at 718-19, 718 N.W.2d at 322.
104. *Id.* at 720, 718 N.W.2d at 322.
105. *See* Leslie Bender, *Creating Life? Examining the Legal, Ethical, and Medical Issues of Assisted Reproductive Technologies*, 9 J. GENDER RACE & JUST. 443, 453 (2006).

establishes several other presumptions of paternity, including as relevant in *Barnes* a presumption that a man is the father of the child if "for the first two years of the child's life, he resides in the same household with the child and openly holds out the child as his own."[106] The Act further grants standing to any man who alleges to be the child's father,[107] and provides that genetic testing shall be conclusive of the paternity determination.[108] While the presumption of legitimacy still retains weight as a tool for assigning parental rights and responsibilities, where paternity is challenged it is silly to grant the presumption controlling weight in light of technological advances which make the paternity determination simple.

B. The Spoliation Inference

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

> It has always been understood–the inference, indeed, is one of the simplest in human experience–that a party's *falsehood* or *other fraud* in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit.[109]

Under this "spoliation inference," the courts "have admitted evidence tending to show that a party destroyed evidence relevant to the dispute being litigated," such evidence permitting an inference "that the destroyed evidence would have been unfavorable to the position of the offending party."[110] The spoliation inference generally serves one or more of three goals: "(1) promoting accuracy in factfinding, (2) compensating the victims of evidence destruction, and (3) punishing spoliators."[111]

The traditional common law rule, and the rule still applied in the majority of jurisdictions, provides that the spoliation inference is appropriate only where the offending party intentionally has destroyed

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106. UNIF. PARENTAGE ACT § 204(a)(5) (2002).

107. UNIF. PARENTAGE ACT § 607(a).

108. UNIF. PARENTAGE ACT § 631.

109. 2 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 278, at 133 (James H. Chadbourn rev. ed. 1979) (emphasis in original).

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

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

evidence.[112] The more modern trend, however, is that "a finding of 'bad faith' or 'evil motive' is not a prerequisite to the imposition of sanctions for destruction of evidence."[113] Under this view, in appropriate circumstances the inference may be applied against a reckless or negligent spoliator.[114] In either event, it is important to bear in mind that the spoliation inference "does not prove the opposing party's case."[115] Rather, the inference is just that–an inference–which if not rebutted merely permits, but does not require, the jury to conclude "that the tenor of the specific unproduced evidence would be *contrary to the party's case*, or at least would not support it."[116] During the prior *Survey* period, the Michigan Supreme Court adopted a three-part test for determining when the spoliation inference may be applied:

> A jury may draw an adverse inference against a party that has failed to produce evidence only when: (1) the evidence was under the party's control and could have been produced; (2) the party lacks a reasonable excuse for its failure to produce the evidence; and (3) the evidence is material, not merely cumulative, and not equally available to the other party.[117]

During the *Survey* period, the Michigan courts considered the scope and operation of the spoliation inference in two published decisions.

Henderson v. Walled Lake Consolidated Schools[118] involved a suit by a high school student against her soccer coach, stemming from the coach's relationship with another player on the team. The trial court granted summary judgment to all of the defendants–various school officials–except for the coach, on all of the plaintiff's claims.[119] Relevant here, defendant Kevin Clarke, the Assistant Principal, maintained a "soccer file," but that file could not be located at the time of trial.[120] As explained by Clarke, the file cabinet containing the athletic files had been temporarily moved to the media center during a renovation of the

112. *See, e.g.*, Vick v. Texas Employment Comm'n, 514 F.2d 734, 737 (5th Cir. 1975).

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

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

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

116. 2 WIGMORE, *supra* note 109, § 290, at 217 (emphasis in original). Several states have adopted a spoliation tort, which provides for a separate tort remedy against a party who loses or destroys evidence. *See* Trevino v. Ortega, 969 S.W.2d 950, 952 n.3 (Tex. 1998) (citing cases from jurisdictions which have adopted the tort). However, the vast majority of jurisdictions, including Michigan, have specifically declined to adopt a spoliation tort. *See id.* at 952; Panich v. Iron Wood Prods. Corp., 179 Mich. App. 136, 139-40, 445 N.W.2d 795, 797 (1989).

117. Ward v. Consolidated Rail Corp., 472 Mich. 77, 85-86, 693 N.W.2d 366, 371-72 (2005) (per curiam).

118. 469 F.3d 479 (6th Cir. 2006).

119. *Id.* at 486. The detailed facts underlying the plaintiff's suit are irrelevant to the point under discussion here, but for the interested reader may be found at *id.* at 484-86.

120. *Id.* at 485 n.2.

administrative offices.[121] Although he was the only person authorized to access the file cabinet, it was not kept locked, and the whereabouts of the "soccer file" were unknown at the time summary judgment was granted to the defendants.[122]

On appeal the plaintiff argued, *inter alia*, that she was entitled to an adverse inference against the defendants based on their failure to produce the soccer file, and that with this inference applied there were triable issues of fact regarding the defendant's knowledge of the coach's improper behavior.[123] The Sixth Circuit, applying Michigan law, rejected this argument. Citing to *Ward*, the court explained that a presumption that unproduced evidence is unfavorable to the party having control of the information is allowed "only where there is evidence of intentional fraudulent conduct and intentional destruction of evidence."[124] Where there is no such evidence, there is no presumption; rather, a jury may but is not required to draw an adverse inference.[125] In *Henderson*, the plaintiff had presented no evidence of intentional destruction of the soccer file. Thus, there was no basis for an adverse presumption. Rather, plaintiff at most was entitled to an instruction that the jury may infer that the soccer file contained adverse information.[126] However, in light of the fact that there was no other evidence that the school officials knew of the coach's conduct, the court concluded that the district court had not erred in "concluding that any *permissible* adverse inference was not warranted or would not have made a difference in a reasonable jury's assessment of the evidence."[127]

In *Banks v. Exxon Mobil Corp.*,[128] Justice Kelly, writing for herself, considered a novel question relating to the spoliation inference: "whether an adverse-inference jury instruction should be taken into consideration when ruling on a motion for summary disposition."[129] *Banks* involved a tort claim brought against the oil company defendants arising from injuries sustained when the pump he was using burst, spraying gasoline into his face.[130] The court of appeals concluded that the defendants were entitled to summary disposition because they lacked constructive notice of the dangerous condition of the pump.[131] The supreme court, in lieu of

121. *Id.*
122. *Id.*
123. *See id.* at 495.
124. *Henderson*, 469 F.3d at 495 (citing *Ward*, 472 Mich. at 85-86, 693 N.W.2d at 371).
125. *Id.*
126. *Id.*
127. *Id.* This conclusion reflects the general rule, discussed below, that while an adverse spoliation inference may be considered at the summary judgment stage, standing alone it is generally not sufficient to withstand summary judgment. *See infra* note 139.
128. 477 Mich. 983, 725 N.W.2d 455 (2007).
129. *Id.* at 984, 725 N.W.2d at 455 (Kelly, J., concurring).
130. *Id.*
131. *Id.* at 983, 725 N.W.2d at 455 (majority opinion).

granting the plaintiff's application for leave to appeal, peremptorily reversed, concluding that there were sufficient facts showing the defendants' notice to present the case to the jury.[132] Justice Kelly concurred in this determination, elaborating that the spoliation inference provided additional evidence demonstrating the inappropriateness of summary disposition.[133]

According to Justice Kelly, the evidence showed that one of the gas station's video cameras taped the pumps, but the defendants could not produce a tape which may have shown that they had notice of the pump's dangerous condition.[134] Based on this determination, the trial judge ruled that it would give an adverse inference instruction to the jury.[135] Although agreeing with the majority's determination, Justice Kelly went on to consider a question unaddressed by the majority and of first impression in Michigan, namely, whether the adverse inference should have been considered in determining whether summary disposition was appropriate.[136] Explaining that summary disposition must be denied where there is sufficient evidence to permit the jury to find for the nonmoving party, and that the adverse inference instruction permits a jury to draw an adverse inference based on spoliation of evidence, Justice Kelly concluded that "it logically follows that the judge must draw the adverse inference when ruling on a motion for summary disposition."[137] This is so even though the adverse inference is permissive, not mandatory, for the jury, because on summary disposition all of the evidence must be viewed in the light most favorable to the nonmoving party.[138] This conclusion, as Justice Kelly observed, flows naturally from the nature of the spoliation inference and the general procedures governing summary disposition. It is also in accord with the decisions of federal courts considering the issue.[139]

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132. *Id.* at 983-84, 725 N.W.2d at 455.

133. *Id.* at 984, 725 N.W.2d at 456 (Kelly, J., concurring).

134. *See Banks*, 477 Mich. at 984-85, 725 N.W.2d at 456.

135. *Id.* at 984, 725 N.W.2d at 456 (Kelly, J., concurring).

136. *Id.*

137. *Id.*

138. *See id.* at 984 n.2, 725 N.W.2d at 456 n.2.

139. *See, e.g.*, Kronisch v. United States, 150 F.3d 112, 128 (2d Cir. 1998); Scott v. IBM Corp., 196 F.R.D. 233, 249-50 (D.N.J. 2000). Under the federal rule, the adverse inference is some evidence weighing against summary judgment which, when coupled with other evidence may support a denial of summary judgment, but is generally not sufficient in its own right to withstand summary judgment in the absence of any other evidence supporting the nonmoving party's case. *See* Medical Lab. Mgmt. Consultants v. American Broadcasting Cos., Inc., 306 F.3d 806, 825 (9th Cir. 2002); *Kronish*, 150 F.3d at 128; Pelletier v. Magnusson, 195 F. Supp. 2d 214, 236-37 (D. Me. 2002).

IV. RELEVANCE

A. Relevance and Undue Prejudice Generally

The rules of relevance are addressed in Article IV of the Michigan Rules of Evidence. Rules 401 and 402 provide the general rules of relevance for the admission of evidence. Rule 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[140] Rule 402 provides, simply, that relevant evidence is admissible (unless otherwise prohibited by the United States or Michigan Constitutions, or other rules of evidence) and irrelevant evidence is not admissible.[141] The remaining rules in Article IV establish rules of limited relevance, prohibiting the introduction of otherwise "relevant" evidence under Rules 401 and 402 for various policy reasons. Taken together, Rules 401 and 402 "constitute[] the cornerstone of the . . . evidentiary system."[142]

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

> An item of evidence, being but a single link in the chain of proof, need not prove conclusively the proposition for which it is offered. . . . It is enough if the item could reasonably show that a fact is slightly more probable than it would appear without that evidence. . . . A brick is not a wall.[143]

In other words, under Rules 401 and 402 "[e]vidence is not subject to exclusion solely because its probative value is extremely low. If evidence has any probative value whatsoever, it is relevant and admissible unless otherwise excludable for an affirmative reason."[144]

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140. MICH. R. EVID. 401.

141. *See* MICH. R. EVID. 402.

142. GLEN WEISSENBERGER & JAMES J. DUANE, FEDERAL EVIDENCE § 401.1, at 73 (4th ed. 2001) [hereinafter "WEISSENBERGER"]. Professor Weissenberger discusses the Federal Rules of Evidence and the federal evidentiary system. However, Michigan Rules 401 and 402 are substantively identical to Federal Rules 401 and 402, *see* MICH. R. EVID. 401, 1978 Note; MICH. R. EVID. 402, 1978 Note, and the Michigan courts look to federal courts when analyzing these rules. *See, e.g.*, People v. Hall, 433 Mich. 573, 581, 447 N.W.2d 580, 583 (1989).

143. MCCORMICK, *supra* note 28, § 185. The Michigan Supreme Court has cited approvingly Professor McCormick on this point. *See* People v. Brooks, 453 Mich. 511, 519, 557 N.W.2d 106, 109-10 (1996).

144. WEISSENBERGER, *supra* note 142, § 401.3, at 75; *see also* JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 17-18 (1827).

As noted above, Rules 401 and 402 provide the general rules of relevance, while the remaining rules of Article IV establish rules of limited admissibility based on various policy considerations. The most prominent of these rules of limited admissibility is Rule 403, which provides that otherwise relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[145] "The underlying premise of the [r]ule is that certain relevant evidence should not be admitted to the trier of fact where the admission would result in an adverse effect upon the effectiveness or integrity of the fact finding process."[146] Because the question of undue prejudice under Rule 403 is inextricably bound to a determination of the probative value of the evidence, Rule 403 determinations in large part derive from general relevance determinations under Rules 401 and 402. It is therefore appropriate to consider all three rules together. During the *Survey* period, the Michigan courts issued a number of decisions addressing these general principles of relevance.

In *People v. Mackin*,[147] the defendants were charged of ethnic intimidation arising from their burning of a cross on the front lawn of a home belonging to an African-American and his Caucasian fiancée.[148] Prior to trial, the prosecution filed notice of its intent to present evidence of another cross burning on the victim's lawn the day prior to the incident for which the defendants were being tried.[149] The trial court concluded that this evidence was more prejudicial than probative, and thus was inadmissible.[150] The prosecutor filed an interlocutory appeal with the Michigan Court of Appeals, which reversed the trial court's determination.[151] The court of appeals rejected the trial court's conclusion that the evidence of the prior cross-burning was more prejudicial than probative.[152] The court explained that "[o]ne element of

145. MICH. R. EVID. 403.

146. WEISSENBERGER, *supra* note 142, § 403.1, at 85-86. As Professor Weissenberger notes, the policy underlying Rule 403 is the same as that underlying the remaining rules of limited admissibility set forth in Article IV of the Rules of Evidence. *Id.* These other rules "represent applications of the balancing of relevancy and countervailing adverse effects which have recurred with sufficient frequency to have resulted in a specific rule." *Id.* at 86; *see also* 22 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE: EVIDENCE § 5235, at 340 (1978) (the rules of limited admissibility "emerged from repeated applications of the doctrine of relevance to recurrent patters in the use of circumstantial evidence."). Rule 403 is thus akin to the "catch-all" exception to the hearsay rule.

147. 477 Mich. 1125, 730 N.W.2d 476 (2007).

148. People v. Mackin, No. 268017, 2006 WL 2708688, at *1 (Mich. Ct. App. Sept. 21, 2006), *rev'd*, 477 Mich. 1125, 730 N.W.2d 476 (2007).

149. *Id.*

150. *Id.*

151. *Id.* at *5.

152. *Id.* at *3.

ethnic intimidation is the intimidation or harassment of another with malicious and specific intent."[153] Although a single cross-burning incident would suffice to show this intent, "the jury is entitled to hear the 'complete story' of the matter at issue," which included the prior cross-burning.[154] This was so, the court explained, because on the night of the second cross-burning, the victim came onto his porch and yelled obscenities at the defendants, who ran away.[155] The victim stayed on his porch to await the police, observing a van drive slowly by his house several times.[156] The van again drove by after the police had arrived, and the police pulled the van over.[157] Thus, the court of appeals reasoned, "[t]he fact of the first cross burning helps to explain the complainant's reactions to the second cross burning,"[158] Further, the court concluded, any prejudicial impact could be ameliorated by an appropriate limiting instruction telling the jury to consider the evidence solely for the purpose of explaining the victim's response to the second cross-burning, and not to show the defendants' participation in the first cross-burning or their propensity to commit the crime.[159]

On the defendants' application for leave to appeal, the supreme court peremptorily reversed. Noting that the ethnic intimidation statute focuses on the state of mind and intent of the defendant, the court concluded that "[t]he complainant's state of mind is not an element of the offense."[160] While the victim's actions may be relevant, the court explained, "the fact that a similar incident occurred the night before is not relevant and is therefore not admissible."[161] Justice Corrigan, agreeing with the court of appeals, dissented. Noting the similarities between the Michigan ethnic intimidation statute and the comparable federal statute,[162] Justice Corrigan found persuasive federal cross burning cases in which "the federal circuits commonly allow juries to consider evidence of the victims' reactions to prove a defendant's intent to intimidate."[163] For example, the victim's reaction may demonstrate how a reasonable person would have perceived the threat and whether the perpetrator could have foreseen that the victim would perceive the action as a threat.[164] Further,

153. *Id.* at *2.
154. *Mackin*, 2006 WL 2708688, at *2.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at *3.
159. *Id.* Because there was no evidence that the defendants had perpetrated the first cross-burning, the "other acts" prohibition of Rule 404(b) was not implicated. *Mackin*, 477 Mich. at *2 n.1.
160. *Id.* at 1125, 730 N.W.2d at 477.
161. *Id.*
162. *See id.* (Corrigan, J., dissenting) (*Comparing* MICH. COMP. LAWS ANN. § 750.147b(1) (West 2004), *with* 18 U.S.C. § 241 (1996)).
163. *Id.* at 1126, 730 N.W.2d at 477.
164. *Id.*

the evidence was relevant to show the defendants' intent, because "multiple burnings negate intent-based defenses such as claims that the second burning was some sort of accident, a holiday celebration, a practical joke, or the like."[165] Agreeing with the court of appeals that a proper curative instruction could have alleviated any undue prejudice, Justice Corrigan therefore concluded that the evidence should be admissible at the defendants' trials.[166]

The Michigan Court of Appeals considered the general relevance rules in *People v. Osantowski*.[167] In that case, the defendant was convicted of making a false report or threat of terrorism and other crimes arising from electronic chat room conversations in which the defendant communicated "his feelings of hate and his plans for the infliction of death and terror on his own family members and other individuals whom he perceived as deserving of the fate defendant chose for them."[168] The recipient of the messages forwarded them to her father, a Washington State University Police Officer, who in turn forwarded them to the Clinton Township Police Department.[169] The police department contacted the defendant's high school, which canceled school related events for the day.[170] A search of the defendant's home uncovered several firearms.[171] Upon questioning by the police, the defendant denied having an intention to hurt anyone, claiming that his statements were not a threat but were merely expressions of anger.[172]

Following his conviction, the defendant appealed to the Michigan Court of Appeals raising, among other claims, a claim that the trial court erred in admitting evidence that he possessed guns, bomb making materials, knives, and ammunition. Defendant argued that this evidence was not relevant and was unfairly prejudicial.[173] More specifically, the defendant argued that, because the prosecutor was only required to show that he made and communicated a threat, and not that he intended or had the capability to carry out the threat, "the weapons and ammunition were not relevant to the elements of the crime charged and were highly prejudicial."[174] The court of appeals disagreed.

The court explained that, to be relevant under Rule 401, "evidence need not relate to an element of the charged crime or an applicable defense."[175] All that is required is that the point be at issue in the case.[176]

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165. *Mackin*, 477 Mich. at 1126, 730 N.W.2d at 478 (internal quotation omitted).

166. *Id.* at 1127, 730 N.W.2d at 478.

167. 274 Mich. App. 593, 736 N.W.2d 289 (2007).

168. *Id.* at 595, 736 N.W.2d at 294. The court of appeals' opinion details the various messages posted by the defendant. *See id.* at 596-98, 736 N.W.2d at 294-96.

169. *Id.* at 599, 736 N.W.2d at 296.

170. *Id.*

171. *Id.*

172. *Id.* at 599-600, 736 N.W.2d at 296.

173. *Osantowski*, 274 Mich. App. at 607, 736 N.W.2d at 300.

174. *Id.* at 608, 736 N.W.2d at 301.

175. *Id.* at 609, 736 N.W.2d at 301.

Because, in his statement to the police, the defendant claimed that his computer posts were merely expressions of anger, "it was incumbent upon the prosecutor to demonstrate that defendant's words were not mere hyperbole, but rather comprised a 'true threat.'"[177] The defendant's arsenal, the court reasoned, evidenced that the defendant's words were not mere hyperbole, and was relevant to his credibility in asserting that he lacked the intent to truly threaten anyone.[178] Thus, the weapons were relevant and material evidence admissible under Rules 401-403.[179] Further, the court explained, the weapons were relevant to the firearm possession crime with which the defendant was also charged, because both the guns and the pipe bomb met the statutory definition of "firearm," and thus these weapons were relevant with respect to the possession of firearms charge.[180]

In *Dykema Gossett, PLLC v. Ajluni*,[181] the Dykema Gossett law firm ("Dykema") brought a suit seeking payment of fees from the defendant Dr. Roger Ajluni, whom Dykema had represented in a prior suit against Blue Cross/Blue Shield of Michigan.[182] That prior suit stemmed from an investigation into Ajluni's billing practices, which ultimately resulted in a pretrial diversion agreement with the United States Attorney, restitution to Blue Cross, and Blue Cross's "departicipation" of Ajluni preventing him from billing Blue Cross directly for services to covered patients.[183] Ajluni, whose son-in-law Tom Pastore had previously worked at Dykema, retained Dykema to represent him.[184] Because of the previous relationship between Pastore and Donald Young, the lead attorney on the case, the parties agreed to a mixed hourly and contingent fee agreement.[185] Under the agreement, Dykema was to be paid at half the normal billing rate up to $50,000, and was to receive 25% of any monetary recovery.[186] Based on this agreement Ajluni, through counsel, filed suit against Blue Cross alleging that it had breached the provider agreement with him by departicipating him.[187] However, four weeks into the trial, Dykema learned that Blue Cross was again investigating Ajluni based on billings submitted under different doctors' billing numbers for patients who had been treated by Ajluni.[188] In light of this evidence and the effect it would have on Ajluni's suit, counsel worked out a settlement

176. *Id.*
177. *Id.*
178. *Id.*
179. *See Osantowski*, 274 Mich. App. at 609-10, 736 N.W.2d at 301-02.
180. *Id.* at 610-11, 736 N.W.2d at 301-02.
181. 273 Mich. App. 1, 730 N.W.2d 29 (2006).
182. *Id.* at 7, 730 N.W.2d at 34.
183. *Id.* at 4-5, 730 N.W.2d at 32-33.
184. *See id.* at 5 n.5, 730 N.W.2d at 33 n.5.
185. *Id.*
186. *Id.*
187. *Ajluni*, 273 Mich. App. at 5-6, 730 N.W.2d at 33.
188. *Id.* at 6, 730 N.W.2d at 33.

agreement whereby Ajluni would drop his claims and Blue Cross would drop its counterclaims, and Blue Cross would agree not to turn over its information to the authorities.[189] Ajluni signed this settlement agreement.[190]

Dykema then sought payment from Ajluni for the service performed in the Blue Cross litigation, which encompassed nearly four years of work.[191] Ajluni refused to pay, and Dykema brought an action against him alleging breach of contract, quantum meruit, fraud, and misrepresentation.[192] The jury found in favor of Dykema on its quantum meruit claim, and awarded $700,000 in damages.[193] This award was remitted by the trial court to $500,000.[194] Ajluni appealed, raising a number of claims, including several claims that the trial court had erred in admitting various pieces of irrelevant evidence and excluding as irrelevant evidence which he sought to introduce.[195] The Michigan Court of Appeals rejected each of these claims.[196]

First, Ajluni claimed that the trial court erred in permitting Dykema attorney Joseph Erhardt to testify about Dykema's pro bono work.[197] The court of appeals rejected this claim. The court explained that, in light of Dykema's quantum meruit theory, a key issue in the case was the determination of a reasonable attorney fee for the work performed by Dykema.[198] And because "the reputation of the attorney or firm" is "one of the criteria for determining reasonable attorney fees,"[199] the evidence as at least marginally relevant to Dykema's claims.[200]

Second, Ajluni argued that he was improperly questioned about other lawsuits to which he was a party.[201] The court of appeals again disagreed with Ajluni's claim that this evidence was irrelevant. The court reasoned that the evidence was admissible both to rebut Ajluni's attempt to portray himself as an unsophisticated party and to undercut his claim that he did not expect that he would have to pay Dykema after the settlement agreement was entered.[202] The court concluded that "[g]iven the low threshold for relevance and the high threshold for abuse of discretion, it was not error to allow this evidence."[203]

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189. *Id.* at 7, 730 N.W.2d at 34.
190. *Id.* at 6-7, 730 N.W.2d at 33-34.
191. *Id.* at 7, 730 N.W.2d at 34.
192. *Id.*
193. *Ajluni*, 273 Mich. App. at 8, 730 N.W.2d at 34.
194. *Id.* at 7-8, 730 N.W.2d at 34.
195. *Id.* at 8, 730 N.W.2d at 34.
196. *Id.* at 24, 730 N.W.2d at 43.
197. *Id.* at 15, 730 N.W.2d at 38.
198. *Id.*
199. *Ajluni*, 273 Mich. App. at 15, 730 N.W.2d at 38.
200. *Id.*
201. *Id.* at 15-16, 730 N.W.2d at 38.
202. *Id.*
203. *Id.* at 16, 730 N.W.2d at 38.

Finally, the court of appeals rejected Ajluni's claim that the trial court had erred in excluding evidence he sought to introduce that Young had told him that he would not have to pay any more fees if the settlement agreement was accepted.[204] The court of appeals reasoned that this evidence was irrelevant because "[t]he language of the contract speaks for itself,"[205] and in any event if Ajluni thought that this statement constituted a waiver of Dykema's rights under the contract, he should have pleaded waiver as an affirmative defense.[206]

The Michigan Court of Appeals again considered issues of general relevance in *United Automobile, Aerospace & Agricultural Implement Workers of America v. Dorsey*.[207] In that case, the UAW agreed in 1995 to purchase the assets of a Florida-based radio network, People's Radio Network (PNI).[208] Charles Harder, PNI's owner and principal on-air personality, contacted Pat Choate due to tax problems that PNI was having.[209] Choate, along with Helen Dorsey and Edward Miller, proposed that the investors form a new radio network, United Broadcasting Network, which could provide a forum for the discussion of issues relevant to labor unions and provide the investors with significant return on their investment.[210] The radio station failed to make money, and eventually went into bankruptcy.[211] The UAW and other investors then brought an action against Choate, Dorsey, and Miller, alleging fraud and misrepresentation.[212] The jury returned a verdict in favor of the plaintiffs, and the defendants appealed.[213]

On appeal, the defendants brought several evidentiary challenges. The court of appeals agreed with the defendants that the trial court had erred in admitting transcripts of Miller's divorce proceedings.[214] In that divorce proceeding, the trial court had sealed all of the files and records of the case.[215] Notwithstanding this order sealing the record, the UAW's attorneys obtained a copy of the transcript, and used it to impeach Miller's testimony at trial in the fraud action.[216] The court of appeals agreed that this evidence should not have been admitted, but the

204. *Id.*
205. *Ajluni*, 273 Mich. App. at 16, 730 N.W.2d at 38.
206. *See id.*, 730 N.W.2d at 38-39.
207. 273 Mich. App. 26, 730 N.W.2d 17 (2006) [hereinafter "*Dorsey II*"].
208. United Auto., Aerospace & Agric. Implement Workers of Am. v. Dorsey, 268 Mich. App. 313, 316-21, 708 N.W.2d 717, 720-23 (2005), *rev'd*, 474 Mich. 1097, 711 N.W.2d 79 (2006) [hereinafter "*Dorsey I*"].
209. *Dorsey I*, 268 Mich. App. at 316, 708 N.W.2d at 720.
210. *Id.* at 317, 708 N.W.2d at 721.
211. *Id.* at 319, 708 N.W.2d at 722.
212. *Id.*
213. *Id.* at 316-21, 708 N.W.2d 717 at 720-23.
214. *Id.* at 322, 708 N.W.2d at 723.
215. *Dorsey I*, 268 Mich. App. at 322, 708 N.W.2d at 723.
216. *See id.* at 322-23, 708 N.W.2d at 723-24.

Michigan Supreme Court reversed this determination.[217] On remand from the supreme court, the court of appeals addressed the remaining evidentiary issues raised by the defendants.

The bulk of the court of appeals' decision addresses the admissibility of a group of memos written by Harder to Choate and Miller in which he expressed complaints about the way Choate and Miller were managing UBN.[218] The plaintiffs sought to admit these memos to counter the defendants' assertions that Harder believed, at the time of trial, that plaintiffs' were the ones causing him problems, to show that Miller had a motive to get rid of Harder, and to impeach Miller's testimony that Harder's chief complaints related to censorship.[219] The court of appeals found no error in the admission of this evidence, concluding that the memos were relevant.[220]

On appeal, the plaintiffs argued that the Harder memos were relevant to show animosity between Harder and Miller.[221] They reasoned that, because Harder accused Miller of mismanaging the radio network, the natural response of Miller would have been to view Harder as a problem, and that Miller would have been angry with Harder, in contradiction to Miller's testimony that he was not angry with Harder.[222] This evidence, plaintiffs argued, provided a counterweight to the defendants' argument that the plaintiffs, and not the defendants, forced Harder to leave the station.[223] The defendants argued in response that nothing in the memos demonstrated Miller's reaction or showed that he was angry with Harder, and that the speculation that they might have made Miller angry was not sufficient to permit the admission.[224] The court of appeals rejected the defendants' argument.

The court relied on the supreme court's decision in *People v. Fisher*.[225] In *Fisher*, the court held that a murdered wife's statements which expressed marital discord were admissible in the husband's murder trial to show the effect that they had on the husband.[226] Relying on this decision, the court of appeals in *Dorsey II* concluded that the

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217. *See* M. Bryan Schneider, *Evidence, 2006 Annual Survey of Michigan Law*, 53 WAYNE L. REV. 295, 312-15 (2007) (discussing this aspect of the case).

218. *Dorsey II*, 273 Mich. App. at 31, 730 N.W.2d at 21.

219. *Id.* at 31-32, 730 N.W.2d at 21.

220. *Id.* The court of appeals also considered whether the memos were inadmissible hearsay. This aspect of the court's decision is discussed *infra* notes 541-62 and accompanying text. In addition, the court of appeals discussed whether the Miller divorce transcripts were properly admitted for impeachment purposes apart from the confidentiality issues addressed in the prior appeal. This aspect of the case is discussed *infra* notes 315-30 and accompanying text.

221. *Dorsey II*, 273 Mich. App. at 31-32, 730 N.W.2d at 21.

222. *Id.*

223. *Id.* at 38-39, 730 N.W.2d at 25.

224. *Id.* at 39, 730 N.W.2d at 25.

225. 449 Mich. 441, 537 N.W.2d 577 (1995).

226. *Id.* at 452-53, 537 N.W.2d at 582-83.

Harder memos were relevant.[227] The court explained that the memos went to a material issue in the case, namely, whether Miller felt anger toward Harder, which in turn was "relevant to defendants' assertion that plaintiffs were the ones who forced Harder out of the radio station."[228] Although the memos did not conclusively establish this fact, they did provide circumstantial evidence of Miller's motive, and it was for the jury to decide whether to believe or disbelieve Miller's testimony that he was not angry at Harder.[229]

The court of appeals also rejected the defendants' argument that the trial court erred in precluding them from questioning Miller and cross-examining Harder's attorney regarding Harder's current attitude toward the plaintiffs and the defendants.[230] According to the defendants, by the time of trial Harder had become disenchanted with the plaintiffs and felt that he was mistaken in 1996 when he concluded that the defendants were the cause of his problems.[231] The court of appeals rejected the defendants' argument that this evidence was relevant.[232] The court explained that Harder's view of the situation at the time of trial was not relevant to his perception of the situation at the time he left the network in 1996.[233] The court reasoned "[t]hat Harder may now have a different perspective on the events that led to his leaving the station in 1996 does not make it more or less probable that plaintiffs caused him to leave, as defendants contend, or that defendants caused him to leave, as plaintiffs contend."[234] Accordingly, the trial court did not err in excluding this evidence.

B. Other Acts Evidence

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

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

227. *Dorsey II*, 273 Mich. App. at 40, 730 N.W.2d at 26.
228. *Id.*
229. *See id.*
230. *Id.* at 41-42, 730 N.W.2d at 27.
231. *See id.* at 40-41, 730 N.W.2d at 26.
232. *Id.*
233. *Dorsey II*, 273 Mich. App. at 41, 730 N.W.2d at 26.
234. *Id.* The court of appeals also determined that the evidence was inadmissible hearsay. This aspect is discussed *infra* notes 540-60 and accompanying text.

> other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.[235]

Unlike the other rules of limited admissibility, however, Rule 404(b) is not primarily grounded in concerns about the low probative value of other acts evidence. On the contrary, such evidence "is objectionable not because it has no appreciable probative value but because it has too much. The natural and inevitable tendency of the tribunal–whether judge or jury–is to give excessive weight to the" evidence.[236] It is also thought unfair to make a party refute charges long since grown stale.[237]

The Michigan Supreme Court has established a four-part test for determining the admissibility of other acts evidence. In order to be admissible under this test: (1) the evidence must be relevant for a purpose other than the defendant's propensity to commit the charged crime–*i.e.*, it must be admitted for one of the permissible purposes listed in Rule 404(b)(1); (2) the evidence must be relevant under Rule 401; (3) the danger of unfair prejudice must not substantially outweigh the probative value of the evidence under Rule 403; and (4) the trial court must give a limiting instruction upon the request of the party against whom the evidence is offered.[238] Although developed in the context of a criminal case, this *VanderVliet* test applies equally to other acts evidence offered in civil trials.[239]

Further, while the exclusionary principle established by Rule 404(b) is important, often more important are the rule's enumerated exceptions. "While the general rule of exclusion is often applauded–and occasionally enforced–it is the exceptions that are of most practical significance."[240] This is particularly true under the view, adopted by the Michigan Supreme Court, that Rule 404(b) reflects a doctrine of inclusion, rather than exclusion.[241] Under this view, Rule 404(b) generally *permits* the introduction of other acts evidence, unless it is offered solely for the impermissible purpose identified in the first sentence of Rule 404(b). In other words, "the first sentence of Rule 404(b) bars not evidence as such,

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

236. 1A WIGMORE, *supra* note 109, § 58.2, at 1212 (Peter Tillers rev. ed. 1983); *see also* Michelson v. United States, 335 U.S. 469, 475-76 (1948).

237. *See* People v. Zackowitz, 172 N.E. 466, 468-69 (N.Y. 1930) (Cardozo, J.); 1A WIGMORE, *supra* note 109, § 58.2, at 1212-13.

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

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

240. 22 WRIGHT & GRAHAM, *supra* note 146, §5232, at 429-31 (footnotes omitted).

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

but a theory of admissibility."[242] During the *Survey* period, the Michigan Court of Appeals issued two published decisions involving Rule 404(b) evidence.

In *People v. Dobek*,[243] the defendant was convicted of several counts of criminal sexual conduct arising from a repeated course of molestations of his step-daughter when she was twelve years old.[244] Amongst other evidentiary and non-evidentiary claims,[245] the defendant claimed on appeal that the trial court had erred in permitting the introduction of other acts testimony detailing other sexual assaults.[246] The "other acts" evidence consisted of the testimony of the defendant's sister-in-law that he had fondled her, the testimony of a babysitter that the defendant had attempted to touch her, and the testimony of the victim regarding other sexual assaults by the defendant with which he was not charged.[247] The court of appeals, applying the *VanderVliet* test,[248] rejected the defendant's claim.

First, relying on the supreme court's decisions in *People v. DerMartzex*[249] and *People v. Knox*,[250] the court reasoned that the victim's testimony was relevant to support the victim's credibility by showing the context involved in the charged offenses and the relationship between the defendant and the victim,[251] as well as to show the defendant's common plan and intent in sexually assaulting the victim.[252] Thus the evidence was probative and admitted for a proper purpose.[253] Further, the probative value of the evidence was not outweighed by the danger of unfair prejudice in light of the substantial probative force of the evidence and the fact that "defendant attempted to use the allegations

242. United States v. Crowder, 141 F.3d 1202, 1206 (D.C. Cir. 1998); *see also* 1A WIGMORE, *supra* note 109, § 215, at 1868-69 (noting that otherwise impermissible character evidence is not excluded where admissible for another purpose because "[t]he well-established principle of multiple admissibility . . . declares that the inadmissibility of an evidential fact for one purpose does not prevent the admissibility for any other purpose otherwise proper."). For a more complete discussion of the conflicting exclusionary and inclusionary views of Rule 404(b), *see* 22 WRIGHT & GRAHAM, *supra* note 146, § 5239; Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 BYU L. REV. 1547, 1557-64 (1998); Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938).

243. 274 Mich. App. 58, 732 N.W.2d 546 (2007).

244. *Id.* at 62, 732 N.W.2d at 554.

245. The defendant's other evidentiary claims relate to questioning defendant about his religious beliefs and expert testimony. These aspects of the case are discussed *infra* notes 282-96 and accompanying text (religious beliefs) and *infra* notes 411-32 and accompanying text (expert testimony).

246. *Dobek*, 274 Mich. App. at 84, 732 N.W.2d at 565.

247. *See id.*

248. *Id.* at 85-86, 732 N.W.2d at 566 (setting forth test).

249. 390 Mich. 410, 213 N.W.2d 97 (1973).

250. 469 Mich. 502, 674 N.W.2d 366 (2004).

251. *Dobek*, 274 Mich. App. at 89-90, 732 N.W.2d at 568.

252. *Id.* at 90-91, 732 N.W.2d at 569.

253. *Id.*

of numerous sexual assaults to his advantage, considering the small home and many residents."[254]

Likewise, the court concluded that the other acts testimonies offered by the babysitter and the defendant's sister-in-law were properly admitted under Rule 404(b).[255] The court explained that the defendant attacked the victim's testimony because the claimed assaults sometimes occurred with others in the same room or house.[256] The testimonies of the sister-in-law and babysitter were relevant because they "showed a plan, scheme, or system whereby defendant would discreetly isolate and improperly touch a female even with others present nearby."[257] Further, the testimonies were relevant to show the defendant's opportunity to commit the sexual assaults on the victim, because they demonstrated that he "would take advantage of any small window of opportunity to sexually touch a female, as he had done with the victim."[258] Because this evidence was significantly probative, its probative value was not outweighed by the danger of unfair prejudice, and the testimonies were appropriately admitted under Rule 404(b).[259]

The court of appeals also considered other acts evidence in *People v. Orr*.[260] In *Orr*, the defendant was convicted of first degree murder arising from his shooting of Miguel Crittendon, his sister's boyfriend.[261] The defendant was originally charged with shooting Crittendon on September 8, 2003, but the police were unable to locate and arrest the defendant.[262] Although Crittendon recovered from his injuries he was shot again, this time fatally, on February 3, 2004.[263] At trial, the prosecution presented evidence regarding the September 8, 2003 shooting.[264] Following his conviction, the defendant appealed, arguing that this evidence was improperly admitted under Rule 404(b) because it was not relevant to the February 3, 2004, shooting and whatever probative value it had was outweighed by the danger of unfair prejudice.[265] The Michigan Court of Appeals disagreed.

The court of appeals reasoned that the evidence was relevant for two proper purposes. First, the court explained that "[i]f a prior act tends to show why a perpetrator committed a seemingly random and inexplicable

254. *Id.* at 91, 732 N.W.2d at 569.
255. *Id.*
256. *Id.*
257. *Dobek*, 274 Mich. App. at 91, 732 N.W.2d at 569.
258. *Id.*
259. *See id.*
260. 275 Mich. App. 587, 739 N.W.2d 385 (2007) (per curiam).
261. *Id.* at 588, 739 N.W.2d at 387.
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.* The defendant also challenged the introduction of hearsay statements made by the victim to his father and a police officer. This aspect of the case is discussed *infra* notes 406-13 and accompanying text.

attack, then the prior act is relevant for purposes other than the impermissible purpose of showing that a defendant has a propensity for violence."[266] Here, there was strong evidence that the defendant had perpetrated the earlier shooting, including the victim's statements identifying the defendant as his attacker and the defendant's own conviction, and thus the evidence of the shooting was admissible for the proper purpose of showing that the second shooting was not a random act of violence by an unknown perpetrator, but was an attempt by the defendant to "finish the job."[267] Second, because first degree murder requires a showing of the defendant's premeditation and intent to kill, the prior shooting and the lapse of time between it and the second shooting showed that the defendant intended to kill Crittendon and deliberated the killing.[268]

The court also rejected the defendant's argument that the probative value of the evidence was outweighed by the danger of unfair prejudice.[269] The court explained that the evidence of the first shooting was strong, lessening the unfairly prejudicial nature of that shooting, and that the shooting was highly probative of the defendant's identity as the second shooter and his intent in shooting the victim.[270] Further, the trial court gave an appropriate limiting instruction, lessening any prejudicial impact of the other acts evidence.[271]

C. Rape Shield Law

Rape-shield laws represent a particular species of the character evidence rule reflected in Rule 404. "Like most States, Michigan has a 'rape-shield' statute designed to protect victims of rape from being exposed at trial to harassing or irrelevant questions concerning their past sexual behavior."[272] Michigan's rape-shield law provides:

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

266. *Orr*, 275 Mich. App. at 591, 739 N.W.2d at 388 (internal quotation omitted).
267. *Id.* at 591, 739 N.W.2d at 388-89.
268. *Id.* at 591-92, 739 N.W.2d at 389.
269. *Id.* at 592, 739 N.W.2d at 389.
270. *See id.* at 592-93, 739 N.W.2d at 389.
271. *See id.* at 593, 739 N.W.2d at 390.
272. Michigan v. Lucas, 500 U.S. 145, 146 (1991).

(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.[273]

The statute further provides that, if a defendant seeks to introduce evidence under (a) or (b), he must give notice of his intent to do so within ten days of the arraignment.[274]

During the *Survey* period, the Michigan Supreme Court considered the rape shield law in two summary opinions. Although these opinions did not provide any analysis, they established an important proposition of law which had not previously been considered by the supreme court. Specifically, the court established that prior false allegations of sexual abuse made by the victim against other individuals is not barred by the rape shield law.[275] The court in both cases merely asserted this proposition without any analysis. However, this conclusion flows from the language of the statute, which precludes evidence relating to the victim's "sexual conduct." A prior false allegation, being false, does not amount to evidence of any *sexual* conduct by the victim. A number of courts have reached this conclusion under similar versions of their own rape shield laws.[276] A question left open by these decisions is the quantum of proof necessary for a defendant to be able to present his evidence of prior false allegations to the jury. Some jurisdictions establish a high threshold, requiring a showing that the prior allegation has been recanted by the victim or otherwise shown to be "demonstrably false."[277] The majority rule, however, merely requires that the proponent of the evidence demonstrate to the judge that the prior allegation is false by a preponderance of the evidence before allowing the evidence to go before the jury.[278] This issue awaits further development.

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273. MICH. COMP. LAWS ANN. § 750.520j(1) (West 2004). The rule established in the rape shield law is also reflected in Rule 404(a)(3), which provides an exception to the general prohibition on character evidence for, in a criminal sexual conduct prosecution, "evidence of the alleged victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease." MICH. R. EVID. 404(a)(3).

274. MICH. COMP. LAWS ANN. § 750.520j(2) (West 2004).

275. *See* People v. Parks, 478 Mich. 910, 910, 733 N.W.2d 14, 14 (2007); People v. Jackson, 477 Mich. 1019, 1019, 726 N.W.2d 727, 727 (2007).

276. *See, e.g.*, Smith v. State, 377 S.E.2d 158, 160 (Ga. 1989); State v. Alberts, 722 N.W.2d 402, 409-10 (Iowa 2006); State v. Smith, 743 So. 2d 199, 203-04 (La. 1999); State v. Davis, 186 S.W.3d 367, 373-74 (Mo. Ct. App. 2005); State v. B.M., 937 A.2d 354, 359 (N.J. Super. Ct. App. Div. 2008); State v. Boggs, 588 N.E.2d 813, 816-17 (Ohio 1992); State v. Tarrats, 122 P.3d 581, 585 (Utah 2005).

277. *See* Chandler v. State, 837 N.E.2d 1100, 1103 (Ind. Ct. App. 2005); Capshaw v. Commonwealth, No. 2006-CA-001918-MR, 2007 WL 2892960, at *5 (Ky. Ct. App. Oct. 5, 2007).

278. *See Alberts*, 722 N.W.2d at 410 (adopting this rule and citing decisions from Alaska, Hawaii, Nevada, and New Jersey); *Tarrats*, 122 P.3d at 585-86.

V. WITNESSES

A. Religious Belief (Rule 610)

Under Rule 610, "evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced."[279] "The purpose of the rule is to guard against the prejudice which may result from disclosure of a witness's faith."[280] This purpose is also guarded by the Michigan Constitution and statute.[281]

In *People v. Dobek*,[282] the defendant was convicted of several counts of criminal sexual conduct arising from a repeated course of molestations of his step-daughter when she was twelve years old.[283] Amongst other evidentiary and non-evidentiary claims,[284] the defendant claimed on appeal that the prosecutor had committed misconduct by questioning him regarding his religious beliefs.[285] On direct examination by his counsel, the defendant testified that he and his family were Catholic, and that they regularly attended church.[286] On cross-examination, the prosecutor asked the defendant whether he was a practicing Catholic during the time of the sexual assaults.[287] When the defendant answered affirmatively, the prosecutor "asked defendant whether his behavior was consistent with the tenets of the Catholic faith."[288] Defense counsel immediately objected, and the trial court sustained the objection and ordered the prosecutor to cease this line of questioning.[289]

On the defendant's appeal, the Michigan Court of Appeals agreed that the prosecutor's questioning was improper.[290] Under *People v. Bouchee*,[291] the court explained, this questioning "'designed to elicit an admission from the defendant that his claimed belief in the Bible was at

279. MICH. R. EVID. 610.

280. United States v. Sampol, 636 F.2d 621, 666 (D.C. Cir. 1980); *see also* 1 MCCORMICK, *supra* note 28, § 46; 28 WRIGHT & GRAHAM, *supra* note 146, § 6152.

281. *See* MICH. CONST. art. 1, § 18 ("No person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief."); MICH. COMP. LAWS ANN. § 600.1436 (West 1996) ("No witness may be questioned in relation to his opinions on religion, either before or after he is sworn.").

282. 274 Mich. App. 58, 732 N.W.2d 546 (2007).

283. *Id.* at 62, 732 N.W.2d at 554.

284. The defendant's other evidentiary claims relate to other acts evidence and expert testimony. These aspects of the case are discussed *supra* notes 243-59 and accompanying text (other acts evidence) and *infra* notes 411-32 and accompanying text (expert testimony).

285. *Dobek*, 274 Mich. App. at 72, 732 N.W.2d at 559.

286. *Id.* at 73, 732 N.W.2d at 559.

287. *Id.*

288. *Id.*

289. *See id.*

290. *Id.*

291. 400 Mich. App. 253, 253 N.W.2d 626 (1977).

odds with his'" conduct was clearly improper, regardless of the fact that the defendant has first broached the topic.[292] Nevertheless, the court concluded that reversal of the defendant's conviction was not warranted.[293] The court explained that although a violation Rule 610 generally does require reversal,[294] reversal is not required where "the trial court acts in a 'swift and commendable' manner in cutting off the improper religious questioning."[295] Because the trial court had done so in the defendant's case, and because nothing was actually divulged to the jury by the prosecutor's questions that was not already divulged in the defendant's direct examination testimony, the court of appeals concluded that reversal was not warranted.[296]

B. Impeachment with Prior Inconsistent Statement (Rule 613)

When a party wishes to impeach a witness with a prior inconsistent statement which the witness previously made, the party must follow the two-step procedure set forth in Rule 613.[297] First, the party is permitted to question the witness concerning the prior statement.[298] The party need not show the statement or its content to the witness on his own, but must do so if requested to do so by opposing counsel.[299] Second, a party may not introduce extrinsic evidence of a prior inconsistent statement "unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require."[300]

During the *Survey* period, the Michigan Supreme Court elaborated on the procedure for impeaching with a prior inconsistent statement in *Barnett v. Hidalgo*,[301] providing a nice, quick refresher course on impeachment. In that case, the plaintiff brought a medical malpractice action against several doctors and a hospital arising from the death of her husband as a result of a rare blood disorder following gall bladder surgery.[302] The primary issue before the supreme court was whether affidavits of merit prepared by the plaintiff's experts at the outset of the case–which differed in some respects from their trial testimony–were

292. *Dobek*, 274 Mich. App. at 73-74, 732 N.W.2d at 560 (quoting *Bouchee*, 400 Mich. at 261, 253 N.W.2d at 630).

293. *Id.* at 75-76, 732 N.W.2d at 561.

294. *Id.* at 74-75, 732 N.W.2d at 560 (discussing *Bouchee*, 400 Mich. at 265, 253 N.W.2d at 631, and People v. Hall, 391 Mich. 175,182-83, 215 N.W.2d 166, 171 (1974)).

295. *Id.* at 75, 732 N.W.2d at 560 (quoting People v. Burton, 401 Mich. 415, 418, 258 N.W.2d 58, 60 (1977) (per curiam)).

296. *Id.* at 75-76, 732 N.W.2d at 560-61.

297. MICH. R. EVID. 613.

298. MICH. R. EVID. 613(a).

299. MICH. R. EVID. 613(a).

300. MICH. R. EVID. 613(b).

301. 478 Mich. 151, 732 N.W.2d 472 (2007).

302. *Id.* at 154, 732 N.W.2d at 474.

admissible at trial, either as substantive evidence under the hearsay rules or as impeachment evidence under Rule 613.[303] With respect to the impeachment issue, the court concluded that the affidavits of merit were admissible as prior inconsistent statements.[304]

In reaching its conclusion, the court began by explaining the procedure to be followed in admitting evidence of a prior inconsistent statement.[305] The court explained that a proper foundation must first be laid by the proponent of the evidence.[306]

To establish this foundation, the proponent of the evidence must elicit testimony inconsistent with the prior statement, ask the witness to admit or deny making the first statement, then ask the witness to admit or deny making the later, inconsistent statement, allow the witness to explain the inconsistency, and allow the opposite party to cross-examine the witness.[307]

Once a party establishes this foundation, extrinsic evidence of the prior inconsistent statement may be admitted, so long as it does not relate to a collateral matter.[308]

Applying this standard, the court concluded that the affidavits of merit were properly used to impeach the plaintiff's experts.[309] The court explained that the trial testimony of the experts, which claimed that two of the defendants–Albaran and Hidalgo–violated the standard of care by failing to diagnose the decedent's blood condition, was inconsistent with their affidavits of merit, which did not make these allegations.[310] Rather, the affidavits of merit focused on the failure to follow the standard of care by defendant Shah, who had settled with the plaintiff prior to trial.[311] The court also rejected the plaintiff's argument that the trial testimony of her expert's was not inconsistent because the changes were the result of additional information the experts learned during discovery.[312] The court explained that "[t]he experts' affidavits or merit and trial testimony were based on the medical and autopsy records, information that had not changed during the course of discovery."[313] Because the trial testimony was inconsistent with the experts' trial testimony, and because the proper procedures laid out in Rule 613(b)

303. *Id.* The hearsay aspect of the court's decision is discussed *infra* notes 491-504 and accompanying text.

304. *Barnett*, 478 Mich. at 153, 732 N.W.2d at 474.

305. *Id.* at 159, 732 N.W.2d at 477.

306. *Id.* at 165, 732 N.W.2d at 480.

307. *Id.*

308. *See id.*

309. *Id.* at 165-66, 732 N.W.2d at 480-81.

310. *Barnett*, 478 Mich. at 165-66, 732 N.W.2d at 480-81.

311. *Id.*

312. *Id.*

313. *Id.* at 166, 732 N.W.2d at 481.

were followed, the court concluded that the affidavits of merit were admissible as impeachment evidence.[314]

The Michigan Court of Appeals likewise considered impeachment by prior inconsistent statement in *United Automobile, Aerospace & Agricultural Implement Workers of America v. Dorsey*.[315] In that case, the UAW agreed in 1995 to purchase the assets of a Florida-based radio network, People's Radio Network (PNI).[316] Charles Harder, PNI's owner and principal on-air personality, contacted Pat Choate due to tax problems that PNI was having.[317] Choate, along with Helen Dorsey and Edward Miller, proposed that the investors form a new radio network, United Broadcasting Network, which could provide a forum for the discussion of issues relevant to labor unions and provide the investors with significant return on their investment.[318] The radio station failed to make money, and eventually went into bankruptcy.[319] The UAW and other investors then brought an action against Choate, Dorsey, and Miller, alleging fraud and misrepresentation.[320] The jury returned a verdict in favor of the plaintiffs, and the defendants appealed.[321]

On appeal, the defendants brought several evidentiary challenges. The court of appeals agreed with the defendants that the trial court had erred in admitting transcripts of Miller's divorce proceedings.[322] In that divorce proceeding, the trial court had sealed all of the files and records of the case.[323] Notwithstanding this order sealing the record, the UAW's attorneys obtained a copy of the transcript, and used it to impeach Miller's testimony at trial in the fraud action.[324] The court of appeals agreed that this evidence should not have been admitted, but the supreme court reversed this determination.[325] On remand from the supreme court, the court of appeals addressed the remaining evidentiary issues raised by the defendants, including the defendants' claim that, regardless of the confidentiality issues, the divorce transcripts were not proper impeachment evidence under Rule 613.[326]

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314. *Id.* at 166-67, 732 N.W.2d at 481.
315. *Dorsey II*, 273 Mich. App. at 29-31, 730 N.W.2d at 20-21.
316. *Dorsey I*, 268 Mich. App. at 316-21, 708 N.W.2d at 720-23.
317. *Id.* at 316, 708 N.W.2d at 720.
318. *Id.* at 317, 708 N.W.2d at 721.
319. *Id.* at 319, 708 N.W.2d at 722.
320. *Id.*
321. *Id.* at 320-22, 708 N.W.2d at 722-23.
322. *Dorsey I*, 268 Mich. App at 324-25, 708 N.W.2d at 725.
323. *Id.* at 322, 708 N.W.2d at 724.
324. *See id.* at 322-23, 708 N.W.2d at 723-24.
325. United Auto., Aerospace & Agric. Implement Workers of Am. v. Dorsey, 474 Mich. 1097, 711 N.W.2d 79 (2006); *see also* Schneider, *supra* note 217, at 312-15 (discussing this aspect of the case).
326. *Dorsey II*, 273 Mich. App. at 29-31, 730 N.W.2d at 20-21. The court of appeals also considered whether memos prepared by Harder were relevant, properly used to impeach Miller and were inadmissible hearsay. These aspects of the court's decision are

At trial, plaintiffs' counsel asked Miller whether he had been fired by the National Center for Manufacturing Sciences, and whether he had a business relationship with Dorsey in 1996.[327] Miller denied both, at which point plaintiffs' counsel impeached Miller with the transcripts from the divorce proceeding, which showed that Miller had testified to the contrary on both points in that proceeding.[328] The court of appeals, quoting Professor McCormick, concluded that this evidence was precisely the type of inconsistent statement contemplated by Rule 613:

> If the prior statement of the witness is contradictory of his present story on the stand, the opportunity for testing the veracity of the 2 stories by the 2 parties through cross-examination and re-examination is ideal. . . . It will go hard, but the 2 questioners will lay bare the sources of the change of face, in forgetfulness, carelessness, pity, terror or greed, and thus reveal which is the true story and which the false. It is hard to escape the view that evidence of a previous inconsistent statement, when the declarant is on the stand to explain it if he can, has in high degree the safeguards of examined testimony.[329]

Because the evidence with which Miller was impeached fit this description, it was properly admitted as impeachment evidence.[330]

VI. EXPERT, SCIENTIFIC & OPINION TESTIMONY

A. Expert Testimony: Daubert, *Rule 702, and the Gatekeeping Function*

For most of the 20th century, the admissibility of expert and scientific testimony in courts throughout the country was governed by the standard announced in *Frye v. United States*.[331] The *Frye* court established what came to be known as the "general acceptance" test, under which a novel scientific technique is admissible in evidence only when it becomes "sufficiently established to have gained general acceptance in the particular field in which it belongs."[332] The Michigan Supreme Court adopted the *Frye* standard in *People v. Davis*.[333] In 1993,

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discussed *supra* notes 207-34 and accompanying text (relevance), and *infra* notes 541-62 and accompanying text (hearsay).

327. *Id.* at 29-30, 730 N.W.2d at 20.

328. *See id.* at 30, 730 N.W.2d at 20.

329. *Id.* at 30-31, 730 N.W.2d at 21 (quoting Ruhula v. Ruby, 379 Mich. 102, 122, 150 N.W.2d 146, 155 (1967) (in turn quoting MCCORMICK, *supra* note 28, § 39 at 75)).

330. *See id.* at 31, 730 N.W.2d at 21.

331. 293 F. 1013 (D.C. Cir. 1923).

332. *Id.* at 1014.

333. 343 Mich. 348, 370-72, 72 N.W.2d 269, 281-82 (1955); *see also* People v. Young, 418 Mich. 1, 17-20, 340 N.W.2d 805, 812-13 (1983); People v. Haywood, 209 Mich. App. 217, 221, 530 N.W.2d 497, 499-500 (1995).

however, the United States Supreme Court held that the adoption of Federal Rule of Evidence 702 abrogated the *Frye* rule.[334] In *Daubert v. Merrell Dow Pharmaceuticals Inc.*, the Court concluded that Rule 702 nevertheless sets forth a standard of both scientific reliability[335] and relevance.[336] These standards require a trial court to perform a "gatekeeping function," determining at the outset "whether the expert is proposing to testify (1) to scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue."[337] Subsequent to the Court's decision, Rule 702 was amended to explicitly incorporate the *Daubert* standard, and now provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[338]

Notwithstanding the abrogation of the *Frye* standard by Rule 702 and *Daubert*, the Michigan courts continued to apply the *Frye* rule.[339] This changed when the Michigan Supreme Court adopted an amendment to Michigan Rule of Evidence which, with a minor non-substantive exception, mirrors Federal Rule 702.[340] During a prior *Survey* period, the Michigan Supreme Court issued a decision adopting the *Daubert* analysis under Rule 702. In *Gilbert v. DaimlerChrysler Corp.*,[341] the supreme court clarified the standards governing expert testimony under Rule 702. The court explained that Rule 702 does not alter the *Frye* test's requirement that a court ensure that expert testimony is reliable.[342]

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

335. *Id.* at 589-90.

336. *Id.* at 591-92.

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

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

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

340. *See* MICH. R. EVID. 702.

341. 470 Mich. 749, 685 N.W.2d 391 (2004).

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

Rather, Rule 702 "changes only the factors that a court may consider in determining whether expert opinion evidence is admissible."[343] The court explained that the *Daubert* standard "simply allows courts to consider more than just 'general acceptance' in determining whether expert testimony must be excluded."[344] The supreme court also admonished the trial courts to vigorously enforce this gatekeeping requirement.[345] The court noted that Rule 702 "mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data."[346] The court further explained that Rule 702 requires that expert testimony be based on specialized knowledge.[347] Thus, "[w]here the subject of the proffered testimony is far beyond the scope of an individual's expertise–for example, where a party offers an expert in economics to testify about biochemistry–that testimony is *inadmissible* under MRE 702."[348] In the court's view, "[u]nless the information requiring expert interpretation actually goes through the crucible of analysis by a qualified expert, it is of little assistance to the jury and therefore inadmissible under MRE 702."[349] During the current *Survey* period, the Michigan courts have continued to expound on the reliability requirement of the *Daubert* test, as well as on the trial court's duties in performing its gatekeeping function.

In *Clerc v. Chippewa County War Memorial Hospital*,[350] the supreme court concluded that the trial court had failed to perform its gatekeeping function properly.[351] In *Clerc*, the plaintiff brought a medical malpractice action against a hospital and doctor on behalf of his wife's estate.[352] The action arose from the decedent's treatment for symptoms consistent with pneumonia. Radiologist Dr. Robert Baker, the individual defendant, reviewed a chest and lung x-ray and found nothing abnormal.[353] Seven months later, the plaintiff's decedent was diagnosed with lung cancer, and she died one year after that diagnosis.[354] Plaintiff filed suit, alleging that Dr. Baker and the hospital had been negligent in reading and interpreting the chest x-ray, resulting in a delay in treatment

343. *Id.* at 781, 685 N.W.2d at 408.
344. *Id.* at 782, 685 N.W.2d at 409.
345. *Id.* at 780, 685 N.W.2d at 408.
346. *Id.*
347. *Gilbert*, 470 Mich. at 789, 685 N.W.2d at 413.
348. *Id.* (emphasis in original).
349. *Id.*
350. 477 Mich. 1067, 729 N.W.2d 221 (2007).
351. *Id.* at 1068, 729 N.W.2d at 221.
352. Clerc v. Chippewa County War Memorial Hosp., 267 Mich. App. 597, 705 N.W.2d 703 (2005), *remanded to trial court on other grounds*, 477 Mich. 1067, 729 N.W.2d 221 (2007) [hereinafter "*Clerc I*"].
353. *Id.* at 598-99, 705 N.W.2d at 705.
354. *Id.* at 599, 705 N.W.2d at 705.

and the decedent's death.[355] Prior to trial, the plaintiff deposed two experts on the issue of causation.[356] Both were doctors who were board-certified in medical oncology.[357] The first, Dr. Stephen Veach, testified at his deposition that the decedent's lung cancer was either Stage I or Stage II[358] when the chest x-ray was taken, but that he could not state with any certainty how far the cancer had spread at the time of the x-ray.[359] The second expert, Dr. Barry Singer, testified that the decedent's cancer would have been at either Stage I or Stage II at the time of the x-ray, but that he "favored" Stage I.[360] This conclusion was based on his general experience.[361] Although Dr. Singer admitted that he could not state with reasonable certainty whether the decedent's cancer was at Stage I or Stage II when the x-ray was taken, he did testify that if the cancer had been diagnosed when the x-ray was taken, the decedent would have had a 60% chance of survival, based on the averages of the Stage I and Stage II survival rates.[362]

The defendants moved to strike the testimony of the plaintiff's experts under Rule 702.[363] The trial court held that the experts did not have a scientific basis for concluding that the cancer was either Stage I or Stage II at the time of the chest x-ray, and that the experts' testimony that the decedent's chance of survival would have been greater than 50% had the cancer been diagnosed at the time of the x-ray was nothing more than speculation.[364] The trial court therefore granted the defendants' motions to strike the expert testimony.[365] Because the plaintiff could not establish causation without the testimony of his experts, the trial court also granted the defendants' motions for summary disposition.[366]

On appeal, the Michigan Court of Appeals reversed the trial court's decision.[367] The court began its analysis by noting that the trial court is obligated, in performing its gatekeeping function, to evaluate the proposed expert testimony to determine whether the expert is qualified,

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355. *Id.* at 598-99, 705 N.W.2d at 705.
356. *Id.*
357. *Id.*
358. *Clerc I*, 267 Mich. App. at 599, 705 N.W.2d at 705. As the court of appeals explained:

> According to the doctors' deposition testimony, lung cancer is staged at Stages I through IV for the purposes of treatment and prognosis. Patients with Stage I lung cancer have a five-year survival rate of seventy percent, while patients with Stage II lung cancer have a five-year survival rate of forty percent.

Id.
359. *Id.*
360. *Id.*
361. *Id.*
362. *Id.* at 599-600, 705 N.W.2d at 705.
363. *Clerc I*, 267 Mich. App. at 599-600, 705 N.W.2d at 705.
364. *Id.* at 600, 705 N.W.2d at 706.
365. *Id.*
366. *Id.* at 600, 705 N.W.2d at 705-06.
367. *Id.* at 602, 705 N.W.2d at 707.

the evidence relevant, and the scientific principles reliable.[368] Under this standard, the court of appeals concluded that:

> [T]he trial court failed to properly exercise its function as a gatekeeper . . . without either conducting a more searching inquiry under its obligation to preclude speculative and unreliable evidence under MRE 702, or holding a *Davis-Frye* evidentiary hearing to determine whether plaintiff's experts' testimony regarding the "backwards staging" of the decedent's cancer had achieved general scientific acceptance for reliability.[369]

The court of appeals explained that, regardless of whether or not the scientific principle involved was "novel" (and hence still subject to *Davis-Frye*), Rule 702 still applies and the trial court is obligated to conduct a "searching inquiry" to evaluate the reliability of the proposed testimony.[370] Noting that the plaintiff bears the burden of demonstrating reliability under Rule 702, the court of appeals concluded that, "by striking plaintiff's experts' testimony without holding a *Davis-Frye* hearing or conducting a more searching inquiry under MRE 702, the trial court foreclosed plaintiff's ability to sustain this burden."[371] The court of appeals therefore remanded the matter to the trial court for an evidentiary hearing on the reliability of the backward staging testified to by plaintiff's expert.[372]

On the defendants' application for leave to appeal, the supreme court summarily remanded the matter to the trial court. [373] The court agreed with the court of appeals that the trial court had failed to perform its gatekeeping function, but for a different reason. In the court's view, the gatekeeping function is guided by M.C.L. section 600.2955(1).[374] This statute was passed by the legislature before Michigan's adoption of Rule 702, and was intended to codify the *Daubert* standard.[375] The statute provides that, in determining whether scientific testimony is sufficiently reliable to be admitted, a trial court "shall consider" seven factors:

> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.

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368. *See id.* at 601-02, 705 N.W.2d at 706-07.
369. *Clerc I*, 267 Mich. App. at 603, 705 N.W.2d at 707.
370. *Id.* at 603-04, 705 N.W.2d at 707.
371. *Id.* at 604, 705 N.W.2d at 707.
372. *Id.* at 606-07, 705 N.W.2d at 708.
373. *Clerc*, 477 Mich. at 1068, 729 N.W.2d at 221.
374. MICH. COMP. LAWS ANN. § 600.2955(1) (West 2000).
375. *See* Greathouse v. Rhodes, 242 Mich. App. 221, 238, 618 N.W.2d 106, 115 (2000), *rev'd on other grounds*, 465 Mich. 885, 636 N.W.2d 138 (2001).

(b) Whether the opinion and its basis have been subjected to peer review publication.

(c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.

(d) The known or potential error rate of the opinion and its basis.

(e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.

(f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.

(g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.[376]

In the view of the *Clerc* court, this statute guides the trial court's exercise of its gatekeeping function under Rule 702. The court concluded that, in the case before it, "the trial court did not consider the range of indices of reliability listed in M.C.L.A. section 600.2955."[377] Rather, the trial court's concern centered on the plaintiff's inability to present specific studies to support the experts' conclusions regarding the growth rate of untreated cancer.[378] Because the trial court "failed to consider other factors"[379] set forth in M.C.L.A. section 600.2955, the court concluded, it "did not fulfill its gatekeeping role."[380] Accordingly, the court remanded the matter to the trial court for a proper inquiry on the admissibility of the plaintiff's expert testimony.[381] Under *Clerc*, trial courts must now be sure to explicitly consider the factors listed in section 600.2955(1) in determining the admissibility of scientific evidence, and practitioners would be wise to insist that they do so.

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376. MICH. COMP. LAWS ANN. § 600.2955(1) (West 2000). The statute also provides that, where novel scientific evidence or methodology is involved, the proponent must show that it has achieved general acceptance among experts in the field. MICH. COMP. LAWS ANN. § 600.2955(2) (West 2000).

377. *Clerc*, 477 Mich. at 1068, 729 N.W.2d at 221.

378. *See id.*

379. *Id.*

380. *Id.*

381. *Id.*

In *Chapin v. A & L Parts*,[382] the court of appeals concluded that the trial court had properly performed its gatekeeping role. *Chapin* involved a suit brought against a number of defendants by a former automobile brake mechanic and his wife after he developed mesothelioma.[383] The plaintiff alleged that he was exposed to asbestos by grinding brake linings during the course of his employment, and that this exposure caused his mesothelioma.[384] Prior to trial, several defendants moved to exclude the testimony of the plaintiff's expert, Dr. Richard Lemen, who opined that plaintiff's grinding of brakes caused him to be exposed to asbestos particles, and that this exposure caused his mesothelioma.[385] The trial court denied the defendants' motion, and the parties settled the plaintiff's claims subject to the defendants' right to appeal the evidentiary issue.[386] On the defendants' appeal, the Michigan Court of Appeals affirmed, concluding that the trial court had properly performed its gatekeeping role and that the evidence was sufficiently reliable to be admitted under Rule 702 and section 600.2955(1).[387]

The court[388] began by noting that "the trial court's rule as gatekeeper does not require it to search for absolute truth, to admit only uncontested evidence, or to resolve genuine scientific disputes."[389] All that is required is that the scientific opinion be "rationally derived from a sound foundation."[390] The fact that the opinion is not universally shared by experts in the field does not render a scientific opinion "unreliable" under Rule 702.[391] With this understanding in mind, and applying the factors set forth in section 600.2955(1), the court of appeals concluded that the evidence offered by Dr. Lemen was admissible.[392]

The court explained that there was no question that the testimony would assist the trier of fact and thus was relevant.[393] Further, there was no question that Dr. Lemen was qualified to render an expert opinion: he

382. 274 Mich. App. 122, 732 N.W.2d 578 (2007), *leave to appeal denied*, 478 Mich. 916, 733 N.W.2d 23 (2007). Although plaintiff's wife was also a plaintiff, her claims were derivative of the plaintiff's claims, and for simplicity the singular "plaintiff" is used here.

383. *Id.* at 125, 732 N.W.2d at 580.

384. *Id.*, 732 N.W.2d at 579.

385. *Id.*, 732 N.W.2d at 580.

386. *Id.*

387. *Id.* at 140, 732 N.W.2d at 587.

388. The principal opinion was authored by Judge Davis. Judge Meter filed a separate concurring opinion, and at points Judge Davis's opinion uses the singular pronoun "I" instead of "we" or "the court." However, Judge Meter's concurring opinion indicates that he joined in full Judge Davis's opinion, *see Chapin*, 274 Mich. App. at 141, 732 N.W.2d at 587 (Meter, J., concurring), and thus Judge Davis's opinion represents the opinion of the court. *Id.*

389. *Chapin*, 274 Mich. App. at 127, 732 N.W.2d at 580 (majority opinion).

390. *Id.*, 732 N.W.2d at 581.

391. *See id.*, 732 N.W.2d at 580-81.

392. *Id.*

393. *See id.* at 129, 732 N.W.2d at 581.

was a public health, occupation health, and epidemiology consultant; he was formerly an Assistant Surgeon General and Deputy Director of the National Institute for Occupational Health; he had authored numerous peer-reviewed articles relating to asbestos diseases; and he was extensively involved in government created asbestos recommendations.[394] The court also explained that Dr. Lemen and the defendants' expert "agreed, either explicitly or implicitly, on a number of salient facts,"[395] including the facts that exposure to asbestos is the only known cause of mesothelioma, exposure to asbestos affects all individuals in essentially the same way, and there is no known safe level of exposure to asbestos.[396]

The only point of contention between experts, the court explained, "was over how one could draw causal connections."[397] The defendants' expert opined that causality could only be established through controlled studies, and not by case studies such as those relied upon by Dr. Lemen.[398] Dr. Lemen disagreed, explaining that the field of epidemiology relied on a number of tools, including both controlled studies and case reports, and given the wide range of available tools and the many issues involved in establishing causal relationships, there is no one "right way" to reach epidemiological conclusions.[399] Specifically, with respect to known toxic substances Dr. Lemen opined that "it would be inappropriate to conduct epidemiological studies specifically looking for deaths in a given profession, which is why the safety standards are based on exposure and not job title."[400] Dr. Lemen explained that epidemiological studies had conclusively established that asbestos causes mesothelioma, that the government reports upon which he relied were based on various toxicological, environmental, epidemiological, and exposure studies analyzed together, and that the Sir Bradford Hill methodology permitted valid scientific conclusions even in the absence of statistical epidemiological evidence.[401] The experts did agree that a

394. *Id.* at 129-30, 732 N.W.2d at 581-82.

395. *Chapin*, 274 Mich. App. at 130, 732 N.W.2d at 582.

396. *Id.* at 130-32, 732 N.W.2d at 582-83.

397. *Id.* at 132, 732 N.W.2d at 583.

398. *Id.*

399. *Id.* at 132-33, 732 N.W.2d at 583.

400. *Id.* at 133, 732 N.W.2d at 583.

401. *Chapin*, 274 Mich. App. at 133-34, 732 N.W.2d at 583-84. The Sir Bradford Hill methodology was proposed in 1965 by Austin Bradford Hill, a British epidemiologist, for the purpose of establishing causality between exposure to chemical toxins and disease known to be associated. Under the methodology, nine factors are considered: (1) temporal relationship; (2) strength of the relationship; (3) dose-response relationship; (4) observation in repeated studies; (5) biological plausibility in view of known facts; (6) alternative explanations for the association; (7) whether association ceases with cessation of exposure; (8) specificity of the association; and (9) consistency with other knowledge. *See* Michael D. Green, et al., *Reference Guide on Epidemiology*, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, at 375 (Federal Judicial Ctr. 2000); *see also Chapin*, 274 Mich. App. at 134, 732 N.W.2d at 584.

number of epidemiological studies had been performed which analyzed the relationship between mesothelioma and brake mechanics, all of which failed to show an association.[402] From these studies, the defendants' expert opined that Dr. Lemen's opinion was "junk science."[403] Dr. Lemen disagreed, contending, as previously explained, that epidemiological studies were only one factor that should be considered, and that all of the other factors in the Sir Bradford Hill methodology led to the conclusion that brake mechanic exposure to asbestos during the course of their employment causes mesothelioma.[404]

The court of appeals rejected the defendants' argument, primarily based on the absence of epidemiological studies, that Dr. Lemen's opinion was unreliable.[405] The court explained that the only real point of contention between the experts was whether causation had to be established through control-group studies, as defendants' expert opined, or whether it was appropriate to look at other sources of data including case studies, as Dr. Lemen opined.[406] The court of appeals concluded that this dispute among the experts was insufficient to render Dr. Lemen's opinion unreliable under Rule 702 and M.C.L.A. section 600.2955(1).[407] In an eloquent and succinct description of the trial court's gate-keeping role, the court explained:

> The fact that two scientists value the available research differently and ascribe different significance to that research does not necessarily make either of their conclusions unreliable. Indeed, science is, at its heart, itself an ongoing search for truth, with new discoveries occurring daily, and with regular disagreements between even the most respected members of any given field. A *Daubert*-type hearing of this kind is not a judicial search for truth. The courts are unlikely to be capable of achieving a degree of scientific knowledge that scientists cannot. An evidentiary hearing under MRE 702 and [M.C.L.A.] section 600.2955 is merely a *threshold* inquiry to ensure that the trier of fact is not called on to rely in whole or in part on an expert opinion that is only masquerading as science. The courts are not in the business of resolving scientific disputes. The only proper role of a trial court at a *Daubert* hearing is to filter out expert evidence that is unreliable, not to admit only evidence that is unassailable. The inquiry is not into whether an expert's opinion is necessarily correct or universally accepted. The inquiry is into

402. *Chapin*, 274 Mich. App. at 135, 732 N.W.2d at 585.
403. *Id.*
404. *Id.* at 136-37, 732 N.W.2d at 585-86.
405. *Id.* at 140, 732 N.W.2d at 587.
406. *Id.* at 138-40, 732 N.W.2d at 586-87.
407. *Id.* at 140, 732 N.W.2d at 587.

whether the opinion is rationally derived from a sound foundation.[408]

The court of appeals reasoned that this case involved a dispute between competing experts, both of whom could marshal strong scientific support for their opinions.[409] In light of the fact that sound scientific principles supported both experts' opinions it was for the jury to decide the facts, and the trial court therefore "properly found Dr. Lemen's opinion reliable and admitted it for the jury's consideration."[410]

The court of appeals also considered the admissibility of scientific expert opinion in *People v. Dobek*.[411] In that case, the defendant was convicted of several counts of criminal sexual conduct arising from a repeated course of molestations of his step-daughter when she was 12 years old.[412] Amongst other evidentiary and non-evidentiary claims,[413] the defendant claimed on appeal that the trial court had erred in permitting Detective Leach to testify concerning the victim's delayed disclosure,[414] and in excluding his proffered expert testimony on the characteristics of a sex offender.[415] The court of appeals rejected both claims.[416]

With respect to Detective Leach's testimony, at trial Leach testified as to the general reasons for a child sexual assault victim to delay

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408. *Chapin*, 274 Mich. App. at 139, 732 N.W.2d at 586-87; *see also* Coy v. Renico, 414 F. Supp. 2d 744, 763 (E.D. Mich. 2006) (citation omitted) (quoting *Daubert*, 509 U.S. at 590) ("[S]cientific debate, however, does not itself require the exclusion of scientific evidence. Even the most long-standing and well-established scientific principles are subject to debate and revision; Einstein's General Theory of Relativity upset three hundred years of understanding of Newtonian mechanics, and after a century of successfully describing the workings of the universe Einstein's theory continues to be hotly debated among scientists. As the Supreme Court has explained, there are 'no certainties in science.' In short, scientific orthodoxy is required neither for admission of evidence under the Due Process Clause nor for its admission under Rule 702.").

409. *See Chapin*, 274 Mich. App. at 140, 732 N.W.2d at 587.

410. *Id.* Judge O'Connell dissented. In his view, the fact that at least 15 epidemiological studies had failed to show any connection between brake grinding and mesothelioma, coupled with Dr. Lemen's testimony that epidemiological studies are the best evidence of causation, rendered Dr. Lemen's testimony unreliable. *Id.* at 145-46, 732 N.W.2d at 590-91 (O'Connell, J., dissenting). Further, the Supreme Court denied the defendant's application for leave to appeal. Chapin v. A & L Parts, Inc., 478 Mich. 916, 733 N.W.2d 23 (2007). Justice Markman dissented from the denial of leave to appeal, identifying 33 separate questions raised by Dr. Lemen's testimony which he felt should be considered by the court. *Id.* at 918-22, 733 N.W.2d at 26-29 (Markman, J., dissenting).

411. 274 Mich. App. 58, 732 N.W.2d 546 (2007).

412. *Id.* at 62, 732 N.W.2d 554.

413. The defendant's other evidentiary claims relate to other acts evidence and questioning defendant about his religious beliefs. These aspects of the case are discussed *supra* notes 243-259 and accompanying text (other acts evidence), and *supra* notes 282-96 and accompanying text (religious beliefs).

414. *Dobek*, 274 Mich. App. at 76, 732 N.W.2d at 561.

415. *Id.* at 92, 732 N.W.2d at 569-70.

416. *Id.* at 107, 732 N.W.2d at 577.

reporting the assaults.[417] The trial court permitted this testimony as the detective's lay opinion under Rule 701, cautioning the jury that it was not an expert opinion.[418] The court of appeals first concluded that the evidence was likely inadmissible as lay opinion because it was based on Detective Leach's knowledge, experience, and training, whereas lay opinion testimony is limited to those opinions which are based on a witness's perception.[419] Prior conflicting decisions involving similar testimony, however, made this conclusion unclear.[420] The court concluded that it need not resolve this issue; however, because even assuming that expert testimony was required, "Leach was more than qualified to give an expert opinion on delayed disclosure to the extent of the testimony actually presented."[421] The court reasoned that Leach testified extensively as to his experience and training in child sex abuse investigations, and testified that delayed disclosure happens frequently with child victims.[422] Further, Leach did not stray beyond his expertise by testifying as to psychological matters; rather confining his testimony to the "prevalence and commonsense reasons that would explain"[423] delayed disclosure.[424] Accordingly, the court concluded that Leach's testimony was admissible.[425]

The court also rejected the defendant's claim that he should have been permitted to introduce his own expert testimony on the characteristics of sex offenders, which purported to show that the defendant was not a sex offender.[426] The court concluded, based on the testimony of the expert at an evidentiary hearing in the trial court, that the testimony was not sufficiently reliable under Rule 702.[427] The court noted that the defendant's expert testified that all the results of his testing are useful for establishing predisposition, they cannot establish whether someone is a sex offender with any degree of certainty, that there is continued debate in psychological community regarding this type of testing and the research is ongoing, and that the test results can be skewed by circumstances in the subject's life or by deliberate deception.[428] Although recognizing that "100 percent scientific

417. *Id.* at 71, 732 N.W.2d at 558.
418. *Id.* at 76-77, 732 N.W.2d at 561.
419. *Id.* at 77, 732 N.W.2d at 561-62.
420. *See Dobek*, 274 Mich. App. at 77-78, 732 N.W.2d at 562 (discussing Chastain v. General Motors Corp., 254 Mich. App. 576, 657 N.W.2d 804 (2002) and Co-Jo, Inc. v. Strand, 226 Mich. App. 108, 572 N.W.2d 251 (1997)).
421. *Id.* at 79, 732 N.W.2d at 562.
422. *Id.*, 732 N.W.2d at 562-63.
423. *Id.* at 79 n.2, 732 N.W.2d at 562 n.9
424. *Id.*
425. *Id.* at 94-95, 732 N.W.2d at 571.
426. *Dobek*, 274 Mich. App. at 94-95, 732 N.W.2d at 571.
427. *Id.*
428. *Id.* at 95-96, 732 N.W.2d at 571-72.

certainty"[429] is not required, the problems identified by the defendants' expert rendered the sex offender profiling evidence insufficiently reliable to satisfy Rule 702.[430] Further, the court explained, this evidence would not assist the trier of fact, but would likely confuse the jury.[431] The court analogized the profiling evidence to polygraph evidence, which is not admissible because it detracts from the jury's truth finding function.[432]

B. Special Rules Regarding Qualifications of Medical Experts

Generally, under Rule 702 an expert is qualified to give specialized scientific or technical testimony when she is qualified by her "knowledge, skill, experience, training, or education."[433] In medical malpractice cases, however, special rules of qualification for experts are applicable. Specifically:

In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:

> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.
>
> (b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:
>
> (i) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.
>
> (ii) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against

429. *Id.* at 96, 732 N.W.2d at 572.
430. *Id.* at 96, 732 N.W.2d at 572.
431. *Id.* at 96-97, 732 N.W.2d at 572.
432. *Dobek*, 274 Mich. App. at 97, 732 N.W.2d at 572.
433. MICH. R. EVID. 702.

> whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.
>
> (c) If the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:
>
> (i) Active clinical practice as a general practitioner.
>
> (ii) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed.[434]

This rule comes into play at two stages. First, prior to commencing a medical malpractice suit, a plaintiff must file an affidavit of merit from an expert witness attesting to the basis for the plaintiff's claim.[435] The expert witness need not actually be qualified under section 600.2169, but the attorney filing the affidavit must have a reasonable, good faith belief that the expert can satisfy the requirements of the statute.[436] At the trial stage, however, the expert must be qualified in accordance with section 600.2169.[437] The Michigan courts considered the qualifications of medical experts in two cases during the *Survey* period.

Woodard v. Custer[438] provides a detailed analysis of the requirements for medical experts. *Woodard* involved two consolidated medical malpractice cases. In the first, *Woodard*, the plaintiff alleged that

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

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

436. *See* Grossman v. Brown, 470 Mich. 593, 599, 685 N.W.2d 198, 201 (2004); MICH. COMP. LAWS ANN. § 600.2912d(1) (West 2000). A defendant in a malpractice action must file an affidavit of meritorious defense, which is generally subject to the same requirements as an affidavit of merit, including the requirement that the affiant be qualified to give expert testimony under section 600.2169. MICH. COMP. LAWS ANN. § 600.2912e (West 2000).

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

438. 476 Mich. 545, 719 N.W.2d 842 (2006).

her infant son's legs were fractured by the defendants' improper placement of an arterial line and a venous catheter in his legs while he was in the pediatric intensive care unit.[439] The defendant doctor was board certified in pediatric medicine, with special qualifications in pediatric critical care medicine and neonatal-perinatal medicine.[440] The plaintiffs' proposed expert was board certified in pediatrics, but lacked any special qualification certificates.[441] Prior to trial, the trial court struck plaintiff's expert as unqualified and, lacking any evidence to go to the jury, granted summary disposition to the defendants.[442] With respect to the trial court's evidentiary determination, the court of appeals affirmed the trial court's conclusion that the expert was not qualified.[443]

In the second case, *Hamilton*, the plaintiff brought a medical malpractice action alleging that the defendant physician failed to properly diagnose and treat her pre-stroke symptoms.[444] The defendant was board certified and specialized in general internal medicine, while the plaintiff's board expert also specialized in general internal medicine but devoted most of his time to treating infectious diseases.[445] The trial court granted a directed verdict to the defendant, concluding that the plaintiff's expert was not qualified because he did not devote the majority of his time to internal medicine.[446] The court of appeals reversed, concluding that the plaintiff's expert was qualified because the expert had the same specialty as the defendant, and that the expert did devote most of his time to the practice of internal medicine considering "treatment of infectious diseases is a subspecialty of internal medicine."[447]

In resolving the parties' appeals, the court provided a useful primer on the qualification of medical experts. Analyzing the requirements of the statute, the court first explained that "[a]lthough specialties and board certificates must match, not *all* specialties and board certificates must match."[448] Rather, because the statute speaks of an expert's testimony on the *appropriate* standard of care, the statute "should not be understood to require such witness to specialize in specialties that are not relevant to the standard of medical practice or care about which the witness is to testify."[449] This conclusion was buttressed by the fact that the statute refers to a "specialty" in the singular, and requires that a majority of the

439. *Id.* at 554, 719 N.W.2d at 847.
440. *Id.*
441. *Id.* at 555, 719 N.W.2d at 847.
442. *Id.*
443. *Id.* at 554-55, 719 N.W.2d at 847-48.
444. *Woodard*, 476 Mich. at 557, 719 N.W.2d at 849.
445. *Id.*
446. *Id.*
447. *Id.* at 556-57, 719 N.W.2d at 848.
448. *Id.* at 558, 719 N.W.2d at 849.
449. *Id.* at 559, 719 N.W.2d at 850.

expert's time be devoted to a specialty, it being impossible to devote a majority of one's time to two different specialties.[450]

With respect to the same specialty requirement, the court concluded that the plain language of the statute does not require board certification.[451] Rather, "a 'specialty' is a particular branch of medicine in which one can potentially become board certified," and thus if the defendant practices such a branch of medicine, the expert must likewise do so.[452] Further, the court rejected the plaintiffs' argument that the statute does not require the expert to have specialized in the same subspecialty as the defendant. Again relying on the plain meaning of the words, the court concluded that a subspecialty is merely a type of specialty which falls within a broader specialty.[453] "Therefore, if a defendant physician specializes in a subspecialty, the plaintiff's expert witness must have specialized in the same subspecialty . . . ."[454]

Turning next to the statute's board certification requirement, the court rejected the plaintiffs' argument that the definition of "board certified" in the Public Health Code should apply.[455] The court explained that the Public Health Code explicitly limited this definition to the Code, and that other statutory provisions adopted different definitions of "board certified."[456] Relying on medical dictionaries, the court concluded that "to be 'board certified' within the meaning of section 2169(1)(a) means to have received certification from an official group of persons who direct or supervise the practice of medicine that provides evidence of one's medical qualifications."[457] Thus, a plaintiff's expert must have obtained the same certification from a medical organization as the defendant's to testify as an expert.[458] The court rejected the plaintiffs' argument that a certificate of special qualifications is not a board certificate, explaining that these documents are from an official organization supervising medical practice and evidence a doctor's

450. *See Woodard*, 476 Mich. at 559-60, 719 N.W.2d at 850. In his concurrence, Justice Taylor reasoned that all of the defendant doctor's specialties must be matched. Recognizing that it would be impossible for a single expert to match all of the defendant's specialties, this requirement could be satisfied so long as the plaintiff presented a group of experts who collectively match the defendant's specialties. *See id.* at 614-18, 719 N.W.2d at 878-81 (Taylor, C.J., concurring in the result). The majority rejected this approach, concluding that it conflicted with the words of the statute and would be unworkable, requiring a plaintiff to produce multiple experts to testify to standards of care which are irrelevant. *Id.* at 568-72, 719 N.W.2d at 854-57.

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

452. *Id.*

453. *Id.* at 562, 719 N.W.2d at 851.

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

455. *Id.* at 563, 719 N.W.2d at 852 (discussing MICH. COMP. LAWS ANN. § 333.2701(a) (West 2001)).

456. *Id.* at 563-64, 719 N.W.2d at 852.

457. *Id.* at 564, 719 N.W.2d at 852.

458. *See id.* at 564, 719 N.W.2d at 852-53.

qualifications.[459] Finally, turning to the statute's requirement that the expert have devoted a majority of her practice or instruction to the relevant specialty, the court reiterated that only the one most relevant specialty must be matched.[460]

Applying these standards, the supreme court concluded that the trial court properly struck plaintiff's expert in *Woodard*.[461] In that case, the court concluded that the child patient was critically ill at the time he was treated, and thus pediatric critical care was the most relevant specialty.[462] Further, there was no question that the plaintiff's expert did not specialize in pediatric critical care, was not board certified in that specialty, and did not devote a majority of his practice to that specialty in the preceding year.[463] Accordingly, the court concluded, the trial court did not err in finding the proposed expert unqualified under section 2169(1).[464] In *Hamilton*, the court likewise concluded that the plaintiff's proposed expert did not meet the same practice requirement of the statute. The court reasoned that, during the year preceding the alleged malpractice, a majority of the expert's time was devoted to treating infectious diseases. Accordingly, the expert did not satisfy the same practice requirement and was not qualified under section 2169(1).[465]

The Michigan Court of Appeals applied the teachings of *Woodard* in *Gonazalez v. St. John Hospital & Medical Center*.[466] In that case, the plaintiff's decedent died from internal bleeding, a complication from his colorectal surgery.[467] He was treated by defendants Kowynia, a surgeon, and Vashi, a third year surgical resident.[468] In the trial court, the plaintiff submitted an affidavit of merit from Dr. Mark Gordon, a board-certified general surgeon.[469] Dr. Gordon opined that Vashi had violated the applicable standard of care.[470] The trial court granted the defendants' motion for summary disposition, concluding that Vashi was a general practitioner and that Gordon, a specialist, therefore was not qualified to testify regarding the standard of care applicable to Vashi.[471]

On the plaintiff's appeal, the court of appeals applied *Woodard* and reversed.[472] After explaining the various rules for determining expert

459. *Id.* at 565, 719 N.W.2d at 853.
460. *Woodard*, 476 Mich. at 566, 719 N.W.2d at 853.
461. *Id.* at 577, 719 N.W.2d at 859.
462. *Id.* at 575-76, 719 N.W.2d at 858-59.
463. *Id.* at 576, 719 N.W.2d at 859.
464. *Id.* at 576-77, 719 N.W.2d at 858-59.
465. *See id.* at 577-78, 719 N.W.2d at 860.
466. 275 Mich. App. 290, 739 N.W.2d 392 (2007).
467. *Id.* at 293, 739 N.W.2d at 394.
468. *Id.*
469. *Id.*
470. *See id.* at 292-93, 739 N.W.2d at 393-94.
471. *Id.* at 293, 739 N.W.2d at 394.
472. *Gonzalez*, 275 Mich. App. at 293, 739 N.W.2d at 394.

qualifications established by the supreme court in *Woodard*,[473] the court of appeals reasoned that it was undisputed "that Vashi was a third-year surgical resident practicing within that discrete specialty on the date of the occurrence in this case."[474] The court noted that, in *Bahr v. Harper-Grace Hospitals*,[475] the court of appeals had held that residents are not specialists, and that the applicable standard of care in a medical malpractice case against a resident is the standard of care for residents, not the specialists in the field in which the resident is training.[476] The court explained, however, that this holding could not be squared with *Woodard*, which defined a "specialist" broadly as any physician who is or may become board certified in a particular branch of medicine.[477] This broad definition, the court of appeals concluded, "necessarily includes those physicians who are also residents."[478] and because "Vashi was a physician who limited his training to surgery, and who could potentially become board-certified on completion of his residency, at the time decedent died, Vashi would be considered a 'specialist.'"[479] Applying *Woodard*, the court of appeals concluded that Vashi was practicing general surgery at the time of the allege malpractice, and thus that this specialty provided the appropriate standard of care.[480] The court explained that the plaintiff need only offer testimony from an expert who is qualified in general surgery under the requirements of section 600.2169(1).[481] Accordingly, the court remanded the matter to the trial court to determine whether Dr. Gordon was qualified under section 600.2169 to opine on the standard of care applicable to Vashi.[482]

VII. HEARSAY

"The theory of the hearsay rule is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of cross-examination."[483] The prohibition on hearsay evidence is deeply rooted in the common law, and is "a rule which may be esteemed, next to jury trial, the greatest contribution of [the common law] system to the world's methods of

473. *Id.* at 295-97, 739 N.W.2d at 395-96.
474. *Id.* at 297, 739 N.W.2d at 396.
475. 198 Mich. App. 31, 497 N.W.2d 526 (1993), *rev'd on other grounds*, 448 Mich. 135, 528 N.W.2d 170 (1995).
476. *Gonzalez*, 275 Mich. App. at 297-98, 739 N.W.2d at 396 (discussing *Bahr*, 198 Mich. App. at 34, 497 N.W.2d at 527-28).
477. *Id.* at 298, 739 N.W.2d at 397.
478. *Id.* at 298, 730 N.W.2d at 397.
479. *Id.* at 298-99, 739 N.W.2d at 397.
480. *Id.* at 302, 739 N.W.2d at 398.
481. *Id.* at 303-04, 739 N.W.2d at 399.
482. *Gonzalez*, 275 Mich. App. at 307-08, 739 N.W.2d at 401.
483. 5 WIGMORE, *supra* note 109, § 1362, at 3.

procedure."[484] The admissibility of hearsay evidence is governed by Article VIII of the Michigan Rules of Evidence. Under the rules, hearsay evidence is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[485] Rule 801 also defines two categories of statements as "non-hearsay" notwithstanding the Rule's definition of hearsay: prior inconsistent statements of a witness and admissions of a party-opponent.[486] Rule 802 provides simply that "[h]earsay is not admissible except as provided by these rules."[487] Rules 803, 803A, and 804 provide exceptions to the hearsay rules.

A. Non-Hearsay

1. Statements of a Party Opponent

As just noted, notwithstanding the ordinary definition of hearsay, Rule 801 defines as "non hearsay" any statement which is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, except statements made in connection with a guilty plea to a misdemeanor motor vehicle violation or an admission of responsibility for a civil infraction under laws pertaining to motor vehicles, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy.[488]

The theory behind this rule is that, when offered against (rather than in support of) a party the purpose of the hearsay rule is not violated. The hearsay rule exists to provide cross-examination of testimonial statements so that their reliability may be tested before the jury. However, a party "cannot complain of a lack of opportunity to cross-examine himself before his assertion is admitted against him. Such a request would be absurd. Hence, the objection of the hearsay rule falls away, because the very basis of the rule is lacking, viz., the need and prudence of affording an opportunity of cross-examination.[489]

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484. *Id.* § 1364, at 28.

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

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

487. MICH. R. EVID. 802.

488. MICH. R. EVID. 801(d)(2).

489. 4 WIGMORE, *supra* note 109, § 1048, at 4-5.

In other words, the hearsay rule is satisfied in the case of a statement of a party opponent because the party "has already had an opportunity to cross-examine himself; or (to put it another way) he now as opponent has the full opportunity to put himself on the stand and explain his former assertion."[490]

In *Barnett v. Hidalgo*,[491] the plaintiff brought a medical malpractice action against several doctors and a hospital arising from the death of her husband as a result of a rare blood disorder following gall bladder surgery.[492] The primary issue before the supreme court was whether affidavits of merit prepared by the plaintiff's experts at the outset of the case–which differed in some respects from their trial testimony–were admissible at trial, either as substantive evidence under the hearsay rules or as impeachment evidence under Rule 613.[493] With respect to the hearsay issue, the supreme court concluded that the affidavits of merit were statements of a party and thus non-hearsay under Rule 801(d)(2).[494]

First, the court concluded that the affidavits of merit were statements in which the plaintiff had manifested an adoption or belief under Rule 801(d)(2)(B).[495] The court noted that the plaintiff was required to file an affidavit of merit as a precondition of her suit, and constitutes part of the plaintiff's pleadings.[496] The plaintiff voluntarily selected her experts and included their affidavits with her complaint, with full knowledge of the statements made in the affidavits by the experts.[497] The court reasoned that "[t]hese steps reflect an acceptance of the contents of the affidavits of merit sufficient . . . to constitute an adoption or belief in their truth."[498]

Second, the court concluded that the affidavit of merit constituted a party statement under Rule 801(d)(2)(C).[499] The court explained that an expert who testifies at trial "is essentially authorized by the plaintiff to make statements regarding the subjects listed" in the medical malpractice expert statute.[500] The court rejected the plaintiff's argument that she had no right to control the content of the experts' testimony.[501] The court explained that she vested with the experts with authority to prepare the affidavits of merit, attached their affidavits to her complaint knowing

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

491. 478 Mich. 151, 732 N.W.2d 472 (2007).

492. *Id.* at 154, 732 N.W.2d at 474.

493. *Id.* at 153, 732 N.W.2d at 474. The impeachment aspect of the court's decision is discussed *supra* notes 301-14 and accompanying text.

494. *Id.* at 175, 732 N.W.2d at 485.

495. *Id.* at 161, 732 N.W.2d at 478.

496. *Id.*

497. *See Barnett*, 478 Mich. at 161-62, 732 N.W.2d at 478.

498. *Id.* at 162, 732 N.W.2d at 478. The court noted that nothing in Rule 801(d)(2) requires that the plaintiff have personal knowledge of the facts underlying her adoptive admission. *See id.* at 162 n.2, 732 N.W.2d at 478 n.2.

499. *Id.* at 163, 732 N.W.2d at 478.

500. *Id.* at 162, 732 N.W.2d at 479.

501. *Id.* at 162-63, 732 N.W.2d at 479.

their contents, and called them as witnesses at trial without amending the affidavits.[502] In these circumstances, the "[p]laintiff cannot now reasonably deny that she authorized the experts to make statements concerning the subject of the affidavits."[503] Accordingly, the affidavits of merit were admissible as statements of a party opponent.[504]

2. Coconspirator Statements

Rule 801 also excepts from the hearsay rule a statement offered against a party which is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy."[505] This rule, which is a subset of the general rule of non-hearsay for party admissions, was considered by the court of appeals in *People v. Martin*.[506]

In *Martin*, the defendants Bobby Martin, Roger Thompson, and Roger Brown were convicted of various offenses relating to their operation of Legg's Lounge, an adult dancing establishment.[507] Two other defendants, Billy Martin and James Frasure, were convicted in a separate trial.[508] Very generally, the evidence at trial established that patrons who paid an additional fee could obtain a VIP card providing access to parts of the establishment where acts of prostitution were performed.[509] Amongst numerous other claims on appeal, defendant Billy Martin argued that the trial court had erred in admitting the testimony of Angela Martin, the ex-wife of defendant Bobby Martin and ex-sister-in-law of Billy Martin.[510] Angela Martin testified as to various statements made to her by Bobby Martin.[511] Specifically, she testified regarding Bobby Martin's and Billy Martin's pay from the club, which included cash payments; that Bobby Martin admitted knowing that sex acts were occurring at the establishment; and about a conversation Bobby and Billy had regarding the VIP cards.[512] On defendant Billy Martin's appeal, the court of appeals concluded that these statements were properly admitted against Billy Martin as coconspirator statements under Rule 801(d)(2)(E).[513]

The court began its analysis by noting that the proponent of the evidence must show three things before a coconspirator statement may

502. *See Barnett*, 478 Mich. at 162-63, 732 N.W.2d at 479.
503. *Id.* at 163, 732 N.W.2d at 479.
504. *Id.* at 167, 732 N.W.2d at 481.
505. MICH. R. EVID. 801(d)(2)(E).
506. 271 Mich. App. 280, 721 N.W.2d 815 (2006).
507. *Id.* at 285, 721 N.W.2d at 824.
508. *Id.* at 285-86, 721 N.W.2d at 824.
509. *Id.* at 318, 721 N.W.2d at 841.
510. *Id.* at 316, 721 N.W.2d at 840.
511. *Id.*
512. *Martin*, 271 Mich. App. at 316, 721 N.W.2d at 840.
513. *Id.* at 319, 721 N.W.2d at 841-42.

be admitted. First, the proponent must establish by a preponderance of the evidence the existence of a conspiracy, and this showing must be made with evidence independent of the coconspirator statements sought to be introduced.[514] Second, the proponent must show that the statement was made during the course of the conspiracy.[515] And finally, the proponent must show that the statement furthered the conspiracy, *i.e.*, is a statement that "prompt[s] the listener, who need not be one of the conspirators, to respond in a way that promotes or facilitates the accomplishment of the illegal objective."[516] Applying these three factors, the court concluded that hearsay statements of Bobby Martin testified to by Angela Martin were admissible against Billy Martin under the coconspirator exception.[517]

First, the court concluded that there was sufficient evidence of the existence of a conspiracy to allow admission of the statements.[518] Numerous witnesses, the court explained, testified that Legg's Lounge charged a fee both to enter the establishment and to access the VIP areas.[519] Witnesses also testified that acts of prostitution occurred in VIP areas, and that dancers had to pay a fee to the establishment for the privilege of working on those areas.[520] There was also evidence that Billy Martin was the manager of the establishment, and that Bobby Martin helped Billy.[521] This evidence, the court explained, established that Legg's derived some of its profits from illegal activities, and that the prostitution was so pervasive that Billy and Bobby Martin must have been knowing participants.[522]

Second, the court explained that there was no question that the statements of Bobby to Angela were during the existence of the conspiracy.[523] Thus, the only remaining question was the third inquiry under Rule 801(d)(2)(E), whether the statements were in furtherance of

514. *Id.* This rule, preventing consideration of the coconspirator statements in determining whether a conspiracy existed, is known as the bootstrapping rule. The United States Supreme Court abolished this prohibition with respect to Federal Rule 801(d)(2)(E) reasoning that the existence of a conspiracy is a preliminary question of admissibility and therefore, under Rule 104, the hearsay rules do not apply to that preliminary determination. *See* Bourjaily v. United States, 483 U.S. 141, 178-81 (1987). The federal rule has been amended to codify this result. *See* MICH. R. EVID. 801(d)(2) and advisory committee note, 1997 amendment. However, the Michigan rule explicitly provides that "independent evidence" is necessary. *See People v. Vega*, 413 Mich. 773, 780, 321 N.W.2d 675, 679 (1982) (per curiam).

515. *Martin*, 271 Mich. App. at 317, 721 N.W.2d at 840-41.

516. *Id.*, 721 N.W.2d at 841.

517. *Id.* at 319, 721 N.W.2d at 841-42.

518. *Id.* at 318, 721 N.W.2d at 841.

519. *Id.* at 316-18, 721 N.W.2d at 840-41.

520. *Id.*

521. *Martin*, 271 Mich. App. at 316, 721 N.W.2d at 840.

522. *Id.* at 317-18, 721 N.W.2d at 841.

523. *Id.* at 316, 721 N.W.2d at 840.

the conspiracy.[524] The court concluded that they were. The court reasoned that the telephone conversation between Bobby and Billy related to access to the VIP room, where the acts or prostitution occurred, and thus were connected with the underlying conspiracy.[525] Likewise, the court reasoned that Bobby Martin's statements to Angela regarding Bobby's and Billy's financial compensation were in furtherance of the conspiracy because, as Bobby's wife, these statements "informed Angela regarding her collective stake with Bobby and [Billy] in the success of the conspiracy and served to foster the trust and cohesiveness necessary to keep Angela from interfering with the continued activities of the conspiracy."[526] The court rejected Billy Martin's argument that, because Bobby was acquitted of the only charge alleging a conspiracy, the statements could not have been in furtherance of the conspiracy.[527] The court explained that a formal charge of conspiracy is not necessary so long as there is independent evidence to establish the existence of the conspiracy.[528] Accordingly, the court concluded that Angela's testimony concerning Bobby's statements to her were admissible against Billy under Rule 801(d)(2)(E).[529]

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

Rule 803 provides twenty-three distinct exceptions to the hearsay rule for various categories of statements. These rules are applicable regardless of whether or not the declarant is otherwise available to testify at trial.[530] These exceptions embody certain circumstances in which the probability of accuracy and trustworthiness of [a] statement is practically sufficient, if not quite equivalent to that of statements tested in the conventional manner [of cross-examination]. This circumstantial probability of trustworthiness is found in a variety of circumstances

524. *Id.* at 318-19, 721 N.W.2d at 841.

525. *Id.*

526. *Id.* at 319, 721 N.W.2d at 841. The court concluded that Bobby's statement to Angela that he knew sex acts were being performed in the VIP areas was not in furtherance of the conspiracy, but found no error in the admission of this statement because it was a statement against penal interest excepted from the hearsay rule under Rule 804(b)(3). *Martin*, 271 Mich. App. at 319, 721 N.W.2d at 841.

527. *Id.* at 319, 721 N.W.2d at 842.

528. *Id.* at 319, 721 N.W.2d at 842. This holding is in accord with federal cases applying Federal Rule 801(d)(2)(E). *See* United States v. Boesen, 473 F. Supp. 2d 932, 948 (S.D. Iowa 2007) (quoting United States v. Kincade, 714 F.2d 1064, 1065 (11th Cir.1983)) ("[O]nce the court has determined that the Government has made the requisite showing of a conspiracy, the admission of testimony under the co-conspirator exception to the hearsay rule is not rendered retroactively improper by subsequent acquittal of the alleged co-conspirator.").

529. *Id.* at 319, 721 N.W.2d at 841-42.

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

sanctioned by judicial practice; and it is usually from one of these salient circumstances that the exception takes its name. There is no comprehensive attempt to secure uniformity in the degree of trustworthiness which these circumstances presuppose. It is merely that common sense and experience have from time to time pointed them out as practically adequate substitutes for the ordinary test, at least, in view of the necessity of the situation.[531]

During the *Survey* period, the Michigan Court of Appeals issued one published decision involving a Rule 803 exception. In addition, a significant supreme court decision involving the excited utterance exception is on the horizon.

1. Excited Utterances

Rule 803 excludes from the operation of the hearsay rule "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."[532] In *People v. Burton*,[533] the supreme court held that an excited utterance may not be admitted under this exception without independent corroborating proof of the startling event or condition which gave rise to the statement.[534] This rule mirrors the independent evidence of a conspiracy requirement for admission of coconspirator statements under Rule 801(d)(2)(E).[535] In an unpublished decision during the *Survey* period, the Michigan Court of Appeals rejected the prosecutor's call to do away with this requirement, finding itself bound by the supreme court's decision in *Burton*.[536] The Michigan Supreme Court granted leave to appeal in *Barrett* specifically to consider whether it should overrule *Burton*'s requirement of independent proof of the underlying startling event.[537] The court's decision, likely to come during the next *Survey* period, may have a significant impact on hearsay law. Not only would an overruling of *Burton* change the standards governing excited utterances, but the court's reasoning in doing so may impact other areas of hearsay law. For example, if the court overrules *Burton* on the basis of Rule 104 and the reasoning employed by the supreme court in *Bourjaily*, this would likely have an impact on the independent evidence requirement of Rule 801(d)(2)(E).[538] The court's resolution of this case bears watching in the coming months.

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531. 5 WIGMORE, *supra* note 109, § 1422, at 253.

532. MICH. R. EVID. 803(2).

533. 433 Mich. 268, 445 N.W.2d 133 (1989).

534. *Id.* at 294, 445 N.W.2d at 144.

535. *See supra* note 514 and accompanying text.

536. People v. Barrett, No. 261382, 2006 WL 3733276 (Mich. Ct. App. Dec. 19, 2006), *leave to appeal granted*, 478 Mich. 875, 731 N.W.2d 767 (2007).

537. *Barrett*, 478 Mich. at 875, 731 N.W.2d at 767-68.

538. *See supra* note 513.

2. State of Mind

Rule 803(3) excepts from the hearsay rule any "statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed . . . ."[539] This rule is based on the premise that "statements concerning the declarant's then existing physical or mental condition are trustworthy because their spontaneity makes them at least as, if not more, reliable than testimony at trial on the same subject."[540]

The Michigan Court of Appeals considered the state of mind exception in *United Automobile, Aerospace & Agricultural Implement Workers of America v. Dorsey*.[541] In that case, the UAW agreed in 1995 to purchase the assets of a Florida-based radio network, People's Radio Network (PNI).[542] Charles Harder, PNI's owner and principal on-air personality, contacted Pat Choate due to tax problems that PNI was having.[543] Choate, along with Helen Dorsey and Edward Miller, proposed that the investors form a new radio network, United Broadcasting Network, which could provide a forum for the discussion of issues relevant to labor unions and provide the investors with significant return on their investment.[544] The radio station failed to make money, and eventually went into bankruptcy.[545] The UAW and other investors then brought an action against Choate, Dorsey, and Miller, alleging fraud and misrepresentation.[546] The jury returned a verdict in favor of the plaintiffs, and the defendants appealed.[547]

On appeal, the defendants brought several evidentiary challenges.[548] The court of appeals agreed with the defendants that the trial court had erred in admitting transcripts of Miller's divorce proceedings.[549] In that divorce proceeding, the trial court had sealed all of the files and records of the case. Notwithstanding this order sealing the record, the UAW's attorneys obtained a copy of the transcript, and used it to impeach Miller's testimony at trial in the fraud action.[550] The court of appeals agreed that this evidence should not have been admitted, but the supreme

539. MICH. R. EVID. 803(3).
540. WEISSENBERGER, supra note 142, § 803.12, at 466-67.
541. 273 Mich. App. 26, 730 N.W.2d 17 (2006).
542. *Dorsey I*, 268 Mich. App. at 316, 708 N.W.2d at 720.
543. *Id.*
544. *Id.* at 317, 708 N.W.2d at 721.
545. *Id.* at 319, 708 N.W.2d at 722.
546. *Id.*
547. *Id.* at 316-21, 708 N.W.2d at 720-23.
548. *Dorsey I*, 268 Mich. App. at 316-21, 708 N.W.2d at 720-23.
549. *Id.* at 330, 708 N.W.2d at 727.
550. *See id.* at 322-23, 708 N.W.2d at 723-24.

court reversed this determination.[551] On remand from the supreme court, the court of appeals addressed the remaining evidentiary issues raised by the defendants.

The bulk of the court of appeals' decision addresses the admissibility of a group of memos written by Harder to Choate and Miller in which he expressed complaints about the way Choate and Miller were managing UBN.[552] The plaintiffs sought to admit these memos to counter the defendants' assertions that Harder believed, at the time of trial, that plaintiffs' were the ones causing him problems, to show that Miller had a motive to get rid of Harder, and to impeach Miller's testimony that Harder's chief complaints related to censorship.[553] The court of appeals found no error in this admission of some of this evidence, but concluded that admitting the memos in their entirety was an abuse of discretion.[554]

The court first rejected the defendant's argument that Harder's state of mind was not a relevant issue, and therefore the memos were not admissible under Rule 803(3).[555] The court explained that defendants themselves had introduced Harder's state of mind into the case during opening statements, and had questioned a witness regarding Harder's views on the problems the network was having.[556] Under Rule 803(3), state of mind evidence is admissible as long as the declarant's state of mind is relevant; it need not itself be an issue in the case.[557] However, the court accepted the defendant's argument that the memos were not admissible because they did not reflect Harder's state of mind.[558] The court explained that while Rule 803(3) permits the admission of statements expressing the declarant's state of mind, the scope of the rule "is very narrow and does not allow the admission of any statements explaining the declarant's state of mind."[559] Although some of the statements in the Harder memos were true state-of-mind statements, much of the information in the memos constitutes Harder's explanation for his feelings.[560] Thus, the trial court erred in admitting the memos in

551. Schneider, *supra* note 217, at 312-15 (2007) (discussing this aspect of the case).

552. *Dorsey II*, 273 Mich. App. at 31-32, 730 N.W.2d at 21.

553. *Id.*

554. *Id.* at 25, 730 N.W.2d at 25. The court of appeals also considered whether the memos were relevant. This aspect of the court's decision is discussed *supra* notes 207-34 and accompanying text. In addition, the court of appeals discussed whether the Miller divorce transcripts were properly admitted for impeachment purposes apart from the confidentiality issues addressed in the prior appeal. This aspect of the case is discussed *supra* notes 315-330 and accompanying text.

555. *Id.* at 37-38, 730 N.W.2d at 24.

556. *Id.*

557. *See* People v. Ortiz, 249 Mich. App. 297, 307-10, 642 N.W.2d 417, 423-25 (2002); People v. Riggs, 223 Mich. App. 662, 704-05, 568 N.W.2d 101, 119 (1997).

558. *Dorsey II*, 273 Mich. App. at 38, 730 N.W.2d at 25.

559. *Id.*

560. *Id.* at 42, 730 N.W.2d at 27.

their entirety under Rule 803(3).[561] Nevertheless, reversal was not warranted because the statements were admissible for the nonhearsay purposes of impeaching Miller and demonstrating the effect the memos had on Miller.[562]

3. Business and Public Records

Also excluded from the hearsay rule by Rule 803 is:

> A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.[563]

As the Michigan Supreme Court has explained, this rule "is justified on grounds of trustworthiness: unintentional mistakes made in the preparation of a record would very likely be detected and corrected,"[564] and businesses have in institutional interest in preparing accurate reports.[565] To be admissible, the proponent of the business record must establish a proper foundation by presenting a qualified witness to "establish that the record was kept in the course of a regularly conducted business activity and that it was the regular practice of such business activity to make that record."[566]

For similar reasons, Rule 803 also excludes from the hearsay rule "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to

561. *See id.*
562. *See id.* at 42-43, 730 N.W.2d at 27.
563. MICH. R. EVID. 803(6).
564. Solomon v. Shuell, 435 Mich. 104, 120, 457 N.W.2d 669, 676 (1990).
565. *See id.*; 5 WIGMORE, *supra* note 109, § 1522; WEISSENBERGER, *supra* note 142, § 803.29.
566. People v. Vargo, 139 Mich. App. 573, 580, 362 N.W.2d 840, 843 (1984).

which matters there was a duty to report[.]"[567] This exception is premised on "the presumption that public officers do their duty. When it is a part of the duty of a public officer to make a statement as to a fact coming within his official cognizance, the great probability is that he does his duty and makes a correct statement."[568]

In *People v. Jambor*,[569] the defendant appealed his conviction for breaking and entering the Bloomfield Surf Club. Investigating the break-in, the police lifted several fingerprints from the scene which were placed on individual fingerprint cards.[570] One of the fingerprints was a match to the defendant.[571] The question before the court of appeals was whether the fingerprint cards were admissible as either business or public records.[572] The court of appeals concluded that both exceptions were applicable.

The court rejected the defendant's argument that the fingerprint cards were no longer trustworthy, and thus not admissible as business records, because they were prepared in anticipation of litigation.[573] The court explained that the fingerprint cards were prepared in the ordinary course of a routine police investigation, and that at the time of the cards were prepared there were no suspects in the case.[574] While the cards were prepared for the purpose of identifying the perpetrator, they "were not prepared specifically in anticipation of litigation against defendant" because "[n]o adversarial relationship existed between defendant and law enforcement at the time the fingerprint cards were prepared."[575] Thus, the cards were admissible as business records.[576]

The court of appeals also concluded that the fingerprint cards were admissible under the public records exception set forth in Rule 803(8).[577] The court noted that the rule, by its terms, does not exclude matters

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567. MICH. R. EVID. 803(8). The Rule excludes from this exception matters observed by law enforcement personnel in a criminal case, and accident reports as provided by statute. *See id.* (referencing MICH. COMP. LAWS ANN. § 257.624 (West 2001)).

568. 5 WIGMORE, *supra* note 109, § 1632, at 618; *see also* WEISSENBERGER, *supra* note 142, § 803.40, at 510.

569. 273 Mich. App. 477, 729 N.W.2d 569 (2007) (per curiam).

570. *Id.* at 479, 729 N.W.2d at 570-71.

571. *Id.* at 479-80, 729 N.W.2d at 571.

572. The court also considered whether the admission of the fingerprint cards violated the defendant's rights under the Confrontation Clause. This aspect of the case is discussed *infra* notes 638-41 and accompanying text. Further, in an earlier appeal, the court held that some of the fingerprint cards were inadmissible because they were not properly authenticated under Rule 901. The supreme court reversed this determination, and remanded for a consideration of the defendant's remaining issues. People v. Jambor, 271 Mich. App. 1, 717 N.W.2d 889 (2006), *rev'd*, 477 Mich. 853, 720 N.W.2d 746 (2006); Schneider, *supra* note 217, at 402-03.

573. *Jambor*, 273 Mich. App. at 482, 729 N.W.2d at 572.

574. *Id.* at 483, 729 N.W.2d at 572-73.

575. *Id.* at 484, 729 N.W.2d at 573.

576. *Id.*

577. *Id.* at 486, 729 N.W.2d at 574.

observed by law enforcement officers.[578] However, the court found this exception to the exception inapplicable for two reasons. First, notwithstanding the language of the rule, Michigan cases have construed the rule "to allow admission of routine police reports made in a nonadversarial setting."[579] Because the defendant was not a suspect at the time the cards were prepared, they were taken in nonadversarial setting.[580] Second, the rule excludes from the hearsay exception only those matters observed by police officers, but "[t]he mere lifting of a latent print from an object is, in and of itself, 'ministerial, objective, and nonevaluative.'"[581] Thus, the cards themselves and the prints they contained were not matters observed by the police to which the public records exception did not apply.

C. Exceptions to the Hearsay Rule–Declarant Unavailable (Rule 804)

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

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

578. *Id.*

579. *Jambor*, 273 Mich. App. at 486, 729 N.W.2d at 574. (citing People v. McDaniel, 469 Mich. 409, 413, 670 N.W.2d 659, 661 (2003); People v. Stacy, 193 Mich. App. 19, 33, 484 N.W.2d 675, 682-83(1992)).

580. *See id.* at 485, 729 N.W.2d at 573.

581. *Id.* (quoting United States v. Gilbert, 774 F.2d 962, 965 (9th Cir. 1985)).

the declarant's attendance or testimony) by process or other reasonable means, and in a criminal case, due diligence is shown.[582]

1. Former Testimony

One of the exceptions to the hearsay rule applicable when the declarant is unavailable allows the admission of the former testimony of the declarant in an earlier proceeding. Specifically, the rule provides that hearsay testimony is not excluded if the declarant is unavailable and the declaration consists of the "[t]estimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."[583] During the *Survey* period, the Michigan Court of Appeals considered the applicability of this exception in *People v. Farquharson*.[584]

In *Farquharson*, the defendant was charged in connection with the shooting of Denise Colen and her brother David.[585] David died as a result of the shooting.[586] The Genesee County Prosecutor issued an investigative subpoena to Andre Mathis, a witness to the shooting.[587] Mathis appeared, and the prosecutor took sworn testimony from Mathis, who identified the shooter not as the defendant, but as Ricardo Dickerson. Mathis was killed in an unrelated shooting prior to trial, and the defendant filed a motion seeking the admission of the transcript of Mathis's investigative subpoena testimony.[588] The trial court granted the motion, and the prosecutor appealed.[589]

The Michigan Court of Appeals determined that the evidence was potentially admissible under the former testimony exception.[590] The court first concluded that the investigative subpoena questioning constituted "another hearing" under Rule 804(b)(1).[591] The court reasoned that the prosecutor himself equated Mathis's testimony with testimony given at a grand jury proceeding, and that under the identical federal rule the United States Supreme Court has held that such a

582. MICH. R. EVID. 804(a). The rule provides that a witness is not "unavailable" for purposes of the rule where the witness's unavailability "is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying." *Id.*

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

584. 274 Mich. App. 268, 731 N.W.2d 797 (2007).

585. *Id.* at 270, 731 N.W.2d at 799.

586. *Id.*

587. *Id.*

588. *Id.* at 270-71, 731 N.W.2d at 799.

589. *Id.* at 270, 731 N.W.2d at 799.

590. *Farquharson*, 274 Mich. App. at 271-72, 731 N.W.2d at 800.

591. *Id.* at 272-73, 731 N.W.2d at 800.

proceeding constitutes "another hearing."[592] Reviewing the relevant Michigan statutes, the court agreed that the investigative subpoena proceeding is akin to a grand jury proceeding.[593] The court explained that in both proceedings the prosecutor has the power to subpoena witnesses, the witness testifies under oath, and a defendant may obtain a witness's testimony.[594] Because of these similarities between investigative subpoena hearings and grand jury proceedings, the court concluded that "testimony given at an investigative subpoena hearing qualifies as '[t]estimony given as a witness at another hearing of the same or a different proceeding . . .' under MRE 804(b)(1)."[595]

However, the court of appeals also concluded that a remand was necessary to determine whether the prosecutor had the same motive to develop Mathis's testimony in the administrative subpoena proceeding as he would have at trial.[596] Again relying on federal cases applying the analogous federal rule to grand jury testimony, the court explained that often such testimony is inadmissible.[597] This is "because the 'motive of a prosecutor in questioning a witness before the grand jury in the investigatory stages of a case is far different from the motive of a prosecutor in conducting the trial.'"[598] No bright-line rule can be used to determine whether the prosecutor's motive to develop the testimony in the investigatory and trial stages are the same. Rather, a trial court must conduct "a fact specific inquiry regarding whether the prosecution had a 'similar motive' in developing the witness's testimony during the grand jury proceeding,"[599] focusing on the nature of the two proceedings, the applicable burdens of proof, and what lines of inquiry were taken or available but not taken.[600] Because the trial court had failed to conduct this inquiry, a remand was necessary "for a determination regarding whether the prosecution had a similar motive in developing Mathis's testimony at the investigative subpoena hearing."[601]

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592. *Id.* at 272, 731 N.W.2d at 800 (citing United States v. Salerno, 505 U.S. 317, 322 (1992)).

593. *Id.* at 273-74, 731 N.W.2d at 801.

594. *Id.* at 273-75, 731 N.W.2d at 801 (discussing MICH. COMP. LAWS ANN. §§ 767.1-767.23, 767A.1-.9 (West 2000)).

595. *Id.* at 275, 731 N.W.2d at 801 (quoting MICH. R. EVID. 804(b)(1)) (alteration in original).

596. *Farquharson*, 274 Mich. App. at 279, 731 N.W.2d at 803.

597. *Id.* at 276-78, 731 N.W.2d at 802-03.

598. *Id.* at 276, 731 N.W.2d at 802 (quoting *Salerno*, 505 U.S. at 320).

599. *Id.* at 278, 731 N.W.2d at 803.

600. *See id.* (discussing United States v. DiNapoli, 8 F.3d 909, 914-15 (2d Cir. 1993) (en banc)).

601. *Id.* at 279, 731 N.W.2d at 803. Judge Talbot concurred in part and dissented in part. While he agreed with the bulk of the court's reasoning, he disagreed that a remand was necessary. In his view, the different purposes of the administrative subpoena hearing and a criminal trial was sufficient to conclude that the prosecutor did not have a similar motive to develop Mathis's testimony. *Farquharson*, 274 Mich. App. at 281, 731 N.W.2d at 804-05 (Talbot, J., concurring in part and dissenting in part). Specifically, unlike the

2. Dying Declarations

Another exception to the hearsay rule applicable when the declarant is unavailable permits the introduction of, "[i]n a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death."[602] The dying declaration exception, which developed well ahead of the hearsay rule in general, was originally premised on "the religious belief that no person would meet his maker with a lie on his lips."[603] Viewed more secularly now, the rule is based on the notion "that the approach of death produces a state of mind which the utterances of the dying person are to be taken as free from all ordinary motives to misstate."[604]

In *People v. Orr*,[605] the defendant was convicted of first degree murder arising from his shooting of Miguel Crittendon, his sister's boyfriend. The defendant was originally charged with shooting Crittendon on September 8, 2003, but the police were unable to locate and arrest the defendant.[606] Although Crittendon recovered from his injuries he was shot again, this time fatally, on February 3, 2004.[607] At trial, the prosecution presented evidence regarding the September 8, 2003 shooting, including Crittendon's statement immediately following the shooting identifying the defendant as his attacker; following his conviction, the defendant appealed, arguing that this evidence was inadmissible hearsay.[608] The Michigan Court of Appeals disagreed.

The court noted that, under the traditional rule, a dying declaration was admissible only if it was made under a conscious belief of impending death, was offered against the person who killed the declarant, and related to the circumstances of the killing.[609] However, the court rejected this test, concluding that the adoption of Rule 804(b)(2)

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prosecutor's motive at trial, Judge Talbot concluded that at the investigatory subpoena hearing "the prosecutor's concern and motivation was simply to gather information and not to prove either the truth or falsity of the testimony provided." *Id.* at 282, 731 N.W.2d at 805. Thus, in his view Mathis's prior testimony was inadmissible, and further proceedings on the issue were not necessary.

602. MICH. R. EVID. 804(b)(2).

603. WEISSENBERGER, *supra* note 142, § 804.17, at 584.

604. 5 WIGMORE, *supra* note 109, § 1438, at 289 (emphasis omitted); *see also* WEISSENBERGER, *supra* note 142, § 804.17, at 584-85 (noting that the modern theory of the exception is "that the powerful psychological forces bearing on the declarant at the moment of death engender a compulsion to speak truthfully.").

605. 275 Mich. App. 587, 739 N.W.2d 385 (2007) (per curiam).

606. *Id.* at 588, 739 N.W.2d at 387.

607. *Id.* at 588, 739 N.W.2d at 387.

608. *Id.* The defendant also challenged the introduction of hearsay statements made by the victim to his father and a police officer. This aspect of the case is discussed *supra* in notes 260-71 and accompanying text.

609. *Id.* at 595 n.13, 739 N.W.2d at 390 n.13.

abrogated the common law rule.[610] By its terms, the court explained, Rule 804(b)(2) requires only that the declarant believe that his death is imminent, and explicitly allows for admission of statements concerning the circumstances "'of what the declarant believes to be impending death.'"[611] Nothing in the language of the rule requires that the declarant have actually died, and there was no evidence that in drafting the rule the supreme court had any concern with whether the declarant actually died.[612] Thus, under the plain language of the rule, the requirement that the declarant has actually died "did not survive the adoption of MRE 804(b)(2),"[613] and Crittendon's dying declaration was therefore admissible.[614]

D. Confrontation Issues

Although the admission of hearsay evidence is generally governed by the hearsay evidence rules discussed above, in criminal cases the use of hearsay evidence also raises issues under the Confrontation Clause of the Sixth Amendment.[615] Although a full treatment of the Confrontation Clause is more appropriately suited to another Article in this *Survey*, given the Clause's relationship to the hearsay rules it is appropriate to briefly note here significant developments in this area of the law.

In *Ohio v. Roberts*,[616] the United States Supreme Court held that hearsay evidence is admissible under the Confrontation Clause when it satisfies two requirements: necessity (*i.e.*, unavailability of the declarant) and reliability.[617] As to the reliability element of this test, the Court also held that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception."[618] If the evidence does not fall within such an exception, "the evidence must be excluded, at least absent a showing of particularized guarantees of

610. *Id.* at 595-96, 739 N.W.2d at 391.

611. *Orr*, 275 Mich. App. at 595-96, 739 N.W.2d at 391 (quoting MICH. R. EVID. 804(b)(2)).

612. *See id.* at 596, 739 N.W.2d at 391.

613. *Id.*

614. This conclusion is consistent with the modern reading of Rule 804(b)(2). *See* FED. R. EVID. 804(b)(2), advisory committee note; WEISSENBERGER, *supra* note 142, § 804.17, at 585 n.108.

615. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."). The Confrontation Clause is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *See* Pointer v. Texas, 480 U.S. 400, 406 (1965).

616. 448 U.S. 56 (1980).

617. *Id.* at 65-66.

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

trustworthiness."[619] The Court abrogated this rule in *Crawford v. Washington*,[620] establishing a dichotomy between "testimonial" and "nontestimonial" hearsay. After surveying the historical development of the Confrontation Clause, the Court reasoned that "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."[621] Explaining that *Roberts* departed from this proper understanding of the Confrontation Clause,[622] the Court held that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[623]

During the *Survey* period, the Supreme Court further explicated the testimonial/non-testimonial distinction in *Davis v. Washington*.[624] As it had in *Crawford*, the Court in *Davis* found it unnecessary to "produce an exhaustive classification of all conceivable statements–or even all conceivable statements in response to police interrogation–as either testimonial or nontestimonial."[625] Rather, the Court found it sufficient to simply hold that

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[626]

Further, the *Davis* Court explicitly addressed the question of "whether the Confrontation Clause applies only to testimonial hearsay,"[627] which had been left open in *Crawford*. Explaining that the *Crawford* analysis focused on the meaning of "witnesses" who give "testimony" under the Confrontation Clause,[628] the *Davis* Court explained that "[a] limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its

619. *Roberts*, 448 U.S. at 66.
620. 541 U.S. 36 (2004).
621. *Id.* at 59.
622. *See id.* at 60-68.
623. *Id.* at 68-69.
624. 547 U.S. 813 (2006).
625. *Id.* at 823.
626. *Id.* at 822.
627. *Id.* at 823.
628. *Id.* (discussing *Crawford*, 541 U.S. at 51).

'core,' but its perimeter."[629] Thus, where nontestimonial hearsay is at issue, the Confrontation Clause is not implicated at all, and need not be considered.[630]

In *People v. Walker*,[631] the Michigan Court of Appeals considered a case similar to *Davis*. The case, which involved a victim's statements to the police, had been remanded from the Michigan Supreme Court in light of *Davis*.[632] Applying *Davis*, the court concluded that the victim's 911 call to the police was not testimonial, and hence was admissible, because it was a true "call for help," and the statements elicited by the 911 operator were "necessary to resolve the present emergency, rather than learn what had happened in the past to establish evidence of a crime."[633] The court explained that the 911 operator did not attempt to elicit investigatory information from the victim, but rather attempted only to find out the circumstances of the crime to ensure that she and others were protected from harm and that emergency help could arrive quickly.[634] However, the court also concluded that the victim's statements to her neighbor and to the police were testimonial, and therefore inadmissible without an opportunity for cross-examination.[635] At the time she gave these statements, the immediate emergency had passed, and the victim was no longer in danger or in need of emergency assistance and, objectively viewed, the primary purpose of the statements was investigatory in nature.[636] Thus, these statements were not admissible.[637]

In *People v. Jambor*,[638] the court found no Confrontation Clause problem in the admission of fingerprint cards which had been admitted under the business records and public records exceptions to the hearsay rule. The cards were not testimonial, the court reasoned, because they did not themselves contain any assertions. The court explained that "[n]o information recorded . . . on the cards could be used to assert that any fingerprint found at the scene belonged to defendant."[639] Any such testimony would have to come from another witness, who would

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629. *Id.*

630. *See Hodges v. Commonwealth*, 634 S.E.2d 680, 689 (Va. 2006). For a fuller discussion of *Crawford*, *Davis*, and the Michigan cases decided under these cases, see Schneider, *supra* note 217, at 384-401.

631. 273 Mich. App. 56, 728 N.W.2d 902 (2006).

632. For a full discussion of the prior appeal in *Walker*, see M. Bryan Schneider, *Evidence, 2005 Annual Survey of Michigan Law*, 52 WAYNE L. REV. 661, 759-63 (2006).

633. *Walker*, 273 Mich. App. at 63, 728 N.W.2d at 906 (citing *Davis*, 547 U.S. at 827).

634. *Id.* at 64, 728 N.W.2d at 906.

635. *Id.* at 64-65, 728 N.W.2d at 907.

636. *See id.* at 65, 728 N.W.2d at 907 (citing *Davis*, 547 U.S. at 830).

637. *Id.*

638. 273 Mich. App. 477, 729 N.W.2d 569 (2007) (per curiam). This case is discussed more fully above in connection with the underlying hearsay issue. *See supra* notes 569-81.

639. *Id.* at 488, 729 N.W.2d at 575.

presumably be subject to cross-examination.[640] Thus, the cards themselves did not constitute testimonial hearsay.[641]

Most notably, in *People v. Taylor*[642] the Michigan Court of Appeals adopted a Confrontation Clause exception for testimonial dying declarations. In *Taylor*, the defendant was convicted of first degree murder in connection with the shooting death of Buel Lasater.[643] At trial, the prosecution presented evidence that when the police responded to a call following the shooting, they found Lasater in a bedroom bleeding, and asked Lasater to identify his assailant.[644] Lasater hesitated, and the officers told him he might not survive and should identify the shooter. Lasater then identified the defendant.[645] On the defendant's appeal, the court rejected his claim that the introduction of this evidence violated the Confrontation Clause.[646]

The court first concluded that the dying declaration was not testimonial.[647] Noting *Davis*' holding that statements to police are not testimonial when, objectively viewed, they are made primarily to assist the police in meeting an ongoing emergency, the court held that "[w]hen, as here, police officers arrive at the crime scene immediately after a shooting, with a number of people in the house, and where the victim-who is clearly dying of multiple gunshot wounds–identifies his assailant, the identifying statements given to the police are nontestimonial under *Crawford*."[648] This reasoning is dubious. While it is true that some dying declarations may be nontestimonial, it is difficult to see how the declaration in this case was anything other than a response give to police questioning for investigatory purposes. At the time the victim told the police who had shot him, there was no further danger to the victim.[649] Importantly, the police repeatedly asked the victim who had shot him, and explicitly told him that he was dying.[650] It seems clear that, in the circumstances of this case, the police were trying to garner evidence for use in a criminal case before the victim died.

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640. *See id.*

641. Although the court did not rely on this basis, it should be noted that because business and public records by their nature are records kept in the ordinary course of business, they always constitute nontestimonial hearsay under *Crawford*. *See* United States v. Feliz, 467 F.3d 227, 233-36 (2d Cir. 2006); United States v. Ellis, 460 F.3d 920, 924 (7th Cir. 2006); *cf. Crawford*, 541 U.S. at 56; *id.* at 75 (Rehnquist, C.J., concurring in the judgment).

642. 275 Mich. App. 177, 737 N.W.2d 790 (2007), *leave to appeal granted*, 480 Mich. 946, 741 N.W.2d 24 (2007).

643. *Id.* at 178, 737 N.W.2d at 792.

644. *Id.* at 181, 737 N.W.2d at 793-94.

645. *Id.* at 181, 737 N.W.2d at 793-94.

646. *Id.* at 184, 737 N.W.2d at 795.

647. *Id.*

648. *Taylor*, 275 Mich. App. at 182, 737 N.W.2d at 794.

649. *See id.* at 181, 737 N.W.2d at 794.

650. *Id.* at 181, 737 N.W.2d at 794.

In any event, *Taylor* is notable for its alternative holding, namely, that even if the statement identifying the defendant was testimonial, it was admissible pursuant to a dying declaration exception to the Confrontation Clause.[651] In *Crawford*, the Court suggested that testimonial dying declarations may be admissible notwithstanding the rule that case established.[652] After explaining that none of the Court's prior cases involving other hearsay exceptions resulted in admission of testimonial hearsay, the Court observed:

> The one deviation we have found involves dying declarations. The existence of that exception as a general rule of criminal hearsay law cannot be disputed. Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*.[653]

Based on this language, the *Taylor* court concluded that dying declarations are admissible under the Confrontation Clause regardless of whether they are testimonial.[654] The court adopted the reasoning of the California Supreme Court, which explained that under the common law dating to well before the ratification of the Constitution there was no question that testimonial dying declarations are admissible.[655] Because *Crawford* read the Confrontation Clause as embodying "those exceptions established at the time of the founding,"[656] the court concluded that "'it follows that the common law pedigree of the exception for dying declarations poses no conflict with the Sixth Amendment.'"[657]

Although the majority of courts have interpreted the *Crawford* language as allowing admission of testimonial dying declarations under the Confrontation Clause,[658] at least two courts and one commentator have noted that the Supreme Court did not so hold in *Crawford*, and that such an exception cannot be reconciled with the logical and historical

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651. *Id.* at 184, 737 N.W.2d at 795.

652. *Crawford*, 541 U.S. at 55.

653. *Crawford*, 541 U.S. at 55 n.6 (citations omitted).

654. *Taylor*, 275 Mich. App. at 181-84, 737 N.W.2d at 794-95.

655. *See id.* at 182-83, 737 N.W.2d at 794-95 (discussing People v. Monterroso, 101 P.3d 956, 972 (Cal. 2004)).

656. *Crawford*, 541 U.S. at 54.

657. *Taylor*, 275 Mich. App. at 183, 737 N.W.2d at 795 (quoting *Monterroso*, 101 P.3d at 972).

658. *See* Williams v. State, 947 So. 2d 517, 520 (Fla. Ct. App. 2006) (citing State v. Martin, 695 N.W.2d 578 (Minn. 2005); *Monterroso*, 101 P.3d 956; United States v. Jordan, No. 04-CR-229-B, 2005 WL 513501 (D. Colo. Mar. 3, 2005)); State v. Lewis, 235 S.W.3d 136, 147-48 (Tenn. 2007) (citing Wallace. v. State, 836 N.E.2d 985, 992-96 (Ind. Ct. App. 2005); State v. Young, 710 N.W.2d 272, 283-84 (Minn. 2006)).

underpinnings of the *Crawford* decision.[659] In *Taylor*, the Michigan Supreme Court has granted leave to appeal to explicitly consider this issue.[660] This case bears watching during the next *Survey* period.

VIII. SPECIAL RELEVANCE RULES IN CONDEMNATION CASES

In the last *Survey* period the Michigan courts were extremely active in discussing the rules of relevance as applied in property condemnation cases.[661] The Michigan Court of Appeals considered one such case during this *Survey* period. Although this decision is based on applications of Rules 401, 402, and 403, the specialized focus makes it appropriate to discuss the decision separately here.

In *City of Detroit v. Detroit Plaza Limited Partnership*,[662] the City of Detroit condemned property in the Rivertown area.[663] The city first expressed interest in the area in the mid-1990s to revitalize the waterfront.[664] The Detroit Economic Development Corporation (EDC) began talks with two of the defendant's general partners, seeking to purchase a parcel of land owned by the partnership for use as a public park.[665] Detroit officials later announced plans to use the Rivertown area for casinos, at which time the talks between the city and the partnership broke down.[666] Over the next couple of years, the EDC was able to purchase some parcels in the Rivertown area, but not others.[667] The city thus instituted condemnation proceedings acquiring various parcels, including that parcel owned by the partnership, through its eminent domain power.[668] At trial in the condemnation proceeding, the only issue was the amount of "just compensation" owed to the defendant partnership for the parcel.[669] The city's appraiser valued the fair market value of the property at $50 per square foot, for a total value of a little over $13.7 million.[670] The partnership's expert, on the other hand, valued the parcel at $115 per square foot, for a total value of $31.5 million.[671]

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659. *See* United States v. Mayhew, 380 F. Supp. 2d 961, 965-66 n.5 (S.D. Ohio 2005); *Jordan*, 2005 WL 513501 at *3; Michael J. Polelle, *The Death of Dying Declarations in a Post-Crawford World*, 71 MO. L. REV. 285, 289-307 (2006).

660. *Taylor*, 480 Mich. at 946, 741 N.W.2d at 24. In addition, the supreme court will consider whether Lasater's identification was testimonial, and if it was in fact a dying declaration. *See id.*

661. *See* Schneider, *supra* note 217, at 412-20.

662. 273 Mich. App. 260, 730 N.W.2d 523 (2006), *leave to appeal denied*, 478 Mich. 925, 733 N.W.2d 42 (2007).

663. *Id.* at 263, 730 N.W.2d at 527.

664. *Id.*

665. *Id.* at 264, 730 N.W.2d at 527.

666. *Id.*

667. *Id.*, 730 N.W.2d at 527-28.

668. *Detroit Plaza Ltd. P'ship*, 273 Mich. App.at 263-65, 730 N.W.2d at 526-27.

669. *Id.* at 265, 730 N.W.2d at 527.

670. *Id.*

671. *Id.* at 265-66, 730 N.W.2d at 527.

The jury ultimately determined that the fair market value of the property was $25 million, and the trial court entered judgment in favor of the partnership in this amount.[672] The city appealed, raising a number of challenges to the trial court's evidentiary rulings.

First, the city challenged the trial court's decision to exclude evidence of a 1996 sale of property adjacent to the parcel involved in the condemnation proceeding.[673] This property was primarily parking areas just east of the Renaissance Center owned by Ford Motor Company.[674] Although not included in the sale of the Renaissance Center to General Motors (GM), these parcels were effectively only saleable to GM.[675] For tax reasons, Ford and GM agreed that GM would pay a "nominal purchase price" of about $28 per square foot for the parcels, but that the transaction would be accomplished through a series of in-kind property transfers from GM to Ford.[676] The city's expert had relied on this sale as a comparable sale in determining the fair market value of the property.[677] The partnership sought to exclude evidence of this sale, arguing that the purchase price was not based on an appraisal, but was merely an agreed upon number designed to facilitate the tax-free property exchange.[678] The trial court granted the partnership's motion in limine, and the court of appeals affirmed this determination.[679]

In its argument, the partnership relied on several cases from other jurisdictions holding that in-kind property transfers are generally not relevant evidence for determining fair market value in condemnation cases.[680] Although this question has never been addressed by a Michigan court, the court of appeals found it unnecessary to answer the question. The court explained that the trial court had excluded the evidence not on the basis that it was an in-kind exchange, but on the basis that the probative value was substantially outweighed by the danger of jury confusion under Rule 403.[681] The court of appeals determined that this conclusion was proper.[682] The court explained that because only property was exchanged and there was no appraisal involved in the sale of the parcel from Ford to GM, consideration of this sale as evidence of fair market value "would require deliberation and decision on a number of

672. *Id.* at 267, 730 N.W.2d at 528.
673. *Id.* at 270, 730 N.W.2d at 529.
674. *Detroit Plaza Ltd. P'ship,* 273 Mich. App. at 270, 730 N.W.2d at 529.
675. *Id.*
676. *Id.* at 269-70, 730 N.W.2d at 529.
677. *Id.* at 265, 730 N.W.2d at 528.
678. *Id.* at 270-71, 730 N.W.2d at 530.
679. *Id.* at 270-73, 730 N.W.2d at 530-31.
680. *Detroit Plaza Ltd. P'ship*, 273 Mich. App. at 270-71, 730 N.W.2d at 530 (citing Homer v. Dadeland Shopping Ctr., 229 So. 2d 834, 838 (Fla. 1969); Morgan v. State, 343 S.W.2d 738, 741 (Tex. Ct. App. 1961)).
681. *Id.* at 272, 730 N.W.2d at 531.
682. *Id.*

issues collateral to that matter,"[683] including that precise tax consequences to the parties in that transaction, the saleability of the property to other potential purchasers, the precise value of each parcel traded by the parties, and the financial benefits Ford and GM received in the exchange.[684] This complex evidence, the court concluded, would require the jury to engage in a complex analysis on a tangential issue, and divert the jury from the significant issues involved in the case.[685] Thus, the evidence was properly excluded under Rule 403.

Second, the court of appeals considered the city's argument that the trial court erred in failing to exclude "project-related" sales.[686] These were voluntary sales by parcel holders within the project area designated by the city council. The city argued that because these sales were under the threat of looming condemnation, they were not voluntary sales and thus not relevant to determining the fair market value of the subject parcel.[687] The city also argued that the prices of these parcels were artificially inflated by the belief that the area was going to be used for casino development.[688] The court of appeals found no error in the admission of this evidence.[689] The court first rejected the city's argument that the evidence was inadmissible under the "scope of the project rule."[690] The court explained that the applicable Michigan statute does not adopt the scope of the project rule *in toto*.[691] The statute, the court explained, merely provides that a change in market value attributable to the known scope of the project is not compensable; it does not by its terms preclude admission of evidence of noncompensable sales as evidence of what the properly compensable value of the subject property was at the time of the taking.[692] Because of this plain language, and in light of "the liberal manner in which evidence in condemnation cases has

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683. *Id.* at 273, 730 N.W.2d at 531.

684. *Id.*

685. *Id.*

686. *Detroit Plaza Ltd. P'ship*, 273 Mich. App. at 274-75, 730 N.W.2d at 531.

687. *Id.*

688. *Id.* at 274, 730 N.W.2d at 531-32.

689. *See id.* at 274-83 , 730 N.W.2d at 531-536.

690. As succinctly stated by one court:

> The "scope of the project" rule provides that any increase or decrease in the value of any property to be acquired which occurs after the scope of the project and its location are known and which is solely attributable to knowledge of the project's scope and location shall not be considered in arriving at the value of the acquired property.

Dames v. 926 Co, Inc., 925 So. 2d 1078, 1081-82 (Fla. Ct. App. 2006) (footnote omitted); *see also* United States v. Miller, 317 U.S. 369, 379 (1943).

691. *Detroit Plaza Ltd. P'ship*, 273 Mich. App. at 266-67, 730 N.W.2d at 533.

692. *Id.* at 276-77, 730 N.W.2d at 533 (discussing MICH. COMP. LAWS ANN. § 213.70 (West 1998)).

traditionally been received in Michigan,"[693] the court found no error in the admission of this evidence.[694]

The court also rejected the city's argument that evidence of these sales was inadmissible because they were sales to the city, *i.e.*, the condemner. The court noted the majority rule that evidence of such sales is generally irrelevant in determining fair market value, because the threat of condemnation renders the sale prices a consequence of a compromise of litigation rather than a true reflection of the market.[695] However, the court adopted the minority position, expressed by the Supreme Court of Hawaii, that evidence of such sales is not *per se* inadmissible.[696] Rather, because considerations apart from fair market value invariably infect almost all property sales, such evidence should be judged on a case-by-case basis, applying the normal rules of relevance and undue prejudice.[697] Although this is the minority view, the court of appeals concluded that it was more consistent with the liberal standards for admissibility in condemnation actions in Michigan.[698] Finally, the court rejected the city's argument that the evidence was inadmissible because it consisted of sales occurring after the date the subject parcel was appraised, noting that it had already rejected this argument in a previous case.[699]

The court of appeals next rejected the city's claim that the trial court erred in excluding evidence of disputes among partners of the partnership regarding who had authority and what steps the partnership was required to take in order to sell the property.[700] The disputes involved two suits between some partners in 1997 and 1998 regarding authority of the partners.[701] The city argued that the evidence was relevant to show the reality of the partnership's ability to sell the property at the fair market value claimed by the partnership.[702] The court of appeals disagreed, concluding that "the fact that disputes between the partners may have been a factor in the partnership's failure to develop the property before

693. *Id.* at 277, 730 N.W.2d at 533.

694. *Id.* at 278, 730 N.W.2d at 534. The court was careful to note that it was not establishing a *per se* rule that evidence of this type is always admissible. Rather, such evidence is subject to the general relevance rules applicable to all evidence. *Id.*

695. *Id.* at 279, 730 N.W.2d at 534.

696. *Detroit Plaza Ltd. P'ship,* 273 Mich. App. at 280-81, 730 N.W.2d at 534-35 (discussing Honolulu Redevelopment Agency v. Pun Gun, 426 P.2d 324, 325-28 (Hawaii 1967)).

697. *Id.*

698. *Id.* at 281, 730 N.W.2d at 535-36.

699. *Id.* at 282-83, 730 N.W.2d at 536 (discussing Detroit/Wayne County Stadium Auth. v. Drinkwater, Taylor & Merrill, Inc., 267 Mich. App. 625, 646-49, 705 N.W.2d 549, 564-66 (2005)). For a full discussion of *Detroit/Wayne County Stadium Authority*, see Schneider, *supra* note 217, at 413-14.

700. *Detroit Plaza Ltd. P'ship*, 273 Mich. App. 260, 730 N.W.2d at 538.

701. *Id.* at 283-84, 273 Mich. App. 536-37.

702. *Id.* at 283-87, 705 N.W.2d at 536-37.

the taking is simply not relevant to the property's fair market value on the date of valuation."[703] The court reasoned that the proper valuation of the property was based on the highest and best use, which does not depend on whether the owner has actually put the property to that use.[704] Because all that was required was that the best use be legally, financially, and physically possible, the fact that partnership disputes may have hampered the partnership's best use of the property was irrelevant to the fair market value determination.[705]

Finally, the court of appeals rejected the city's argument that the trial court erred in excluding an offer by the partnership to sell the property to the city.[706] This alleged offer was for a sale price of $7.5 million.[707] The court again concluded that the probative value of this evidence was outweighed by the danger of jury confusion.[708] The court explained that the offer was never reduced to a written agreement, and the partners' deposition testimony regarding this offer varied widely.[709] In these circumstances, there were "clearly a number of questions regarding whether and to what extent an agreement for the sale of the property was reached by the parties."[710] In light of these questions, "and the extensive and varied testimony necessary to resolve them,"[711] the trial court did not abuse its discretion in excluding this evidence under Rule 403 on the basis that the risk of jury confusion substantially outweighed the probative value of the evidence.[712]

IX. CONCLUSION

Once again, the Michigan courts were active in issuing decisions on evidentiary issues during the *Survey* period, particularly in the areas of relevance, expert evidence and hearsay. The next *Survey* period looks to be equally productive, particularly with significant hearsay decisions expected in *Barrett* and *Taylor*.[713]

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703. *Id.* at 284, 705 N.W.2d at 537.
704. *See id.*
705. *See id.*, 730 N.W.2d at 537-38.
706. *Detroit Plaza Ltd. P'ship*, 273 Mich. App. at 289, 730 N.W.2d at 540.
707. *Id.* at 287, 730 N.W.2d at 538-39.
708. *Id.* at 289, 730 N.W.2d at 539-40.
709. *Id.* at 289, 730 N.W.2d at 539.
710. *Id.*
711. *Id.*
712. *See Detroit Plaza Ltd. P'ship*, 273 Mich. App. at 289, 730 N.W.2d at 539-40.
713. *See supra* notes 537-38 and accompanying text; *supra* notes 642-60 and accompanying text.