EVIDENCE

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I. INTRODUCTION

This Article discusses significant developments in the law of evidence during the *Survey* period.[1] The Article focuses primarily on published decisions of the Michigan Court of Appeals and the Michigan Supreme Court. To the extent they discuss significant issues of Michigan evidence law, however, unpublished decisions and decisions by the federal courts are also discussed. The Michigan courts were relatively quiet during this *Survey* period on evidentiary issues, issuing their most significant decisions in the areas of relevance and other acts evidence.

II. SPOLIATION OF EVIDENCE

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

> It has always been understood the inference, indeed, is one of the simplest in human experience that a party's *falsehood* or *other fraud* in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit.[2]

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

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1. The *Survey* period covers cases decided between June 1, 2007, and May 31, 2008.
2. 2 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 278, 133 (James H. Chadbourn rev. ed. 1979) (emphasis in original).
3. *See* Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 78 (3d Cir. 1994).
4. *Id.*
5. *Id.*

the victims of evidence destruction, and (3) punishing spoliators."[6] 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 evidence.[7] 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."[8] Under this view, in appropriate circumstances, the inference may be applied against a reckless or negligent spoliator.[9] In either event, it is important to bear in mind that the spoliation inference "does not prove the opposing party's case."[10] 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."[11] 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.[12]

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

In *Adkins v. Wolever*,[13] the plaintiff, a state prisoner, brought a federal civil rights action against the defendant prison guard, alleging

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6. JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE § 2.2, 33 (1989); *see also, Schmid*, 13 F.3d at 79.

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

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

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

10. Schneider v. G. Guilliams, Inc., 976 S.W.2d 522, 526 (Mo. Ct. App. 1998).

11. 2 WIGMORE, *supra* note 2, § 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).

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

13. 520 F.3d 585 (6th Cir. 2008), *reh'g granted en banc, vacated*, No. 07-1421 (6th Cir. May 23, 2008).

that the guard had assaulted him in his cell.[14] An internal investigation of the incident was conducted, and the investigator reviewed a video tape of the incident.[15] However, the investigator determined that the plaintiff's version of events could not be substantiated, because the camera's view of the cell was partially blocked by two other guards.[16] The plaintiff then commenced his lawsuit, and sought in discovery to obtain a copy of the video tape, as well as photographs of his injuries and video tapes of interviews with other prison guards.[17] The defendant did not produce the evidence, and at some point it became clear that the evidence was no longer available.[18] At trial, the plaintiff sought a jury instruction allowing the jury to draw an adverse inference from the destruction of the evidence.[19] The trial court denied the request, concluding that there was no evidence that the defendant himself had caused the loss of the evidence and that an adverse inference could not be drawn against him from the destruction of the evidence by other prison officials.[20]

On the plaintiff's appeal, the Sixth Circuit concluded that the trial court did not abuse its discretion in denying the instruction.[21] The court first concluded that Michigan law, rather than federal law, governed the spoliation issues.[22] The court noted that it was bound by prior Sixth Circuit decisions applying state spoliation law, even though other federal circuits have applied federal spoliation law in cases presenting a federal question.[23] Turning to Michigan spoliation law, the Sixth Circuit read Michigan spoliation law as allowing a court to impose spoliation sanctions "only when parties to the litigation destroy evidence."[24]

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14. *Id.* at 586.
15. *Id.*
16. *See id.* at 586.
17. *Id.*
18. *See id.*
19. *See Adkins*, 520 F.3d at 587.
20. *See id.* at 587.
21. *See id.*
22. *Id.*
23. *See id.* The court obviously disagreed with this prior case law, explaining that "[a]pplying federal law in this evidentiary realm makes good sense," because imposition of sanctions for spoliation is an inherent power of federal courts, and therefore the decision to impose them should be governed by federal law. *Id.* It is likely this issue regarding whether federal or state law applies that prompted the en banc Sixth Circuit to grant rehearing. *See Adkins,* 520 F.3d. at 588 (encouraging the court to revisit the state/federal issue en banc).
24. *Id.* at 587. This decision comports with the general rule, which does not permit a spoliation sanction against a party based on the destruction of evidence by a third party. *See* MacSteel, Inc. v. Eramet N. Am., No. 05-74566, 2006 WL 3334011, at *1 (E.D. Mich. Nov. 16, 2006); Choice Builders, Inc. v. Complete Landscape Serv., Inc., 955 So. 2d 437, 441 (Ala. Ct. App. 2006); Kippenham v. Chaulk Servs., Inc., 697 N.E.2d 527,

Because Wolever was the only defendant named in the suit, and because there was no evidence that he had spoliated any evidence, the court concluded that the plaintiff was not entitled to a spoliation instruction under Michigan law.[25]

The federal district court considered the Michigan spoliation inference in *J.B. Hunt Transport, Inc. v. Adams*.[26] In that case, the defendant, Jamal Adams, was injured when the motorcycle he was driving crashed into a truck owned by the plaintiff, J.B. Hunt.[27] J.B. Hunt refused to provide Adams with personal protection benefit and State Farm, Adams's no-fault insurer, provided him benefits.[28] J.B. Hunt brought a declaratory judgment action against Adams and State Farm seeking a declaration that it was not liable to reimburse State Farm.[29] Specifically, J.B. Hunt argued that it was not subject to the Michigan No-Fault Act because the truck involved in the incident was operated in Michigan for less than thrity days during the year in which the accident occurred.[30] During the course of discovery, J.B. Hunt was unable to produce the driver logs and repair records for the truck involved in the accident.[31] J.B. Hunt had retained the records for the time required by federal regulations governing motor carriers and then discarded them.[32] Blue Care Network, which had been named as a third-party defendant, argued that the discarding of the records while there was a potential for litigation entitled it to an adverse inference that the truck had operated in Michigan for more than thirty days.[33]

The court disagreed; although noting the general rule that a party has a duty to preserve evidence once there is a potential for litigation, the court also explained that under Michigan law "missing evidence gives rise to an adverse presumption only when the complaining party can

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531 (Mass. 1998). *But cf.* New Jersey Mgrs. Ins. Co. v. Hearth & Home Technologies, Inc., No. 3:06-CV-2234, 2008 WL 2571227, at *7 (M.D. Pa. June 25, 2008) (party may be held liable for spoliation by third party agent to whom it entrusted evidence).

25. *See Adkins*, 520 F.3d at 587. In reaching this conclusion, the court also noted that Michigan does not currently recognize an independent cause of action for spoliation of evidence. *See id.* at 587-88. The federal district court also reached this conclusion in a unpublished decision during the *Survey* period. *See* Appalachian Railcar Servs., Inc. v. Boatright Enters., Inc., No. 1:05-cv-790, 2008 WL 828112, at *30-31 (W.D. Mich. Mar. 25, 2008).

26. 537 F. Supp. 2d 880 (E.D. Mich. 2007).

27. *See id.* at 881-82.

28. *See id.* at 882.

29. *See id.*

30. *See id.* at 881-82.

31. *See id.* at 889.

32. *See J.B. Hunt Transport*, 537 F. Supp. 2d at 889.

33. *See id.* at 889-90.

establish intentional conduct indicating fraud and a desire to destroy evidence and thereby suppress the truth."[34] Turning to the facts before it, the court found no evidence that J.B. Hunt had destroyed the records in bad faith.[35] Rather, J.B. Hunt had acted consistent with both its standard business practice and the relevant federal regulations.[36] Further, the court reasoned that any adverse inference which could be drawn from J.B. Hunt's failure to produce the logs and repair records was rebutted by the records of the truck's on-board computer.[37] The court reasoned that these records represented the best evidence of the truck's location at any time, and that they conclusively established that the truck had not been operated in Michigan for more than thirty days in the relevant year.[38] Explaining that "[w]here . . . there exists credible, uncontroverted evidence to refute the adverse inference, the adverse inference is rebutted if not altogether unwarranted,"[39] the court concluded that the adverse inference was not warranted in light of the records of the on-board computer.[40]

III. RELEVANCE

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

A. Relevance and Undue Prejudice Generally

The rules of relevance are addressed in Article IV of the Michigan Rules of Evidence (MRE).[41] MRE 401 and MRE 402 provide the general rules of relevance for the admission of evidence.[42] MRE 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

34. *Id.* at 890 (citing Ward v. Consol. Rail Corp., 472 Mich. 77, 85, 693 N.W.2d 366, 371 (2005)).

35. *See id.*

36. *See id.*

37. *See id.*

38. *See J.B. Hunt Transport,* 537 F. Supp.2d at 890. As explained by the court, the on board computer sends a signal to a satellite indicating the truck's position, and the records accounted for every day of the truck's operation in 2003. *See id.* at 890-91.

39. *Id.* at 890 (citing *Ward*, 472 Mich. at 86, 693 N.W.2d at 371).

40. *See id.*

41. *See* MICH. R. EVID. 401-411.

42. MICH. R. EVID. 401-402.

evidence."[43] MRE 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.[44] The remainder of the rules in Article IV establish rules of limited relevance, prohibiting the introduction of otherwise "relevant" evidence under MRE 401 and 402 for various policy reasons. Taken together, MRE 401 and 402 "[constitute] the cornerstone of the . . . evidentiary system."[45]

The threshold established by MRE 401 and MRE 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.[46]

In other words, under MRE 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."[47]

As noted above, MRE 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 MRE 403, which provides that otherwise relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair

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43. MICH. R. EVID. 401.

44. *See* MICH. R. EVID. 402.

45. GLEN WEISSENBERGER & JAMES J. DUANE, FEDERAL EVIDENCE 401.1, at 73 (4th ed. 2001) [hereinafter WEISSENBERGER]. Professor Weissenberger discusses the Federal Rules of Evidence (FRE) and the federal evidentiary system. However, MRE 401 and 402 are substantively identical to FRE 401 and FRE 402. *See* MICH. R. EVID. 401 note (1978); MICH. R. EVID. 402 note (1978). 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).

46. JOHN W. STRONG, MCCORMICK ON EVIDENCE § 185, 278 (5th ed. 1999) [hereinafter MCCORMICK]. The Michigan Supreme Court has approvingly cited Professor McCormick on this point. *See* People v. Brooks, 453 Mich. 511, 519, 557 N.W.2d 106, 109-10 (1996).

47. WEISSENBERGER, *supra* note 45, § 401.3, at 75; *see also*, JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 17-18 (1827).

prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[48] "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."[49] Because the question of undue prejudice under MRE 403 is inextricably bound to a determination of the probative value of the evidence, MRE 403 determinations in large part derive from general relevance determinations under MRE 401 and 402. It is therefore appropriate to consider all three rules together. During the *Survey* period, the Michigan Court of Appeals issued three published decisions addressing these general principles of relevance.

In *People v. Kahley*,[50] the defendant was convicted of first degree criminal sexual conduct and appealed his conviction.[51] Among other claims, defendant claimed on appeal that he was denied a fair trial "when the police officer who interviewed him testified that [the] defendant refused to take a polygraph examination."[52] Reviewing the issue for plain error, in light of the defendant's failure to object to the testimony at trial,[53] the court concluded that the defendant was not entitled to a new trial.[54]

The court of appeals agreed with the defendant that the officer's testimony amounted to error, and that the error was plain.[55] The court explained that "[i]t is well established that testimony concerning a

48. MICH. R. EVID. 403.

49. WEISSENBERGER, *supra* note 45, § 403.1, at 85-86. As Professor Weissenberger notes, the policy underlying MRE 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"). MRE 403 is thus akin to the "catch-all" exception to the hearsay rule.

50. 277 Mich. App. 182, 744 N.W.2d 194 (2007), *appeal denied*, 481 Mich. 882, 748 N.W.2d 880 (2008). *Kahley* also considered an issue relating to other acts evidence. This aspect of the case is discussed *infra* notes 170-176 and accompanying text.

51. *See Kahley*, 277 Mich. App. at 183, 744 N.W.2d at 196.

52. *See id.*

53. Under the plain error rule, an error which was not objected to at trial may provide a basis for reversal of a conviction only if (1) there was error, (2) the error was plain, and (3) the error affected substantial rights. *See* People v. Carines, 460 Mich. 750, 763, 597 N.W.2d 130, 138 (1999).

54. *Kahley*, 277 Mich. App. at 183-84, 744 N.W.2d at 196.

55. *See id.*

defendant's polygraph examination is not admissible in a criminal prosecution,"[56] and that the admission of such testimony amounts to plain error.[57] The court also found no distinction between testimony concerning a defendant's polygraph under the general rule and testimony relating to the defendant's refusal to take a polygraph at issue in *Kahley*.[58] As with the result of a polygraph, a defendant's refusal to take a polygraph may unduly prejudice a defendant by suggesting the defendant's guilt and bearing on his right to remain silent.[59] Nevertheless, the court concluded that the defendant was not entitled to reversal because the officer's testimony concerning the polygraph refusal did not substantially affect the defendant's rights.[60] Specifically, the court noted that officer's testimony was brief, that the defendant himself testified that he requested a polygraph but was not given one, and that the defendant had confessed to the crime.[61] In these circumstances, the court concluded that the officer's testimony did not affect the outcome of the defendant's trial, and thus did not warrant reversal of his conviction.[62]

The court of appeals also considered the rules of relevance and undue prejudice in *Taylor v. Mobley*,[63] a case brought under the Michigan dog-bite statute[64] for injuries sustained when the defendant's pit bull bit the plaintiff.[65] The jury ruled in the plaintiff's favor, but declined to award noneconomic damages for pain and suffering.[66] On appeal, the plaintiff argued that the trial court had erred in excluding, under MRE 403, evidence that the dog that bit her was a pit bull.[67] The court of appeals disagreed, concluding that the trial court had not abused its discretion in prohibiting evidence relating to the type of dog that

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56. *Id.* at 183, 744 N.W.2d at 196 (citing People v. Jones, 468 Mich. 345, 355, 662 N.W.2d 376, 382 (2003)).

57. *See id.*

58. *See id.* at 183 n.1, 744 N.W.2d at 196 n.1.

59. *See id.*

60. *See Kahley*, 277 Mich. App. at 184, 744 N.W.2d at 196.

61. *See id.*

62. *Id.*

63. 279 Mich. App. 309, 760 N.W.2d 234 (2008). *Taylor* was decided two days after the close of the *Survey* period.

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

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

MICH. COMP. LAWS ANN. § 284.351(1).

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

66. *Id.*

67. *Id.*

attacked her.[68] The court noted that trial court's ruling that "while the size of the dog is relevant, the fact that the dog is a pit bull is irrelevant to the issue of damages."[69] The court also noted the trial court's concern that, given the reputation of pit bulls, evidence that the dog in question was a pit bull could be given undue weight by the jury and cause the jury to confuse the issues of liability and damages.[70] The court of appeals explained that the plaintiff's interest in presenting evidence of her noneconomic damages was accommodated by the trial court's ruling allowing her to describe both the size of the dog and the nature of the attack.[71] Viewing the evidentiary issue as a close question, "and precisely because this is a close question,"[72] the court of appeals concluded that the trial court did not abuse its discretion in prohibiting evidence that the dog that bit the plaintiff was a pit bull.[73]

Judge Gleicher dissented from the court's decision.[74] In her view, the trial court had failed to properly apply MRE 403's requirement that the prejudicial nature of the evidence *substantially* outweigh the probative value of the evidence.[75] Judge Gleicher reasoned that because the plaintiff "was attacked by a pit bull, not a toy poodle,"[76] evidence that the dog was a pit bull "had strong probative value in substantiating plaintiff's fear and shock during the attack, and the risk of any undue prejudice was minimal."[77] Therefore, in her view, the risk of unfair prejudice did not substantially outweigh the probative value of the evidence that the dog was a pit bull, and the trial court erred in excluding the evidence under MRE 403.[78]

In *People v. Yost*,[79] the Michigan Court of Appeals considered a number of evidentiary claims. In *Yost*, the defendant was convicted of

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68. *Id.*

69. *See id.* at 315-16, 760 N.W.2d at 239.

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

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

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

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

77. *Taylor*, 279 Mich. App. at 322-23, 760 N.W.2d at 242.

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

79. 278 Mich. App. 341, 749 N.W.2d 753 (2008) (per curiam). In addition to the relevance issue discussed here, the court also considered issues relating to other acts evidence, expert witnesses, lay opinion testimony, hearsay, and the Confrontation Clause. These aspects of the case are discussed *infra* notes 138-169 and accompanying text (other acts evidence); *infra* notes 350-386 and accompanying text (expert testimony); *infra* note 457 (lay opinion testimony); *infra* notes 506-518 and accompanying text (hearsay); and *infra* notes 589-606 and accompanying text (confrontation).

first degree felony murder arising from the death of her seven-year-old daughter on October 10, 1999.[80] The evidence at trial showed that the daughter left home without permission on that day, and when she returned the defendant told her to take a nap.[81] When the defendant later tried to wake her daughter, she was not responsive.[82] The defendant's neighbors came over to visit, and shortly thereafter the defendant's daughter had a seizure and stopped breathing.[83] The neighbor tried to resuscitate the daughter, and an ambulance was summoned.[84] The defendant's daughter was transported to the hospital, but she was pronounced dead upon arrival.[85] The coroner was unable to determine a cause of death from the autopsy, but a blood test revealed that the defendant's daughter had Imipramine in her system.[86] Although the drug had been prescribed to the defendant's daughter, the coroner concluded from the level found in her blood that she died from Imipramine poisoning.[87] More specifically, the coroner concluded that it would have taken more than ninety pills to account for the level of Imipramine in the daughter's blood, and that the absence of any pill residue in the daughter's stomach suggested that the pills had been dissolved in a liquid prior to being ingested.[88] From these facts, the coroner concluded that the daughter's death was a homicide.[89]

At trial, "[t]he prosecution centered its case on the unlikelihood that [the daughter] would deliberately or accidentally take such a large overdose of Imipramine along with evidence that defendant had both a motive and the opportunity to cause [the daughter] to ingest the Imipramine."[90] For her part, the defendant presented, or attempted to present, evidence that: her daughter had a heart defect which caused her death; the level of Imipramine in her daughter's blood was not sufficient to be lethal; and her daughter suffered from depression and may have

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80. *Id.* at 343-44, 749 N.W.2d at 761.

81. *See id.*

82. *See id.*

83. *See id.* at 745, 749 N.W.2d at 761.

84. *See id.*

85. *See Yost*, 278 Mich. App. at 344-45, 749 N.W.2d at 761.

86. *See id.* at 345, 749 N.W.2d at 761. Imipramine is an antidepressant medication used primarily to treat depression and childhood bed wetting. It is also used to treat attention deficit disorder and disorders involving chronic pain. *See* MedicineNet.com, Imipramine, *available at* http://www.medicinenet.com/imipramine/article.htm (last visited Apr. 23, 2009).

87. *See Yost*, 278 Mich. App. at 345, 749 N.W.2d at 761-62.

88. *See id.* at 345, 749 N.W.2d at 762.

89. *See id.* at 345, 749 N.W.2d at 761-62.

90. *Id.* at 345-46, 749 N.W.2d at 762.

ingested the Imipramine herself, either deliberately or accidentally.[91] The jury found the defendant not guilty of first degree premeditated murder, but did find her guilty of second degree murder and first degree felony murder based on an underlying felony of first degree child abuse.[92] The defendant appealed challenging, inter alia, a number of the trial court's evidentiary rulings.[93]

Relevant to this part, the defendant argued that the trial court had erred in precluding her from presenting testimony of her limited intellectual functioning.[94] At trial, the defendant attempted to present the testimony of an expert, Dr. Siroza VanHorn, concerning her intellectual, problem-solving, and parenting abilities, as well as the testimony of her other daughter, Roxanne Davis, concerning her intellectual abilities and functioning in the family.[95] During the prosecutor's case, a number of witnesses testified that the defendant had exhibited odd reactions during the events leading to and following her daughter's death, and the prosecutor used this evidence to show the defendant's motive and consciousness of guilt.[96] To combat this evidence, the defendant sought to introduce the evidence of her limited intellectual abilities to show that she was confused and could be easily manipulated.[97] In response to the prosecutor's argument that the defendant was attempting to put forth evidence of diminished capacity, defense counsel argued that the evidence was relevant to help the jury understand the context of the defendant's actions and statements.[98] The trial court ruled that the witnesses could testify, but that the defendant could not offer a diminished capacity defense or argue that her statements to the police were involuntary.[99]

Defense counsel then called Roxanne Davis, and attempted to elicit from her testimony concerning the defendant's ability to communicate and plan.[100] Ruling on the prosecutor's objection, the trial court prevented the defendant from presenting evidence that she did not have the intellectual ability to carry out the murder, or any evidence regarding her lack of communication skills, because these issues went to the

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91. *Id.* at 346, 749 N.W.2d at 762.

92. *See id.*

93. *See Yost,* 278 Mich. App at 346-53, 749 N.W.2d at 762-65.

94. *See id.* at 346, 749 N.W.2d at 762.

95. *See id.*

96. *See id.* at 347, 749 N.W.2d at 762. A full description of the prosecutor's evidence is not necessary here, but can be found at *id.* at 347-49, 749 N.W.2d at 762-63.

97. *Id.* at 349, 749 N.W.2d at 763-64.

98. *See id.* at 349-50, 749 N.W.2d at 764.

99. *See Yost,* 278 Mich. App. at 350-51, 749 N.W.2d at 764.

100. *See id.* at 351, 749 N.W.2d at 764.

diminished capacity issue, which is not a defense.[101] Defense counsel then called VanHorn to create a separate record regarding VanHorn's proposed testimony.[102] The prosecutor objected to her testimony on hearsay grounds, and the trial court sustained the objection.[103]

On appeal, the prosecutor argued that the trial court's rulings regarding the evidence of the defendant's intellectual abilities were correct because the evidence was an attempt by the defendant to improperly present a diminished capacity defense.[104] As explained by the court of appeals, in *People v. Carpenter*,[105] the Michigan Supreme Court held that in light of the comprehensive statutory scheme governing the insanity defense, the diminished capacity defense was no longer viable under Michigan law.[106] Thus, the question for the *Yost* court was "whether, and to what extent, evidence tending to demonstrate that a defendant has limited intellectual functioning may still be admitted at trial after the abolition of the diminished capacity defense."[107] Turning to that question, the court explained that in light of the nature of the now-abolished diminished capacity defense, the *Carpenter* rule prohibits a defendant from offering "evidence of a lack of mental capacity for the purpose of avoiding or reducing criminal responsibility by negating the intent element of an offense."[108] The court went on to hold, however, that this rule "does not mean that a defendant who is legally sane can never present evidence that he or she is afflicted with a mental disorder or otherwise has limited mental capabilities."[109]

In reaching this conclusion, the court began by noting the general principle that, under MRE 402, relevant evidence is generally admissible.[110] Under *Carpenter*, evidence of a mental condition offered to negate specific intent is not relevant, and thus should be excluded under MRE 402.[111] However, the court explained, evidence inadmissible for one purpose may nevertheless be admissible for another, proper purpose.[112] Thus, although evidence of diminished capacity is not

101. *See id.*
102. *Id.* at 352, 749 N.W.2d at 765.
103. *See id.* at 351-53, 749 N.W.2d at 765.
104. *See id.* at 353, 749 N.W.2d at 766.
105. 464 Mich. 223, 627 N.W.2d 276 (2001).
106. *See Yost*, 278 Mich. App. at 354, 749 N.W.2d at 766 (discussing *Carpenter*, 464 Mich. at 241, 627 N.W.2d at 285).
107. *Id.* at 353, 749 N.W.2d at 766.
108. *Id.* at 354-55, 749 N.W.2d at 766.
109. *Id.* at 355, 749 N.W.2d at 766.
110. *See id.*
111. *See id.*
112. *See Yost*, 278 Mich. App. at 355, 749 N.W.2d at 767.

admissible to show lack of specific intent, a defendant may "present evidence of her limited intellectual capabilities if offered for a relevant purpose other than to negate the specific intent element of the charged offense."[113] Noting the broad definition of "relevant evidence" under MRE 401, the court explained that, notwithstanding the abolition of the diminished capacity defense, "there are circumstances where a defendant's mental capacity may make a fact that is of consequence to the determination of the action more or less probable without such evidence being offered to negate the specific-intent element of the charged offense."[114] For example, the court explained, because identity is an essential element of any offense, "where identity is in dispute, a defendant may properly present evidence concerning his or her mental capacity that tends to make it less probable that the defendant has been accurately identified as the perpetrator of the crime."[115] Thus, for instance, if the crime was such that it could only have been perpetrated by someone of high intelligence, evidence that the defendant had low intelligence would make it less probable that she committed the crime and would thus be relevant under MRE 401, without being offered to negate the specific intent element of the crime.[116]

Turning to the specific evidence at issue, the court explained that there was no direct evidence that connected the victim's Imipramine overdose to the defendant.[117] Rather, the prosecutor's case was based solely on the defendant's motive and opportunity, coupled with her behavior and statements following the victim's death.[118] "As a result, one of the key questions at trial was whether [the victim] ingested the Imipramine on her own, resulting in either a deliberate or accidental overdose, or whether defendant caused [the victim] to ingest the Imipramine."[119] Because of this, the defense evidence that defendant's intellectual abilities made her easily manipulated was relevant to show that her statements and actions were not evidence of consciousness of guilt, a proper purpose unrelated to whether, if she committed the crime, she was able to form the specific intent to kill.[120] Considering the testimony offered by the defendant's daughter, Roxanne Davis, the court concluded that the trial court was correct to prohibit her from testifying as to whether the defendant was intelligent enough to have carried out

113. *Id.*
114. *Id.* at 355-56, 749 N.W.2d at 767.
115. *Id.* at 356, 749 N.W.2d at 767.
116. *See id.*
117. *See id.*
118. *See Yost*, 278 Mich. App. at 356-57, 749 N.W.2d at 767.
119. *See id.*
120. *See id.*, 749 N.W.2d at 768.

the crime because this testimony "implicated whether defendant was mentally capable of premeditation,"[121] and any proper probative value it may have had was substantially outweighed by the danger of unfair prejudice.[122] However, the trial court did err in prohibiting the victim's daughter from testifying regarding the defendant's communication and social skills, because this evidence went to explain the defendant's behavior, rather than her intent.[123] Likewise, the defendant's expert should have been permitted to testify about the defendant's "limited intellectual abilities for the purpose of explaining how the limitations might explain the previously admitted evidence concerning defendant's behaviors and statements."[124] Because the prosecutor's case rested in significant part on the defendant's statements and reactions to the events, the erroneous exclusion of this evidence was not harmless, and the defendant was entitled to a new trial.[125]

The court of appeals's general conclusion that evidence of mental abilities may be admissible notwithstanding the abolition of the diminished capacity defense was certainly correct. As the Michigan Supreme Court explained in *Carpenter*, the theory behind the diminished capacity defense "'is that if because of mental disease or defect a defendant cannot form the specific state of mind required as an essential element of a crime, he may be convicted only of a lower grade of the offense not requiring that particular mental element.'"[126] By abolishing the diminished capacity defense, therefore, the *Carpenter* court made irrelevant any testimony of a defendant's mental condition which would make her unable to form the intent required for a specific intent crime. However, as the court of appeals correctly observed, it is well established that "evidence that is admissible for one purpose does not become inadmissible because its use for a different purpose would be precluded."[127] Thus, evidence of a defendant's mental condition should be admissible when offered for a relevant purpose other than inability to form the specific intent of the crime charged.[128]

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121. *Id.* at 359, 749 N.W.2d at 769.

122. *See id.*

123. *See id.*

124. *See Yost*, 278 Mich. App. at 365, 749 N.W.2d at 771-72.

125. *See id.* at 365-66, 749 N.W.2d at 772.

126. *Carpenter*, 464 Mich. at 232, 627 N.W.2d at 280 (quoting Chestnut v. State, 538 So. 2d 820, 822 (Fla. 1989)).

127. People v. VanderVliet, 444 Mich. 52, 73, 508 N.W.2d 114, 126 (1993); *see also* People v. Sabin, 463 Mich. 43, 56, 614 N.W.2d 888, 896 (2000).

128. For example, the Ohio Supreme Court held that the Ohio insanity statutes abolished the diminished capacity defense in State v. Wilcox, 436 N.E.2d 523 (Ohio 1982), and the *Carpenter* court relied on *Wilcox* in reaching the same conclusion under

B. Other Acts Evidence

1. Other Acts Evidence Under Rule 404(b)

After MRE 403, the second significant rule of limited admissibility is reflected in MRE 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 other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.[129]

Unlike the other rules of limited admissibility, however, MRE 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']."[130] It is also thought unfair to make a party refute charges long since grown stale.[131]

The Michigan Supreme Court has established a four-part test for determining the admissibility of other acts evidence.[132] 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

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Michigan law. *See Carpenter*, 464 Mich. at 237, 239, 627 N.W.2d at 283, 284. Notwithstanding *Wilcox*, the Ohio courts have permitted evidence of defendant's mental condition where relevant to an issue other than ability to form the specific intent of the crime charged. *See, e.g.*, State v. Daws, 662 N.E.2d 805, 817 (Ohio Ct. App. 1994) (evidence of mental condition admissible to show defendant's apprehension of harm to establish self-defense, notwithstanding rule prohibiting such evidence to show lack of specific intent).

129. 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).

130. 1A WIGMORE, *supra* note 2, § 58.2, at 1212 (Peter Tillers rev. ed. 1983); *see also*, Michelson v. United States, 335 U.S. 469, 475-76 (1948).

131. *See* People v. Zackowitz, 172 N.E. 466, 468-69 (N.Y. 1930) (Cardozo, J.); 1A WIGMORE, *supra* note 2, § 58.2, at 1212-13.

132. *See VanderVliet*, 444 Mich. at 74-75, 508 N.W.2d at 126.

crime, i.e., it must be admitted for one of the permissible purposes listed in MRE 404(b)(1); (2) the evidence must be relevant under MRE 401; (3) the danger of unfair prejudice must not substantially outweigh the probative value of the evidence under MRE 403; and (4) the trial court must give a limiting instruction upon the request of the party against whom the evidence is offered.[133] Although developed in the context of a criminal case, the *VanderVliet* test applies equally to other acts evidence offered in civil trials.[134]

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."[135] 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.[136] Under this view, MRE 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 MRE 404(b). In other words, "the first sentence of Rule 404(b) bars not evidence as such, but a theory of admissibility."[137] During the *Survey* period, the Michigan Court of Appeals issued three published decisions involving Rule 404(b) evidence.

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133. *See id.* This test is similar to the test employed by federal courts under Federal Rule of Evidence 404(b). *See* United States v. Trujillo, 376 F.3d 593, 605 (6th Cir. 2004).

134. *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).

135. 22 WRIGHT & GRAHAM, *supra* note 49, § 5232, at 429-31 (footnotes omitted).

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

137. United States v. Crowder, 141 F.3d 1202, 1206 (D.C. Cir. 1998); *see also*, 1A WIGMORE, *supra* note 2, § 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 MRE 404(b), *see* 22 WRIGHT & GRAHAM, *supra* note 49, § 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).

In *People v. Yost*,[138] discussed above, the defendant was convicted of first degree felony murder in connection with the death of her daughter from an overdose of the antidepressant Imipramine.[139] Amongst numerous other claims on appeal, the defendant claimed that the trial court had erred in permitting introduction of other acts evidence.[140] Specifically, prior to trial the prosecution gave notice to the defendant that it intended to introduce evidence of: the defendant's involvement with child protective services, including allegations of physical abuse; prior drug overdoses by the defendant's children; and the defendant's prior knowledge of allegations of sexual abuse by the victim against her son, the victim's brother.[141] The prosecutor argued that the defendant's motive was to stop the victim from talking to the prosecutor about the allegations of sexual abuse which was scheduled for the day after her death, and that the other acts evidence concerning the abuse and the victim's allegations was relevant to show this motive and the defendant's intent.[142] The prosecutor also argued that the evidence of the prior overdoses was relevant to show that the defendant had lied to the police and to show lack of mistake.[143] The trial court ruled that all of the other acts evidence was being offered for a proper purpose under MRE 404(b), and that the evidence was relevant for those purposes.[144] The Michigan Court of Appeals concluded that the admission of the evidence of prior physical abuse was improper, but that the other prior acts evidence was properly admitted.[145]

Turning first to the evidence of prior physical abuse, the court of appeals concluded that the trial court had erred in finding the evidence relevant for the proper purposes of showing absence of mistake, intent, and common scheme or plan.[146] With respect to mistake, the court noted that "defendant did not argue that she accidentally gave Imipramine to [the victim] or that she mistakenly gave a greater dosage of Imipramine

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138. 278 Mich. App. 341, 749 N.W.2d 753 (2008). In addition to the other acts issue discussed here, the court also considered issues relating to relevance, expert witnesses, lay opinion testimony, hearsay, and the Confrontation Clause. These aspects of the case are discussed *supra* notes 79-125 and accompanying text (relevance); *infra* notes 350-386 and accompanying text (expert testimony); *infra* note 457 (lay opinion testimony); *infra* notes 506-518 and accompanying text (hearsay); and *infra* notes 589-606 and accompanying text (confrontation).

139. For a full discussion of the factual background of the case, *see supra* notes 79-89.

140. *See Yost*, 278 Mich. App. at 396, 749 N.W.2d at 787.

141. *See id.* at 397-98, 749 N.W.2d at 787-88.

142. *See id.* at 398-99, 749 N.W.2d at 788.

143. *See id.* at 399, 749 N.W.2d at 788-89.

144. *See id.* at 399-401, 749 N.W.2d at 789-90.

145. *See id.* at 412-13, 749 N.W.2d at 795-96.

146. *See Yost*, 278 Mich. App. at 403-06, 749 N.W.2d at 791-92.

than she intended."[147] Rather, she argued that did not give the victim the medication at all.[148] Thus, mistake and accident were not relevant issues at the trial, and prior acts evidence going to mistake and accident was likewise not relevant. With respect to intent, the court reasoned that although malice and intent were relevant issues, the prior allegations of abuse were not probative of these issues.[149] The court explained that the allegations of abuse involved non-severe physical contact, which did not involve the defendant's medicating her children or demonstrate an intent to kill.[150] Further, the prior instances of abuse occurred significantly before the victim's death.[151] Because the instances of prior abuse were so dissimilar to the charged crime, and were remote in time, they were not probative of the defendant's intent.[152] With respect to common scheme, the court reasoned that the prior instances of abuse were so dissimilar from the charged conduct that "it cannot be persuasively argued that the alleged physical abuse demonstrated a common scheme, plan, or system employed by defendant to 'control her children.'"[153]

The court of appeals concluded that the trial court did not err in determining that the evidence of the prior physical abuse was relevant to the proper purpose of showing the defendant's motive.[154] The court noted that the prosecution's theory at trial was that the defendant killed the victim because of her aggravation at the victim's reports of abuse to child protective services personnel.[155] The court reasoned that the defendant's statements to the police concerning the victim's reports, coupled with the history of the defendant's involvement with child protective services provided "strong evidence of defendant's motive."[156] Nevertheless, turning to the MRE 403 balancing required by the *VanderVliet* test, the court of appeals concluded that the trial court had erred in permitting this evidence.[157] Noting the lack of direct evidence of the defendant's guilt, the court reasoned that although the evidence of prior physical abuse was relevant to motive, "it was also powerful evidence that defendant was a poor mother who repeatedly neglected and abused her children. As a result, there was a significant possibility that

147. *Id.* at 403-04, 749 N.W.2d at 791.
148. *Id.* 404, 749 N.W.2d at 791.
149. *See id.*
150. *See id.* at 404, 749 N.W.2d at 791.
151. *Id.* at 404-05, 749 N.W.2d at 791.
152. *See Yost*, 278 Mich. App. at 404-05, 749 N.W.2d at 791-92.
153. *Id.* at 405, 749 N.W.2d at 792.
154. *See id.* at 405, 749 N.W.2d at 792.
155. *See id.*
156. *Id.* at 406, 749 N.W.2d at 793.
157. *See id.* at 407, 749 N.W.2d at 793.

the jury might inappropriately use this evidence to conclude that defendant acted in conformity with her abusive character and poisoned [the victim]."[158] Further, the court reasoned, the probative value of the evidence of prior abuse was slight, and the prosecution had other means for establishing motive.[159] "Given the limited necessity of the evidence to prove motive and the high probability that the jury improperly used the testimony," the court concluded that the prejudicial effect substantially outweighed the probative value of the evidence, and that the trial court therefore erred in admitting under MRE 404(b).[160]

With respect to the prior acts evidence of prior drug overdoses involving the defendant's children, the court of appeals concluded that the evidence was properly admitted under MRE 404(b).[161] The court reasoned that this evidence was used to show that the defendant was aware of the dangers of leaving medications accessible to her children.[162] "Because the prosecutor argued that, at the very least, defendant was grossly negligent in leaving the Imipramine where [the victim] could get it," the court explained, "defendant's experience with her children's prior involvement with accidental overdoses was relevant."[163] Further, the evidence was relevant to show the defendant's consciousness of guilt, because she had lied to the police about her knowledge of these prior overdoses.[164] Although the jury might have considered this evidence for an improper purpose, this risk was slight in relation to the probative value of the evidence. Thus, the evidence was properly admitted under MRE 404(b).[165]

Finally, the court of appeals likewise concluded that the trial court did not err in admitting evidence of prior sexual abuse of the victim.[166] The court explained that the evidence showed that the defendant had been informed that she could lose her children if she permitted sexual abuse in her home, and that she risked losing public assistance if the children were removed.[167] "Hence, the evidence was relevant for a purpose other than a character-to-conduct theory, i.e., to prove that defendant had a motive to kill or hurt [the victim] in order to avoid the

158. *Yost*, 278 Mich. App. at 408, 749 N.W.2d at 793.
159. *See id.*
160. *Id.*
161. *See id.*
162. *Id.*
163. *Id.* at 410, 749 N.W.2d at 794.
164. *See Yost*, 278 Mich. App. at 410, 749 N.W.2d at 794.
165. *See id.*
166. *See id.* at 411-12, 749 N.W.2d at 795.
167. *See id.*

problems associated with the investigation of new allegations."[168] Further, the risk of unfair prejudice was slight, because the evidence did not suggest that the defendant herself had been involved in the prior sexual abuse, and the defendant was able to present evidence that she responded appropriately to the allegations and cooperated with the investigations into those allegations.[169] Thus, the evidence was properly admitted under MRE 404(b).

The court of appeals also considered other acts evidence in *People v. Kahley*.[170] In *Kahley*, the defendant was convicted of first-degree criminal sexual conduct.[171] On appeal, the defendant claimed that the trial court erred in admitting evidence that he sexually abused his girlfriend's son.[172] The court of appeals disagreed. Applying the *VanderVliet* test, the court first found that the evidence was admitted for the proper purpose of establishing a common scheme or plan.[173] The court explained that both the charged and uncharged acts of sexual assault involved four-year old boys who were under the defendant's care at the same time, and that the charged acts were essentially the same as the alleged abuse of the uncharged act.[174] Further, the court concluded that the evidence was relevant to whether the charged sexual abuse occurred, because it showed the defendant's actions in accordance with a common plan.[175] Finally, the court concluded that in light of the highly probative nature of the evidence, the danger of unfair prejudice did not substantially outweigh the probative value of the evidence.[176] The court's decision was consistent with prior Michigan cases involving other acts evidence in sexual assault cases.[177]

Finally, in *People v. Pattison*,[178] the defendant was charged with first-degree criminal sexual conduct arising from allegations that he had

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168. Id. at 411, 749 N.W.2d at 795.

169. *See id.* at 411-12, 749 N.W.2d at 795.

170. 277 Mich. App. 182, 744 N.W.2d 194 (2007), *appeal denied*, 481 Mich. 882, 748 N.W.2d 880 (2008). *Kahley* also involved an issue of relevance. This aspect of the case is discussed *supra* notes 50-62 and accompanying text.

171. *See id.* at 183, 744 N.W.2d at 196.

172. *See id.* at 184, 744 N.W.2d at 196.

173. *See id.*

174. *See id.* at 185, 744 N.W.2d at 197.

175. *See id.*

176. *See Kahley*, 277 Mich. App. at 185, 755 N.W.2d at 197.

177. *See, e.g.*, People v. Dobek, 274 Mich. App. 58, 89-91, 732 N.W.2d 546, 568-69 (2007).

178. 276 Mich. App. 613, 741 N.W.2d 558 (2007). *Pattison* also considered issues relating to the statutes governing evidence of prior sexual assault and prior domestic abuse. These aspects of the case are discussed *infra* notes 191-207 and accompanying text.

sexually abused his daughter over a two year period when she was thirteen or fourteen years old, as well as with pandering for his role in her subsequent prostitution activities.[179] The defendant appealed several pretrial evidentiary rulings of the trial court. With respect to MRE 404(b), the defendant challenged that trial court's ruling that would have permitted the prosecutor to introduce evidence of the defendant's history of unwanted sexual contact with a coworker to show defendant's actions in conformity with a common scheme or plan.[180] The court concluded that this evidence was not admissible under MRE 404(b).[181]

Comparing the evidence of the alleged crime and the evidence of the unwanted sexual advances toward the defendant's coworker, the court of appeals concluded that the evidence was too dissimilar to show a common scheme or plan.[182] The court explained that the evidence relating to the coworker involved defendant ambushing the coworker, an adult, and kissing her on the neck.[183] The allegations charged against the defendant, on the contrary, involved his minor daughter, repeated acts of penetration, and was accomplished through manipulation and his abuse of his parental authority.[184] In light of the fact that "the workplace acts and their contextual circumstances are not remotely similar to the charged conduct," the court concluded that those acts did "not support any inference that defendant's charged conduct was part of a common plan."[185] The court also rejected the prosecutor's argument that the evidence was relevant to the victim's credibility.[186] The court noted that the Michigan Supreme Court has rejected this argument, and concluded that "'evidence of sexual acts between the defendant and persons other than the complainant is not relevant to bolster the complainant's credibility because the acts are not part of the principal transaction.'"[187] Accordingly, the court concluded that the evidence was not admissible in the prosecutor's case-in-chief under MRE 404(b).[188]

179. *See id.* at 615, 741 N.W.2d at 559-60.
180. *See id.* at 616, 741 N.W.2d at 560.
181. *See id.* at 616-18, 741 N.W.2d at 560-61.
182. *See id.*
183. *See id.*
184. *See Pattison*, 276 Mich. App. at 617, 741 N.W.2d at 560-61.
185. *Id.* at 617, 741 N.W.2d at 561.
186. *See id.*
187. *Id.* (quoting *Sabin*, 463 Mich. at 70, 614 N.W.2d at 902).
188. *See id.* at 618, 741 N.W.2d at 561.

2. Prior Domestic Abuse and Sexual Assault Evidence Statutes

Notwithstanding MRE 404(b), two statutory provisions provide for admissibility of other acts evidence in certain circumstances. First, the prior sexual assault evidence statute provides, in relevant part, that "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant."[189] Similarly, the prior domestic abuse statute provides, in relevant part, that:

> in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403.[190]

The Michigan Court of Appeals considered both the validity and operation of these statutes in four cases during the *Survey* period.

In *People v. Pattison*,[191] the court considered both statutes. In that case, the defendant was charged with first-degree criminal sexual conduct arising from allegations that he had sexually abused his daughter over a two year period when she was thirteen or fourteen years old, as well as with pandering for his role in her subsequent prostitution activities.[192] The defendant appealed several pretrial evidentiary rulings of the trial court, including issues under both statutes.[193]

First, defendant challenged the trial court's ruling permitting the prosecutor to introduce evidence of defendant's alleged sexual assaults against his former fiancée under MRE 404(b). The court of appeals

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

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

191. 276 Mich. App. 613, 741 N.W.2d 558 (2007). *Pattison* also involved an other acts issue under MRE 404(b). This aspect of the case is discussed *supra* notes 128-140 and accompanying text.

192. *See Pattison*, 276 Mich. App. at 615, 741 N.W.2d at 559-60.

193. *See id.* at 615-21, 741 N.W.2d at 559-63.

concluded that it need not analyze the MRE 404(b) issue, however, because the evidence was independently admissible as evidence of prior domestic abuse under M.C.L. Section 768.27b.[194] The court noted that the statute "now allows trial court to admit relevant evidence of other domestic assaults to prove any issue, even character of the accused, if the evidence meets the standard of MRE 403."[195] The court reasoned that the evidence that the defendant used his control over his fiancée's money and daughter to accomplish his sexual assault of her was relevant to whether he used the same conduct to abuse his daughter, and that the evidence was more probative than prejudicial.[196] Thus, the court concluded that this evidence was admissible under M.C.L. Section 768.27b.[197]

More significantly, the court also rejected the defendant's argument that the trial court erred in permitting evidence of his alleged sexual abuse of four other minors under M.C.L. Section 768.27a.[198] The defendant raised three challenges to the admission of the prior sexual abuse evidence under the statute.[199] First, he argued that application of the statute violated the Ex Post Facto Clause of the Michigan constitution because the alleged abuse occurred before enactment of the statute.[200] In *Calder v. Bull*,[201] Justice Chase set forth a four category definition of ex post facto laws, the fourth of which defines as an ex post facto law "[e]very law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender."[202] The court of appeals found that M.C.L. Section 768.27a did not constitute an ex post facto law under this definition.[203] The court reasoned that although the statute may allow introduction of evidence that previously would have been inadmissible under MRE 404(b), "the altered [admissibility] standard does not lower the quantum of proof or value of the evidence needed to convict a defendant."[204] For example, the court explained, the defendant

194. *See id.* at 615-16, 741 N.W.2d at 560.

195. *Id.*, 741 N.W.2d at 560.

196. *See id.* at 615-16, 741 N.W.2d at 560.

197. *See id.* at 616, 741 N.W.2d at 560.

198. *See Pattison*, 276 Mich. App. at 618, 741 N.W.2d at 561.

199. *See id.*

200. *See* MICH. CONST. art. I, § 10 ("No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted.").

201. 3 U.S. (3 Dall.) 386 (1798).

202. *Id.* at 390. The Michigan Supreme Court has explicitly adopted Justice Chases's formulation as applicable to the ex post facto prohibition of the Michigan constitution. *See* People v. Stevenson, 416 Mich. 383, 396, 331 N.W.2d 143, 148 (1982).

203. *See Pattison,* 276 Mich. App. at 619, 741 N.W.2d at 562.

204. *Id.* at 619, 741 N.W.2d at 561-62.

could be convicted solely on the basis of the victim's testimony, regardless of any evidence admitted under the statute.[205] Thus, the statute did not alter the standard for conviction, and therefore did not violate the ex post facto prohibition.[206]

The court next rejected the defendant's argument that M.C.L. Section 768.27a violates the separation of powers because it intrudes on the Michigan Supreme Court's power to prescribe rules of procedure.[207] The Michigan Constitution provides that "[t]he Supreme Court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state."[208] Under this provision, "[i]t is beyond question that the authority to determine rules of practice and procedure rests exclusively with" the Supreme Court.[209] The court's power, however, extends only to rules of practice and procedure; the Supreme Court "is not authorized to enact court rules that establish, abrogate, or modify the substantive law."[210] In *McDougall*, the Michigan Supreme Court rejected a "mechanical" approach under which all

205. *See id.* at 619, 741 N.W.2d at 562.

206. *See id.*, 741 N.W.2d at 562. This conclusion was correct. In Carmell v. Texas, 529 U.S. 513 (2000), the Supreme Court considered a Texas rule which abolished the requirement of corroboration of a victim's testimony before a defendant could be convicted of sexual assault. *See id.* at 516. The Court held that retroactive application of this rule was an ex post facto law because it "changed the quantum of evidence necessary to sustain a conviction." *Id.* at 530. The Court noted that the rule did not simply regulate the mode by which evidence is presented to the jury, but rather the sufficiency of the prosecutor meeting the burden of proof. *See id.* at 545. The Court was careful to note, however, that ordinarily rules of evidence do not constitute an ex post facto law under the fourth *Calder* formulation. *Id.* The Court explained that such rules do not "necessarily affect, let alone subvert, the presumption of innocence. The issue of the admission of evidence is simply different from the question whether the properly admitted evidence is sufficient to convict the defendant." *Id.* at 546; *see also, id.* at 533 n.23. Here, the rule implemented by MICH. COMP. LAWS ANN. § 768.27a is a procedural rule governing the admissibility of evidence; it does not, as in *Carmell*, in any way change the prosecutor's burden of proof or the sufficiency of the evidence necessary to meet that burden. *Id.* Thus, the court of appeals was correct in finding no ex post facto problem in the application of MICH. COMP. LAWS ANN. § 768.27a. *See* Trotter v. Sec'y, Dep't of Corrections, 535 F.3d 1286, 1292-93 (11th Cir. 2008) (retroactive application of new law permitting introduction of victim impact evidence at penalty phase in capital case did not violate Ex Post Facto Clause because the new law did not alter the quantum of evidence necessary to impose death penalty); Neill v. Gibson, 278 F.3d 1044, 1051-53 (10th Cir. 2001) (same); People v. Dolph-Hostetter, 256 Mich. App. 587, 594-600, 664 N.W.2d 254, 258-61 (2003) (retroactive application of change in Michigan marital communications privilege did not constitute ex post facto law under *Carmell*).

207. *See Pattison,* 276 Mich. App. at 619, 741 N.W.2d at 562.

208. MICH. CONST. art. 6, § 5.

209. McDougall v. Schanz, 461 Mich. 15, 26, 597 N.W.2d 148, 154 (1999).

210. *Id.* at 27, 597 N.W.2d at 154.

statutes relating to evidence constitute rules of practice or procedure.[211] Rather, the court "takes into account the undeniable distinction between *procedural* rules of evidence and evidentiary rules of substantive law."[212]

Applying the *McDougall* test to M.C.L. Section 768.27a, the *Pattison* court concluded that the statutory provision did not intrude on the Supreme Court's rule making power.[213] The court explained that the provision "does not principally regulate the operation or administration of the courts,"[214] but rather constitutes a substantive police decision by the legislature to allow juries to consider a defendant's history in certain types of cases.[215] The court explained that to allow a defendant's prior history would generally shed light on whether the defendant committed the offense charged, but that the courts have made a policy choice, embodied in MRE 404(b), of keeping such information from the jury so that it will not convict a defendant based solely on his past history.[216] The court reasoned that the enactment of M.C.L. Section 768.27a "reflects a contrary policy choice, and it is no less a policy choice because it is contrary to the choice originally made by our courts."[217] Thus, as a rule of substantive policy, M.C.L. Section 768.27a does not violate the separation of powers.[218]

Finally, the court of appeals rejected the defendant's argument that the prior sexual assault evidence did not bear on any relevant issue under the language of M.C.L. Section 768.27a.[219] The court explained that, contrary to the defendant's argument, propensity evidence is not generally considered to be irrelevant to whether a defendant has committed the crime for which he is charged.[220] "On the contrary, it is because of the human instinct to focus exclusively on the relevance of such evidence that the judiciary has traditionally limited its presentation to juries."[221] Thus, evidence of a defendant's past sexual assaults bears on whether a defendant committed a similarly charged crime, and thus bears on a relevant matter under the language of M.C.L. Section 768.27a.[222]

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211. *See id.* at 29, 597 N.W.2d at 155.
212. *Id.* at 29, 597 N.W.2d at 155 (quotation omitted) (emphasis in original).
213. *See Pattison,* 276 Mich. App. at 619-20, 741 N.W.2d at 562.
214. *Id.* at 619, 741 N.W.2d at 562.
215. *See id.* at 620, 741 N.W.2d at 562.
216. *See id.*
217. *Id.*
218. *See id.*
219. *See Pattison,* 276 Mich. App. at 620-21, 741 N.W.2d at 562-63.
218. *See id.*
221. *Id.*
222. *See id.* at 620-21, 741 N.W.2d at 562-63.

In the remaining cases decided by the court of appeals during the *Survey* period, the court reaffirmed its holdings in *Pattison*. In *People v. Watkins*,[223] the defendant was charged with multiple counts of criminal sexual conduct arising from the alleged sexual assault of his twelve-year-old neighbor.[224] After the defendant's first trial ended in a mistrial, the prosecution sought to present the testimony of two witnesses, one of whom testified at the defendant's first trial that the defendant has sexually assaulted her when she was fifteen-years-old, and one of whom testified at the defendant's first trial that defendant sexually assaulted her when she was twenty-years-old.[225] The trial court granted the defendant's motion to exclude this evidence, concluding that the first witness's testimony was too dissimilar to the charged acts to establish a common scheme or plan, and that the second witness's testimony was not admissible because she was a grown woman at the time of the alleged sexual assault.[226] The court of appeals initially affirmed the trial court's order with respect to the second witness, but remanded the issue to the trial court with respect to the first witness for a determination of whether the testimony was admissible under M.C.L. Section 768.27a.[227] The Michigan Supreme Court vacated the court of appeals' initial decision, remanding for the court of appeals to consider "'whether MCL 768.27a conflicts with MRE 404(b) and, if it does, whether the statute prevails over the court rule.'"[228]

On remand, the court of appeals determined that M.C.L. Section 768.27a and MRE 404(b) do conflict and, relying on *Pattison*, that M.C.L. Section 768.27a is valid. The court explained that the prior victim's testimony was certainly relevant because it makes it more probable than not that the defendant committed the similar charged offenses.[229] Because, however, this evidence would be excluded under MRE 404(b), the rule and the statute conflicted, and it was necessary to consider whether the statute controlled over the court rule.[230] Turning to this question, the court relied on *Pattison* to conclude that the statute is valid as a substantive policy decision within the power of the legislature.[231] Accordingly, the court remanded the matter to the trial

223. 277 Mich. App. 358, 745 N.W.2d 149 (2007), *appeal granted*, 480 Mich. 1167, 747 N.W.2d 226 (2008).

224. *See id.* at 359-60, 745 N.W.2d at 150-51.

225. *See id.*

226. *See id.* at 360-62, 745 N.W.2d at151-52.

227. *See id.* at 362, 745 N.W.2d at 152.

228. *Id.* (quoting People v. Watkins, 479 Mich. 853, 734 N.W.2d 601 (2007)).

229. *See Watkins*, 27 Mich. App. at 364-65, 745 N.W.2d at 153.

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

231. *See id.*

court for a determination of which aspects of the prior victim's testimony was admissible under M.C.L. Section 768.27a.[232]

The court of appeals reached the same conclusion with respect to the prior domestic assault statute, again relying on *Pattison*, in *People v. Schultz*.[233] Noting that M.C.L. Section 768.27b is a sister statute to M.C.L. Section 768.27a and that they similarly permit evidence otherwise prohibited by MRE 404(b),[234] the court concluded that the defendant's arguments that M.C.L. Section 768.27b constitutes an ex post facto law and violates the separation of powers were without merit in light of the court's prior decision in *Pattison*.[235] Finally, in *People v. Petri*[236] the court concluded that the defendant's attorney did not render ineffective assistance at trial by failing to object to the introduction of two prior criminal sexual conduct convictions, because the evidence was admissible under M.C.L. Section 768.27a.[237]

The Michigan Supreme Court will be taking up these issues during the next *Survey* period in *Watkins*. In that case, the court has granted leave to appeal, directing the parties to specifically address five issues relating to M.C.L. Section 768.27a:

> (1) whether MCL 768.27a conflicts with MRE 404(b) and, if it does, (2) whether the statute prevails over the court rule . . . ; (3) whether the omission of any reference to MRE 403 in MCL 768.27a (as compared to MCL 768.27b(1)), while mandating that propensity evidence "is admissible for any purpose for which it is relevant," violated defendant's due process right to a fair trial; (4) whether the Court should rule that propensity evidence described in MCL 768.27a is admissible only if it is not otherwise excluded under MRE 403; and (5) whether MCL 768.27a interferes with the judicial power to ensure that a criminal defendant receives a fair trial . . . .[238]

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232. *See id.* With respect to the prior victim who was an adult at the time of the alleged prior sexual assault, the court of appeals concluded that her testimony was not admissible under MICH. COMP. LAWS ANN. § 768.27a because her testimony did "not describe a listed offense against a minor, so MCL 768.27a simply does not apply." *Id.*

233. 278 Mich. App. 776, 754 N.W.2d 925 (2008).

234. *See id.* at 778, 754 N.W.2d at 926.

235. *See id.* at 778-79, 754 N.W.2d at 926-27.

236. 279 Mich. App. 407, 760 N.W.2d 882 (2008). Petri also involved an issue of expert testimony. This aspect of the case is discussed *infra* notes 396-404 and accompanying text.

237. *See id.* at 411, 760 N.W.2d at 886.

238. *Watkins*, 480 Mich. at 1167, 747 N.W.2d at 226-27. The Michigan Court of Appeals rejected another ex post facto and separation of powers challenge to M.C.L.

C. Past Sexual History (Rape Shield Law)

Rape-shield laws represent a particular specie 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."[239] Michigan's rape-shield law provides:

> Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g [the sexual conduct offense provisions] unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) evidence of the victim's past sexual conduct with the actor;
>
> (b) evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.[240]

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.[241]

During the prior *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 evidence of prior false allegations of sexual abuse made by the victim against other

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Section 768.27a in a decision issued just after the close of the *Survey* period. *See* People v. Wilcox, 280 Mich. App. 53, 761 N.W.2d 466 (2008).

239. Michigan v. Lucas, 500 U.S. 145, 146 (1991).

240. MICH. COMP. LAWS ANN. § 750.520j(1) (West 2004). The rule established in the rape shield law is also reflected in MRE 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).

241. *See* MICH. COMP. LAWS ANN. § 750.520j(2) (West 2004).

individuals is not barred by the rape shield law.[242] The court in both cases merely asserted this proposition without any analysis.

Also during the prior *Survey* period, the Supreme Court granted leave to appeal to consider a number of issues relating to the rape-shield law. In *People v. Piscopo*,[243] the court granted leave to consider, inter alia, whether the rape shield law applies to evidence of past sexual assault, imaginary sexual activity, and prior allegations of sexual assault, as well as the proper procedures and standards to be applied on these issues by a trial court.[244] During this *Survey* period, however, the Supreme Court vacated its prior order and denied the application for leave to appeal, leaving these issues unresolved.[245] However, the court has also now granted leave to appeal in a case raising similar issues. In *People v. Parks*,[246] the Court granted leave to consider whether, and under what circumstances, the rape shield law applies to evidence of past sexual abuse of a victim, as well as whether the truth or falsity of those allegations matter for the admissibility of such evidence.[247] Thus, the next *Survey* period is likely to provide further guidance on the scope of the rape shield statute.

IV. WITNESSES

A. Oath (Rule 603)

MRE 603 provides that "[b]efore testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so."[248] Although MRE 603 is vague regarding the requirements of an oath, various provisions of the Michigan Revised Judicature Act provide further details. For instance, M.C.L. Section 600.1432(1) provides that

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242. *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).

243. 478 Mich. 860, 731 N.W.2d 409 (2007).

244. *See id.*

245. *See* People v. Piscopo, 480 Mich. 966, 741 N.W.2d 826 (2007). Justice Markman dissented from this decision. *Id.* In his view, the rape shield statute's prohibition on evidence of a victim's prior sexual "conduct" requires "some volitional element," and thus the statute did not apply to evidence that the victim had been abused by her father or imagined being raped by a demon. *See id.* at 970-71, 741 N.W.2d at 829 (Markman, J., dissenting).

246. 481 Mich. 860, 748 N.W.2d 241 (2008).

247. *See id.*, 748 N.W.2d at 242.

248. MICH. R. EVID. 603.

> [t]he usual mode of administering oaths now practice in this state, by the person who swears holding up the right hand, shall be observed in all cases in which an oath may be administered by law except as otherwise provided by law. The oath shall commence, "You do solemnly swear or affirm."[249]

Further, M.C.L. Section 600.1432(1) of the Act provides that "[e]very person conscientiously opposed to taking an oath may, instead of swearing, solemnly and sincerely affirm, under the pains and penalty of perjury."[250] The Michigan Court of Appeals considered these rules governing oaths in one case during the *Survey* period.

Donkers v. Kovach[251] involved a legal malpractice action brought by the plaintiffs against their former attorneys. During the discovery phase of the case, the defendants sought to take the deposition of plaintiff Donkers. However, she refused to raise her right hand and be sworn under oath, claiming that such would violate her religious beliefs. Plaintiff Donkers again refused to raise her hand or be sworn at a subsequent hearing in court, offering instead to affirm that she would tell the truth. The trial court then dismissed the plaintiffs' action with prejudice.[252]

On appeal, the court reversed, concluding that the plaintiff was not required to raise her right hand to adequately affirm the truthfulness of her testimony. The court began its analysis by noting that M.C.L. Section 600.1432 of the Revised Judicature Act requires that the oath be administered by the witness holding up his or her right hand, but also provides that this form of the oath is not required where "otherwise provided by law."[253] The court further noted, however, that M.C.L. Section 600.1434 provides that a witness conscientiously opposed to an oath may, instead, affirm to tell the truth. "It is therefore 'otherwise provided by law' that in lieu of swearing an oath under MCL 600.1432, a person may 'solemnly and sincerely affirm' to testify truthfully."[254] However, the court observed, it was not clear "whether a witness who elects to affirm to testify truthfully must also raise his or her right hand when doing so."[255]

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

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

251. 277 Mich. App. 366, 745 N.W.2d 154 (2007), *appeal denied*, 481 Mich. 897, 749 N.W.2d 744 (2008).

252. *See id.* at 367-68, 745 N.W.2d at 155-56.

253. *See id.* at 370, 745 N.W.2d at 157 (discussing MICH. COMP. LAWS ANN. § 600.1432(1) (West 1996)).

254. *Id.* (quoting MICH. COMP. LAWS ANN. § 600.1432(1), .1434 (West 1996)).

255. *Id.*

Turning to this question, the court of appeals noted that the two statutes govern the same subject matter and thus must be read together. The court also explained that the general rule is that when two statutes governing the same subject matter conflict, the more specific statute controls. Thus, M.C.L. Section 600.1434, which provides a specific exception to the general rule of oaths provided in M.C.L. Section 600.1432, controls whether a raising of the right hand is required.[256] Further, the court explained, M.C.L. Section 600.1434 does not require a person affirming to tell the truth to raise the right hand, while M.C.L. Section 600.1432 does include such a requirement. Because "[t]he omission of a provision in one statute that is included in another statute should be construed as intentional,"[257] the court concluded that "the act of raising one's right hand is not required to effectuate a valid affirmation under MCL 600.1434."[258] The court explained that this conclusion was also supported by MRE 603. As observed by the court, federal courts interpreting the identical federal rule have explained that MRE 603 requires no particular form, and that at least one court has held that witnesses need not raise their hands to affirm or swear in the context of the federal discovery rules.[259] The court of appeals found no reason to depart from these federal decisions in interpreting the Michigan version of Rule 603.[260] The court therefore concluded that the trial court erred in concluding that the plaintiff was required to raise her right hand before affirming to tell the truth.[261]

Judge Markey dissented. In his view, M.C.L. Section 600.1432 applies by its terms to all cases, and this includes cases in which an oath is not actually administered.[262] This conclusion is required by reading the statutes together, as suggested by the majority. In Judge Markey's view, however, reading the statutes together required a finding that raising the hand is required for an affirmation.[263] He noted that the Michigan Supreme Court has held that the mode of the oath applies in all cases, "and that the upraised right hand was an integral and required formality for a valid oath that is subject to the pains of perjury."[264] Further, Judge

256. *See id.* at 370-71, 745 N.W.2d at 157.

257. *Donkers*, 277 Mich. App. at 371, 745 N.W.2d at 157.

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

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

260. *See id.* at 373, 745 N.W.2d at 158.

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

262. See *id.* at 375-77, 745 N.W.2d at 159-61 (Markey, J., dissenting).

263. *Donkers*, 277 Mich. App. at 376, 745 N.W.2d at 160 (Markey, J., dissenting).

264. *Id.* at 376, 745 N.W.2d at 160 (discussing People v. Ramos, 430 Mich. 544, 424 N.W.2d 509 (1988)).

Markey explained, M.C.L. Section 600.1432, by its terms, applies to all cases, even when an oath is not actually administered. This is suggested by the fact that M.C.L. Section 600.1432 explicitly provides that the oath must begin "You do solemnly swear or affirm,"[265] suggesting that an affirmation is also covered by the hand-raising requirement of the statute. Judge Markey also concluded that the hand-raising requirement did not raise any constitutional problems under the First Amendment.[266] Justice Markman agreed with Judge Markey in his dissent from the Supreme Court's denial of leave to appeal.[267]

B. Sequestration (Rule 615)

MRE 615 provides that a court, either on its own motion or at the request of a party, "may order witnesses excluded so that they cannot hear the testimony of other witnesses."[268] The "purpose of Rule 615 is to prevent witnesses from tailoring their testimony to that which has already been presented and to help in detecting testimony that is less than candid."[269] In one case during the *Survey* period, the Michigan Court of Appeals considered the extent of a trial court's power to penalize a party or witness for violating a sequestration order.

In *People v. Meconi*,[270] the defendant was charged with assaulting Nikki Kleinsorge at his mother's house. At the beginning of the defendant's trial in the district court, the judge instructed all potential witnesses to leave the courtroom and to not discuss their testimony with anyone.[271] The prosecutor and the defense counsel gave their opening statements, and the prosecutor called Kleinsorge to testify.[272] It then

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

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

267. *See* Donkers v. Kovach, 481 Mich. 897, 897-99, 749 N.W.2d 744, 745-46 (2008) (Markman, J., dissenting from denial of leave to appeal).

268. MICH. R. EVID. 615. The rule excludes from its operation a party, a designated representative of a party which is not a natural person, and a person whose presence is essential. *See id.*

269. United States v. Hargrove, 929 F.2d 316, 320 (7th Cir. 1991) (citing Geders v. United States, 425 U.S. 80, 87 (1976)); *see also*, People v. Stanley, 71 Mich. App. 56, 61, 246 N.W.2d 418, 421 (1976). As Professor Wigmore noted, the rule dates to biblical times, and was used by Daniel to vindicate Susanna of adultery charges in the Apocrypha. *See* 6 WIGMORE, *supra* note 2, § 1837, at 455-56 (James H. Chadbourn rev. ed., 1976). Wigmore claims that the sequestration rule "is (next to cross-examination) one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice." *Id.* § 1838, at 463.

270. 277 Mich. App. 651, 746 N.W.2d 881 (2008).

271. *See id.*

272. *See id.*

became apparent that Kleinsorge had not left the courtroom, and had heard the opening statements.[273] She indicated that she had been told to stay in the courtroom by the crime victim's advocate.[274] The trial judge declared a mistrial, and subsequently ruled that Kleinsorge's testimony was tainted such that she could not testify at the defendant's new trial.[275] The prosecutor appealed to the circuit court, which initially ruled that the trial court's order sequestering the victim violated the victim's constitutional right to be present at the trial.[276] On reconsideration, however, the circuit court vacated its decision and denied the prosecutor's application for leave to appeal.[277] The prosecutor then appealed to the Michigan Court of Appeals, which reversed.[278]

Bypassing the constitutional question of the victim's right to be present, the court of appeals concluded that the trial court had erred in prohibiting the victim from testifying at the defendant's second trial.[279] The court began its analysis by noting that the federal courts generally impose one of three remedies for a witness' violation of a sequestration order: (1) holding the witness in contempt; (2) allowing inquiry into the violation on cross-examination of the witness; and (3) exclusion of the witness's testimony.[280] The court also explained, however, that the "courts have routinely held that exclusion of a witness's testimony is an extreme remedy that should be sparingly used."[281] Relying on three significant factors, the court of appeals concluded that the trial court had abused its discretion in imposing this severe sanction.[282] First, the court explained that it was undisputed that the victim's violation of the sequestration order was not purposeful, but was an innocent mistake; second, the court explained that the victim had not heard any testimony of other witnesses, while MRE 615 specifically focuses on precluding a witness from hearing the testimony of other witnesses; lastly, the court noted that the defendant's trial was a bench trial in which the judge would be able to take into account the victim's violation of the

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273. *See id.*

274. *See id.*

275. *See id.* at 652-53, 746 N.W.2d at 882.

276. *See Meconi,* 277 Mich. App. at 653, 746 N.W.2d at 882. Specifically, the Michigan constitution grants crime victims the right, inter alia, "to attend trial and all other court proceedings the accused has the right to attend." MICH. CONST., art. I, § 24(1).

277. *See Meconi,* 277 Mich. App. at 653, 746 N.W.2d at 882.

278. *Id.*

279. *See id.*

280. *See id.* at 654, 746 N.W.2d at 883 (citing United States v. Hobbs, 31 F.3d 918, 921 (9th Cir. 1994)).

281. *See id.* at 653, 746 N.W.2d at 882.

282. *See id.*

sequestration order in assessing her credibility.[283] "In light of these mitigating factors," the court concluded, "the trial court abused its discretion in implementing the most severe sanction."[284]

Judge Sawyer concurred, addressing the constitutional issue bypassed by the majority.[285] Based on the constitutional provision granting crime victims the right to be present at "trial and all other court proceedings the accused has the right to attend,"[286] he concluded that "a victim may not be involuntarily sequestered."[287] Judge Sawyer noted that the victim's sequestration was consistent with both MRE 615 and the Crime Victim's Rights Act.[288] Nevertheless, Judge Sawyer concluded, the rule and statute must yield to the plain text of the constitutional provision.[289] Nor was the statute saved by the provision of Article I, Section 24 of the Michigan Constitution granting the legislature the authority to "provide by law for the enforcement of this section."[290] This provision, Judge Sawyer explained, merely permits the legislature to establish laws which enforce the rights set forth in Section 24; it does not authorize the legislature to either define or restrict those rights.[291] Because the constitution grants an affirmative right to a victim to be present at all stages of the trial which is coextensive with the defendant's right to be present, the victim could not be sequestered from the opening statements.[292]

V. EXPERT, SCIENTIFIC & OPINION TESTIMONY

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

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283. *See Meconi,* 277 Mich. App. at 654-55, 746 N.W.2d at 883.

284. *Id.* at 655, 746 N.W.2d at 883.

286. *Id.*

286. MICH. CONST. art. I, § 24(1).

287. *Meconi,* 277 Mich. App. at 655, 746 N.W.2d at 883 (Sawyer, J., concurring).

288. *See id.* at 656-57, 746 N.W.2d at 884. The Crime Victim's Rights Act provides, in relevant part, that a victim has the right to be present, but that a victim who will testify may be sequestered until she first testifies. *See* MICH. COMP. LAWS ANN. § 780.761 (West 1998).

289. *See Meconi,* 277 Mich. App. at 658-59, 746 N.W.2d at 885 (Sawyer, J., concurring).

290. MICH. CONST. art. I, § 24(2).

291. *See Meconi,* 277 Mich. App. at 659-60, 746 N.W.2d at 885-86 (Sawyer, J., concurring).

292. *See id.* at 661, 746 N.W.2d at 886.

A. Expert Testimony

1. Reliability, Scope, and Bases of Expert Opinions

For most of the 20th century, the admissibility of expert and scientific testimony in courts throughout the country was governed by the standard announced in *Frye v. United States*.[293] 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."[294] The Michigan Supreme Court adopted the *Frye* standard in *People v. Davis*.[295] In 1993, however, the Supreme Court held that the adoption of Federal Rule of Evidence 702 abrogated the *Frye* rule.[296] In *Daubert*, the Court concluded that Rule 702 nevertheless sets forth a standard of both scientific reliability[297] and relevance.[298] 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."[299] Subsequent to the Court's decision, FRE 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

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

294. *Id.* at 1014.

295. 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).

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

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

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

299. *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 FRE 702. *See* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147-49 (1999).

> reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[300]

Notwithstanding the abrogation of the *Frye* standard by FRE 702 and *Daubert*, the Michigan courts continued to apply the *Frye* rule.[301] 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.[302] During a prior *Survey* period, the Michigan Supreme Court issued a decision adopting the *Daubert* analysis under Rule 702. In *Gilbert v. DaimlerChrysler Corp.*,[303] the Supreme Court clarified the standards governing expert testimony under Rule 702. The Court explained that MRE 702 does not alter the *Frye* test's requirement that a court ensure that expert testimony is reliable. Rather, MRE 702 "changes only the factors that a court may consider in determining whether expert opinion evidence is admissible."[304] The Court also explained that the *Daubert* standard "simply allows courts to consider more than just 'general acceptance' in determining whether expert testimony must be excluded."[305] The Supreme Court also admonished the trial courts to vigorously enforce this gate keeping requirement. The Court noted that MRE 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."[306] The Court further explained that MRE 702 requires that expert testimony be based on specialized knowledge. Thus, "[w]here the subject of the proffered testimony is far beyond the scope of an individual's expertise—or example, where a party offers an expert in economics to testify about biochemistry—that testimony is *inadmissible* under MRE 702."[307] 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

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

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

302. *See* MICH. R. EVID. 702.

303. 470 Mich. 749, 685 N.W.2d 391 (2004).

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

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

306. *Id.*

307. *Id.* at 789, 685 N.W.2d at 413 (emphasis in original).

inadmissible under MRE 702."[308] 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 gate keeping function and the appropriate bases and scope of an expert's testimony.

In *People v. Unger*,[309] the defendant was convicted of murdering his wife at a cottage they had rented on Lower Herring Lake.[310] The defendant and his wife were on a wooden deck on top of a boathouse on the night of the victim's death. According to the defendant, he went to check on their two children, and when he returned his wife was not on the deck.[311] He assumed that she had gone to talk to a neighbor, and he went to bed. When he awoke the next morning, he called the neighbors, Linn and Maggie Duncan, and told them that his wife had not returned to the cottage all night.[312] The Duncans helped search for the defendant's wife, and discovered her body in the lake near the boathouse.[313] Linn Duncan told the defendant that his wife was in the water, and the defendant went right to the body, even though Duncan had not told the defendant the location of the body and it was not possible to see the body from where he had met defendant.[314] When the police arrived, they noticed a bloodstain on the concrete pavement which ran from the boathouse wall to the lake.[315] They also observed that there was no trail leading from the blood stain on the concrete to the lake. The defendant was eventually tried on a charge of first-degree premeditated murder, and found guilty.[316]

On appeal, the defendant raised a number of claims, three of which focused on the trial court's handling of the parties' expert witnesses.[317] First, the defendant challenged the admission of testimony by Dr. Ljubisa Dragovic, the Oakland County Medical Examiner.[318] He testified that, in his opinion, the victim died from drowning, not from head injuries sustained upon impact with the concrete around the boathouse.[319] At the preliminary examination, the district court held that Dr. Dragovic's

308. *Id.*
309. 278 Mich. App. 210, 749 N.W.2d 272 (2008).
310. *Unger*, 278 Mich. App. at 213-16, 749 N.W.2d at 281-82.
311. *See id.*
312. *See id.*
313. *See id.*
314. *See id.*
315. *See id.*
316. *See Unger*, 278 Mich. App. at 213-16, 749 N.W.2d at 281-82.
317. *See id.* at 216-20, 749 N.W.2d at 282-85.
318. *See id.* at 216, 749 N.W.2d at 282.
319. *See id.* at 215, 749 N.W.2d at 282.

testimony was not admissible.[320] However, the circuit court held a supplemental hearing, and concluded both that Dr. Dragovic was qualified, and that his testimony was reliable.[321] The court of appeals rejected the defendant's argument that this supplemental hearing was improper, explaining that because the circuit court was the trial court for the case and because the district court had erred in finding Dr. Dragovic not qualified, it was within the circuit court's discretion to hold a new hearing concerning the admissibility of Dr. Dragovic's testimony.[322]

Turning to the admissibility of Dr. Dragovic's testimony, the court of appeals found no error in the circuit court's performance of its gatekeeping function. The court explained that there was no question that Dr. Dragovic was qualified, as he had testified numerous times as an expert in neuropathology and forensic pathology.[323] The court also noted that Dr. Dragovic's testimony was based on established methods in these fields.[324] Thus, the fact that Dr. Dragovic did not personally autopsy the victim did not render his testimony unreliable.[325] Dr. Dragovic, the court explained, based his opinion on the reports, photographs, and specimens prepared as part of the autopsy, and applied his expertise to these facts.[326] Further, the court rejected the defendant's argument that Dr. Dragovic's testimony was not rendered unreliable by Dr. Dragovic's inability to point to any specific medical literature to support his conclusions.[327] As the court explained, "[i]t is obvious that not every particular factual circumstance can be the subject of peer-reviewed writing. There are necessarily novel cases that raise unique facts and have not been previously discussed in the body of medical texts and journals."[328] Likewise, Dr. Dragovic's opinion was not unreliable simply because other experts disagreed with his opinion. Rather, this merely created a credibility contest for the jury to resolve.[329] Thus, the court correctly concluded that the circuit court had not erred in admitting Dr. Dragovic's testimony, because the circuit court "properly focused on the

320. *See id.* at 215, 749 N.W.2d at 282.
321. *See id.* at 218, 749 N.W.2d at 283.
322. *See Unger*, 278 Mich. App. at 218-19, 749 N.W.2d at 283-84.
323. *See id.* at 219, 749 N.W.2d at 284.
324. *See id.*
325. *Id.*
326. *See id.*
327. *Id.* at 220, 749 N.W. 2d at 284.
328. *Unger*, 278 Mich. App. at 220, 749 N.W.2d at 284.
329. *Id.*

scientific validity of Dr. Dragovic's method rather than on the credibility or soundness of his particular opinions."[330]

Second, and relatedly, the defendant claimed on appeal that the trial court had erred in permitting Dr. Dragovic to testify that the victim had been pushed over the deck railing on the boat house, rather than falling accidentally.[331] This testimony, the defendant argued, was beyond the scope of Dr. Dragovic's expertise.[332] The court of appeals rejected this claim. The court noted that, under MRE 702, an expert "may not opine on matters outside of his or her area of expertise,"[333] but concluded that Dr. Dragovic's testimony was within the scope of his expertise as a forensic pathologist.[334] The court explained that Dr. Dragovich testified that the duty of a medical examiner is not only to determine cause of death, but also to determine manner of death, a proposition supported by both Michigan statute and case law from other jurisdictions.[335] Concluding that "it is not beyond a forensic pathologist's area of expertise to offer testimony in the courts of this state concerning both the cause of death and the manner of death,"[336] the court found no error in the admission of Dr. Dragovic's testimony, which was based on his review of the victim's injuries and his experience in investigating homicide deaths.[337]

Finally, the defendant argued on appeal that the trial court had erred in excluding some computer animations prepared by his expert, Dr. Igor Paul.[338] Dr. Paul, a professor of biomechanical engineering, opined that the victim most likely fell from the deck, and prepared a computer simulation showing how the victim's fall could have occurred.[339] At trial,

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330. *Id.* As the Supreme Court has explained, evidentiary reliability depends upon scientific validity, not scientific reliability. *See Daubert*, 509 U.S. at 579 n.9. Although the distinction is a fine one, scientific validity refers to the procedures used to produce the end result, not the scientific reliability of the ultimate result. *See id.*

331. *Unger*, 278 Mich. App. at 251, 749 N.W.2d at 300.

332. *Id.*

333. *Id.*

334. *Id.* at 251-52, 749 N.W.2d at 300-01.

335. *See id.* (discussing MICH. COMP. LAWS ANN. § 52.202(1) (West 2006); MICH. COMP. LAWS ANN. § 52.205(3) (West 2006); Williams v. State, 937 So. 2d 35, 43 (Miss. Ct. App. 2006); Fridovich v. State, 489 So. 2d 143, 145 (Fla. Ct. App. 1986)). Specifically, the Michigan statutes provide, respectively, that "[a] county medical examiner . . . shall investigate the cause and manner of death," and that the medical examiner must "carefully reduce or cause to be reduced to writing every fact and circumstance tending to show the condition of the body and the cause and manner of death." MICH. COMP. LAWS ANN. §§ 52.202(1), .205(3) (West 2006).

336. *Unger*, 278 Mich. App. at 252, 749 N.W.2d at 301.

337. *See id.* at 252-53, 749 N.W.2d at 301.

338. *Id.* at 246, 749 N.W.2d at 298.

339. *See id.* at 227-28, 247-48, 749 N.W.2d at 288, 298-99.

the court allowed Dr. Paul to show some of the animations which were based on his engineering calculations and modeling in order to assist the jury in understanding his testimony.[340] However, the trial court prevented Dr. Paul from showing the jury computer animations which showed not only the victim falling from the boathouse deck to the concrete below, but also showed her moving into the lake due to seizures.[341] While the first set of animations were based entirely on Dr. Paul's engineering modeling, the second set of animations were based in part on his speculation that the victim could have accidentally fallen from the boathouse and then suffered seizures or convulsions which resulted in her falling into the lake.[342] The defendant claimed that this ruling was erroneous, and the court of appeals disagreed.[343]

The court began by noting that, under MRE 703, "'[t]he facts or data . . . upon which an expert bases an opinion or inference shall be in evidence.'"[344] The corollary to this rule, the court explained, is that "an expert witness may not base his or her testimony on facts that are not in evidence."[345] In other words, if "an expert's opinion is based on assumptions that are contrary to the facts in evidence, it is technically irrelevant to the actual issues at trial."[346] Applying this rule, the court explained that Dr. Paul was merely a biomechanical engineer, and had no expertise in neurology or seizures and convulsions.[347] Further, Dr. Paul's opinion regarding the seizures was purely speculation, and was contradicted by the testimony of the medical experts, who opined that the victim could not have suffered seizures or convulsions of sufficient severity to cause her body to move into the lake.[348] Thus, the court concluded that the computer animations which included the seizures were not admissible under MRE 703.[349]

The Michigan Court of Appeals also considered two expert evidence issues in *People v. Yost.*[350] In *Yost,* the defendant was convicted of first

340. *See id.* at 247-48, 749 N.W.2d at 299.
341. *Id.* at 248, 749 N.W.2d at 299.
342. *Unger*, 278 Mich. App. at 248, 749 N.W.2d at 301.
343. *Id.* at 246, 749 N.W.2d at 298.
344. *Id.* at 248 (quoting MICH. R. EVID. 703) (omission in original).
345. *Id.*
346. *Id.*
347. *See id.* at 249, 749 N.W.2d at 299.
348. *See Unger*, 278 Mich. App. at 249, 749 N.W.2d at 299.
349. *Id.*
350. 278 Mich. App. 341, 749 N.W.2d 753 (2008) (per curiam). In addition to the expert witness issues discussed here, the court also considered issues relating to relevance, other acts evidence, lay opinion testimony, hearsay, and the Confrontation Clause. These aspects of the case are discussed *supra* notes 79-125 and accompanying text (relevance); *supra* notes 138-169 and accompanying text (other acts evidence); *infra*

degree felony murder arising from the death of her seven-year-old daughter on October 10, 1999.[351] The evidence at trial showed that the daughter left home without permission on that day, and when she returned the defendant told her to take a nap.[352] When the defendant later tried to wake her daughter, she was not responsive.[353] The defendant's neighbors came over to visit, and shortly thereafter the defendant's daughter had a seizure and stopped breathing.[354] The neighbor tried to resuscitate the daughter, and an ambulance was summoned. The defendant's daughter was transported to the hospital, but she was pronounced dead upon arrival.[355] The coroner was unable to determine a cause of death from the autopsy, but a blood test revealed that the defendant's daughter had Imipramine in her system.[356] Although the drug had been proscribed to the defendant's daughter, the coroner concluded from the level found in her blood that she died from Imipramine poisoning. More specifically, the coroner concluded that it would have taken more than ninety pills to account for the level of Imipramine in the daughter's blood, and that the absence of any pill residue in the daughter's stomach suggested that the pills had been dissolved in a liquid prior to being ingested.[357] From these facts, the coroner concluded that the daughter's death was a homicide.[358]

At trial, "[t]he prosecution centered its case on the unlikelihood that [the daughter] would deliberately or accidentally take such a large overdose of Imipramine along with evidence that defendant had both a motive and the opportunity to cause [the daughter] to ingest the Imipramine."[359] For her part, the defendant presented, or attempted to present, evidence that: her daughter had a heart defect which caused her death; the level of Imipramine in her daughter's blood was not sufficient to be lethal; and her daughter suffered from depression and may have

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note 457 (lay opinion testimony); *infra* notes 506-518 and accompanying text (hearsay); and *infra* notes 589-606 and accompanying text (confrontation).

351. *Id.* at 344, 749 N.W.2d at 761.

352. *Id.*

353. *Id.*

354. *Id.* at 344-45, 749 N.W.2d at 761.

355. *See id.*

356. *See Yost,* 278 Mich. at 345, 749 N.W.2d at 761. Imipramine is an antidepressant medication used primarily to treat depression and childhood bed wetting. It is also used to treat attention deficit disorder and disorders involving chronic pain. *See* MedicineNet.com, Imipramine, *available at* http://www.medicinenet.com/imipramine/-article.htm (last visited Apr. 23, 2009).

357. *See Yost,* 278 Mich. App. at 345, 749 N.W.2d at 761-62.

358. *Id.*

359. *Id.* at 345-46, 749 N.W.2d at 762.

ingested the Imipramine herself, either deliberately or accidentally.[360] The jury found the defendant not guilty of first-degree premeditated murder, but did find her guilty of second-degree murder and first-degree felony murder based on an underlying felony of first-degree child abuse.[361] The defendant appealed challenging, inter alia, a number of the trial court's evidentiary rulings.[362]

Relevant to this part, the defendant raised two challenges to the trial court's handling of expert testimony. Prior to trial, defendant sought to present the testimony of Dr. Stephen Cohle, a pathologist.[363] At a pretrial hearing, Dr. Cohle indicated that he disagreed with the medical examiner's conclusion that the victim had died as a result of an Imipramine overdose.[364] Specifically, after consulting a standard text used by pathologists, Dr. Cohle found that the medical examiner's conclusion did not account for an increase in the blood level of Imipramine caused by postmortem redistribution, and that the amount found in the victim's blood was less than the lethal level reflected in the standard text.[365] Dr. Cohle also opined that based on the quantity of Imipramine in each pill, it would have taken only thirty-to-forty pills, rather than eighty-to-one hundred twenty pills as indicated by the prosecution's experts, to reach the level found in the victim's blood.[366] Finally, contrary to the testimony of the prosecution's experts, Dr. Cohle opined that the ratio of Imipramine to Desipramine (an antidepressant which the victim was also taking) in the victim's blood suggested that the victim had taken a chronic low dose of Imipramine, rather than ingesting it all in a short time.[367]

At the conclusion of the hearing, the trial court severely restricted Dr. Cohle's testimony. The court ruled that Dr. Cohle had relied on an outside text to determine the pharmacological properties of Imipramine, and that this text could not be admitted under any exception to the hearsay rule.[368] Because MRE 703 requires that the bases of an expert's opinion be admitted into evidence, the trial court prohibited Dr. Cohle from testifying with regard to: whether Imipramine overdose was the cause of death; the amount of pills needed to account for the level of Imipramine found in the victim's blood; and the affect of postmortem

360. *See id.* at 346, 749 N.W.2d at 762.
361. *See id.*
362. *Id.*
363. *Yost*, 278 Mich. App. at 373, 749 N.W.2d at 775.
364. *See id.* at 376, 749 N.W.2d at 777.
365. *See id.* at 376-77, 749 N.W.2d at 777.
366. *See id.* at 377, 749 N.W.2d at 777.
367. *See id.*, 749 N.W.2d at 778.
368. *See id.* at 377, 749 N.W.2d at 777.

redistribution on the levels found.[369] In a related, but separate, ruling, the trial court prohibited the defendant from calling an expert toxicologist who had not been noticed as a witness until shortly before trial.[370] On appeal, the defendant challenged this ruling with regard to the toxicologist, and the court of appeals found that the exclusion of the toxicology expert violated the defendant's constitutional right to present a defense.[371] Although the defendant did not raise any claim with respect to the court's limitations on Dr. Cohle's testimony, the court of appeals addressed the trial court's ruling, finding that the court's ruling was plain error and was likely to arise at the defendant's retrial.[372]

With respect to this issue, the court noted that Dr. Cohle testified that he was familiar with the general issues of postmortem redistribution and the formula for determining the amount of pills needed to obtain a certain concentration of drugs, but that he did not know the specific characteristics of Imipramine and had to obtain those characteristics from standard medical texts.[373] The court of appeals, quoting MRE 703,[374] explained that under the rule "an expert may not offer an opinion that is based on 'facts or data in the particular case' unless the facts or data are in evidence or will be in evidence."[375] The court ruled, however, that "the reference to facts or data 'in the *particular case*' limits the type of evidence that must be admitted into evidence to facts or data that are *particular* to that case."[376] While facts such as the victim's weight or the amount of Imipramine found in the victim's blood were facts particular to the defendant's case, and thus required to be admitted under MRE 703, the general characteristics of the drug "are all constants in every case involving Imipramine. Therefore, it was not necessary to have the data in evidence before Cohle could utilize them in rendering an opinion."[377]

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369. *See Yost*, 278 Mich. App. at 378, 749 N.W.2d at 778.

370. *Id.* at 380, 749 N.W.2d at 779.

371. *See id.* at 379-87, 749 N.W.2d at 779-82. The court's resolution of this issue addressed only the constitutional issue, and did not discuss evidentiary issues relating to expert testimony. *Id.* Thus, the court's discussion of this issue is beyond the scope of this Article.

372. *See id.* at 388, 749 N.W.2d at 783.

373. *See id.* at 389, 749 N.W.2d at 783-84.

374. Specifically, MRE 703 provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence." MICH. R. EVID. 703.

375. *Yost*, 278 Mich. App. at 390, 749 N.W.2d at 784.

376. *Id.* (emphasis in original).

377. *Id.* This conclusion is consistent with the text of Federal Rule of Evidence 703. Unlike the Michigan rule, the federal rule explicitly provides that "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences

The defendant in *Yost* also challenged the testimony of the prosecution's medical examiner regarding the likelihood that the victim committed suicide. Specifically, at trial the medical examiner, Dr. Virani, testified that based on the level of Imipramine found in the victim's blood, he concluded that the victim died as a result of a homicide.[378] Dr. Virani reached this conclusion after ruling out both accident and suicide.[379] With respect to the later, Dr. Virani opined that a seven-year-old child (the age of the victim) does not have the mental maturity to commit suicide.[380] On appeal, the defendant argued that this testimony exceeded the scope of Dr. Virani's expertise as a pathologist; the court of appeals disagreed.[381]

The court explained that the fact that Dr. Virani was not an expert in suicide did not disqualify him from rendering an opinion on the matter so long as the opinion did not stray too far from his area of expertise.[382] As did the *Unger* court, the *Yost* court found it significant that medical examiners are required by statute to investigate both the cause and manner of death, and thus "medical examiners must routinely investigate and determine whether the manner of death for a particular person was suicide."[383] Dr. Virandi's opinion was based on his experience making these determinations, and thus was within the scope of his expertise.[384] Further, the court of appeals reasoned that, although not an expert on brain development, Virandi's medical training included "a basic understanding of brain development."[385] Thus, Dr. Virani's testimony regarding the likelihood of suicide was not beyond the scope of his expertise, and "any limitations in his experience and training were properly a matter of weight rather than admissibility."[386]

The court of appeals also considered expert testimony in *Department of Environmental Quality v. Waterous Co.*,[387] a case decided shortly after

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upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted." FED. R. EVID. 703. The court of appeals also concluded that, in any event, the evidence underlying Dr. Cohle's opinion was admissible under the catch-all exception to the hearsay rule. *Yost*, 128 Mich. App. at 393-93, 749 N.W.2d at 785. This aspect of the case is discussed *infra* notes 506-518 and accompanying text.

378. *Id.* at 393-93, 749 N.W.2d at 785.

379. *Id.*

380. *Id.*

381. *Yost*, 278 Mich. App. at 393, 749 N.W.2d at 785-86.

382. *See id.* at 394, 749 N.W.2d at 786.

383. *Id.* at 395, 749 N.W.2d at 786.

384. *See id.*

385. *Id.* at 395, 749 N.W.2d at 787.

386. *Id.*

387. 279 Mich. App. 346, 760 N.W.2d 856 (2008).

the close of the *Survey* period. In that case, the Department of Environmental Quality (DEQ) brought an action seeking to hold the defendant liable for remediation of pollution caused by the defendant.[388] Among other issues on appeal, the defendant challenged the admissibility of the expert testimony presented by the DEQ regarding contamination of sediments at the site, because this testimony was based on nonbinding agency guidelines rather than on reliable scientific methods.[389] Specifically, as explained by the court of appeals, "the DEQ's expert relied on two exhibits unpromulgated quality screening guidelines and a draft memorandum in support of establishing the criteria against which the presence of certain contaminants should be measured to determine whether remediation is necessary."[390] The court of appeals found no error in the admission of this evidence.[391] Relying on the trial court's stated reasons for allowing the evidence, the court explained that there was no challenge to either the process of collecting the sediment samples or the data upon which the expert relied.[392] Further, "the point of [the] case was to show that remedial action was warranted, not to absolutely prove the extent of contamination,"[393] and thus the fact that the data relied upon by the expert amounted to only guidelines to show impact on the environment did not call into question the expert's testimony regarding the need for remediation.[394]

2. Qualifications of Experts

Of course, a question preliminary to the introduction of expert or scientific evidence, is whether the proposed witness is qualified to give such testimony. The Michigan courts issued three decisions during the *Survey* period discussing expert qualification issues.

a. Qualification under Rule 702

Generally, under Rule 702 an expert is qualified to give specialized scientific or technical testimony when he or she is qualified by her

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

389. *See id.* at 380, 760 N.W.2d at 874.

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

391. *Id.* at 382-83, 760 N.W.2d at 875.

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

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

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

"knowledge, skill, experience, training, or education."[395] The Michigan Court of Appeals addressed expert qualification in *People v. Petri*.[396] In *Petri*, the defendant was convicted of criminal sexual conduct for assaulting his neighbor, a minor girl.[397] At trial, the investigating officer, Detective Domine, testified that his decision to carry forward with his investigation was influenced in part by his belief, based on statements by the victim's mother, that the defendant may have been "grooming" the victim to facilitate the sexual assault.[398] Among other claims, the defendant argued that his attorney rendered constitutionally inadequate assistance by failing to object to this testimony on the basis that Detective Domine was not qualified to give such an expert opinion; the court rejected this claim.[399]

The court first found that the testimony was presented only to show why Detective Domine continued his investigation, and not to provide a psychological analysis of child sex abusers, and thus did not amount to expert testimony.[400] In any event, the court continued, even if this grooming testimony constituted expert testimony, Detective Domine was qualified to give the testimony under Rule 702.[401] The court noted that Detective Domine had been an officer for fifteen years, and had received specialized training in interviewing child victims.[402] Because "[a] police witness can be qualified as an expert on the basis of experience or training in child sexual abuse cases,"[403] Detective Domine was qualified to give his testimony on grooming, and thus the defendant's attorney was not constitutionally deficient for failing to object to this testimony.[404]

The court of appeals also considered expert qualification in *Surman v. Surman*,[405] a case involving a custody dispute. In proceedings

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395. MICH. R. EVID. 702.

396. 279 Mich. App. 407, 760 N.W.2d at 882. *Petri* also discussed an issue relating to evidence of prior sexual assaults. This aspect of the case is discussed *supra* notes 236-237 and accompanying text.

397. *See Petri*, 279 Mich. App. at 409, 760 N.W.2d at 884.

398. *See id.* at 415, 760 N.W.2d at 888. "Generally, in the CSC context, grooming denotes the offender's tactics and methods to make the intended victim comfortable with sexual contact." People v. Hasselbring, No. 257846, 2007 WL 1029036, *3 n.3 (Mich. Ct. App. Apr. 5, 2007); *see also Petri*, 279 Mich. App. at 416, 760 N.W.2d at 888 (describing Detective Domine's definition of the term).

399. *Petri*, 379 Mich. App. at 411, 760 N.W.2d at 885.

400. *See id.* at 416, 760 N.W.2d at 888.

401. *Id.*

402. *See id.*

403. *Id.*

404. *Id.* at 416-17, 760 N.W.2d at 888.

405. 277 Mich. App. 287, 745 N.W.2d 802 (2007) (per curiam), *appeal denied*, 480 Mich. 1138, 746 N.W.2d 70 (2008).

following the couple's divorce, the parties each sought custody of their minor children.[406] At the hearing on the custody issue, the court took the expert testimony of Kathy Palka, who was counseling the couple's son.[407] In establishing her qualifications, Palka testified that she was a psychologist with a limited license, and that she had degrees in family counseling, community counseling, and substance abuse counseling.[408] She claimed qualification in forty-four areas of expertise, and claimed to have testified in hundreds of cases.[409] She also testified that she had worked as a family counselor involving counseling of children for twenty years.[410] Based primarily on her education and years as a counselor, the trial court qualified Palka as an expert in family and child counseling.[411] On appeal, the father claimed that the trial court had erred in qualifying Palka because she had grossly overstated her qualifications, and that her true experience did not qualify her as an expert.[412] The court of appeals rejected this claim.

First, the court explained that the trial court's extensive questioning of Palka regarding her background, and specifically regarding her qualifications in family counseling, belied any claim that the trial court has failed to rigorously conduct its gate keeping function under Rule 702.[413] The court also noted that the father had failed to present any evidence that Palka had, in fact, overstated her qualifications.[414] More importantly, the court explained, "when determining whether a witness is qualified as an expert, the trial court should not weigh the proffered witness's credibility."[415] Rather, any potential weaknesses in the expert's qualifications are for the finder of fact to consider in deciding the weight to be given the expert's testimony, rather than to the admissibility of the testimony.[416] Thus, "to the extent that Joseph Surman believed that Palka was overstating or exaggerating her qualifications, cross-examination was the proper avenue to attempt to invalidate those qualifications."[417]

406. *Id.* at 289-90, 745 N.W.2d at 805.
407. *Id.* at 291-92, 745 N.W.2d at 806.
408. *Id.* at 305, 745 N.W.2d at 813.
409. *Id.*
410. *Id.* at 305-06, 745 N.W.2d at 813.
411. *See Surman,* 277 Mich. App. at 305-07, 745 N.W.2d at 813-14.
412. *See id.* at 308, 745 N.W.2d at 815.
413. *See id.* at 309, 745 N.W.2d at 815.
414. *See id.*
415. *Id.*
416. *See id.* at 309-10, 745 N.W.2d at 815.
417. *Surman*, 277 Mich. App. at 310, 745 N.W.2d at 815.

Therefore, the trial court did not err in permitting Palka to testify as an expert.[418]

b. Qualification in Medical Malpractice Cases

Although Rule 702 governs expert qualification in the general run of cases, in medical malpractice cases, special rules of qualification for experts are applicable. Specifically:

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

418. *Id.*

> (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.[419]

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.[420] The expert witness need not actually be qualified under M.C.L. 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.[421] At the trial stage, however, the expert must be qualified in accordance with M.C.L. Section 600.2169.[422] The Michigan Supreme Court considered the qualification of a medical expert in one case during the *Survey* period.

In *Bates v. Gilbert*,[423] the Michigan Supreme Court considered, in the context of an attorney's reasonable belief of qualification at the affidavit of merit stage, whether an ophthalmologist is qualified as an

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419. MICH. COMP. LAWS ANN. § 600.2169(1) (West 2000). Although the Michigan Constitution vests the Supreme Court with the exclusive power to promulgate rules of practice and procedure, *see* MICH. CONST. 1963, art. VI, § 5, the Supreme Court has determined that M.C.L. § 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).

420. *See* MICH. COMP. LAWS ANN. § 600.2912d (West 2000). Beyond the expert qualification issue, the Michigan courts issued 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.

421. *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 M.C.L. § 600.2169. *See* MICH. COMP. LAWS ANN. § 600.2912e (West 2000).

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

423. 479 Mich. 451, 736 N.W.2d 566 (2007) (per curiam).

expert under M.C.L. Section 600.2169 to give expert testimony against an optometrist.[424] In *Bates*, the plaintiff brought a medical malpractice action against the defendant, an optometrist, claiming that the defendant was negligent in failing to perform a glaucoma test upon examining her.[425] In support of her claim, plaintiff submitted an affidavit of merit executed by an ophthalmologist.[426] As relevant to this Article, the trial court ruled that the plaintiff's counsel could have reasonably believed that the ophthalmologist was a proper expert against the defendant optometrist.[427] Specifically, the trial court noted that an optometrist would not have been qualified to opine on causation, and thus counsel was left with no choice but to present the affidavit of an ophthalmologist.[428] The court of appeals, over a dissent, affirmed the trial court's determination, noting that the lack of case law applying M.C.L. Section 600.2169 to optometrists or other non-physician defendants in medical malpractice cases rendered plaintiff's reliance on an ophthalmologist reasonable.[429] On the defendant's application for leave to appeal, the Supreme Court reversed.[430]

The Court began by quoting the relevant statutes governing affidavits of merit and expert testimony, and noted that under those statutes:

> the plaintiff's counsel must reasonably believe that the expert selected by the plaintiff to address the applicable standard of practice or care in the affidavit of merit devoted a majority of his or her professional time during the year before the alleged malpractice to practicing or teaching the same health profession as the defendant health professional.[431]

Because only limited information is available to counsel when the affidavit of merit is filed, counsel is given "considerable leeway in identifying an expert affiant," but this "leeway cannot be unbounded."[432] Thus, the question before the Court was whether the plaintiff's counsel could have reasonably believed, at the time the affidavit of merit was filed, that ophthalmology and optometry constituted the "same health

424. *Id.* at 452, 736 N.W.2d at 567.
425. *Id.* at 453, 736 N.W.2d at 567.
426. *Id.*
427. *Id.* at 453-54, 736 N.W.2d at 567.
428. *See id.* at 453-54, 736 N.W.2d at 567.
429. *Grossman*, 470 Mich. at 454, 736 N.W.2d at 567-68.
430. *Id.* at 455, 736 N.W.2d at 568.
431. *Id.* at 458, 736 N.W.2d at 570.
432. *Id.*

profession" under M.C.L. Section 600.2169.[433] The Court concluded that plaintiff's counsel could not have so concluded.[434]

The Court reasoned that "[o]ptometry and ophthalmology are two differently regulated and licensed health professions that address different problems."[435] The Court explained that ophthalmologists are doctors who treat eye diseases and can perform invasive procedures, while optometrists are not physicians and merely examine the eye for defects or conditions which can be corrected by the use of artificial lenses.[436] Based on these differences, and the clear language of the statutes, the ophthalmologist's affidavit of merit was not proper.[437]

Justice Cavanagh, joined by Justice Kelly, concurred in part and dissented in part.[438] Justice Cavanagh agreed with the court's resolution of the ophthalmologist/optometrist issue, but wrote separately "to comment on the absurdity of not explaining to plaintiff how she *can* meet the requirements set forth in MCL 600.2912d(1)."[439] Specifically, in a case such as this, an optometrist would not be qualified to offer expert testimony on causation, but an ophthalmologist would not be qualified because he does not practice the same health profession under M.C.L. Section 600.2169.[440] The Court recognized this conundrum when it directed the parties to brief this issue, and in Justice Cavanagh's view the Court should have addressed that matter.[441] The Court's failure to do so, coupled with the Court's denial of leave to appeal in *Sturgis Bank & Trust Co. v. Hillsdale Community Health Center*,[442] led Justice Cavanagh to conclude that "this Court will permit plaintiff to submit an affidavit of merit, executed by an optometrist, in which the optometrist provides a statement regarding causation," similar to what occurred in *Sturgis*.[443] Whether the entire Court will actually adopt this view remains to be seen.

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433. *See id.* at 459, 736 N.W.2d at 570.

434. *Id.* at 455, 736 N.W.2d at 568.

435. *Grossman,* 470 Mich. at 459, 736 N.W.2d at 570.

436. *See id.* at 460-61, 736 N.W.2d at 571.

437. *See id.* at 461, 736 N.W.2d at 571.

436. *Id.* at 463, 736 N.W.2d at 572 (Cavanagh J., concurring in part and dissenting in part).

439. *See id.* at 463, 736 N.W.2d at 573 (Cavanagh, J., concurring in part and dissenting in part).

440. *Id.* at 464, 736 N.W.2d at 573.

441. *Grossman*, 470 Mich. at 464-65, 736 N.W.2d at 573.

442. 268 Mich. App. 484, 708 N.W.2d 453 (2005), *appeal denied*, 479 Mich. 854, 735 N.W.2d 206 (2007).

443. *Bates*, 479 Mich. at 465, 736 N.W.2d at 573-74 (Cavanagh, J., concurring in part and dissenting in part).

B. Opinion Testimony

At common law, under the "opinion testimony" rule, it was generally held that lay witnesses were not permitted to offer opinions in evidence.[444] This rule derived from two legal developments beginning in the 17th century. First, "the rule requiring personal knowledge was once sometimes phrased as a rule against opinion testimony, and this phrasing of the personal knowledge requirement led to the notion that witnesses must testify to facts."[445] Second, the rules relating to expert testimony evolved to prohibit such testimony unless it was necessary for the jury.[446] "From these developments came the idea that opinion testimony by law witnesses was not evidence at all, and that lay witnesses should give only facts, leaving the jury to say what they mean."[447] This flat prohibition was abrogated by the adoption of Rule 701, which provides:

> If the witnesses is not testifying as an expert, the witness' [sic] testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' [sic] testimony or the determination of a fact in issue.[448]

During the *Survey* period, the Michigan Court of Appeals discussed lay opinion testimony under Rule 701 in one case, *People v. Schumacher*.[449] In that case, the defendant was convicted of unlawfully disposing of scrap tires under Section 16902(1) of the Natural Resources

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444. 3 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 342, at 578 (2d ed. 1994).

445. *Id.*

446. *See id.*

447. *Id.*; *see also* 7 WIGMORE, *supra* note 2, § 1917 (James H. Chadbourne rev. ed. 1978) (discussing historical development of the opinion testimony rule); WEISSENBERGER, *supra* note 45, § 701.2 (same).

448. MICH. R. EVID. 701. Professors Mueller and Kirkpatrick assert that this rule is "[s]o sensible . . . that it is hard to believe that the law was ever different." MUELLER & KIRKPATRICK, *supra* note 444, § 342, at 578. This rule mirrors Federal Rule 701 as originally enacted. MICH. R. EVID. 701. In 2000, Federal Rule 701 was amended to add a third condition for the admissibility of lay opinion testimony, namely that it be "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." FED. R. EVID. 701. This amendment assures that the rigorous rules regarding expert testimony will not be evaded through Rule 701. *See* WEISSENBERGER, *supra* note 45, § 701.5, at 357-58.

449. 276 Mich. App. 165, 740 N.W.2d 534 (2007), *appeal denied*, 480 Mich. 1043, 743 N.W.2d 876 (2008).

and Environmental Protection Act (NREPA), which prohibits disposal of scrap tires at any place other than specifically enumerated locations, such as authorized disposal sites or tire retailers.[450] At trial, a Department of Environmental Quality (DEQ) investigator testified that, in his opinion, the site where the defendant had disposed of the tires was not a lawful place for disposal under the NREPA.[451] On appeal, the defendant argued that this testimony was improper because it constituted a legal opinion which invaded the province of the jury.[452] The court of appeals rejected this claim.[453]

Because the defendant had not objected at trial, the court of appeals reviewed the investigator's testimony for plain error, and concluded that the admission of the testimony did not affect the defendant's substantial rights.[454] The court explained that even if the investigator's testimony was an improper legal conclusion, the defendant was permitted to cross-examine the investigator and present his own theory of the case, and the jury was properly instructed on the elements of the crime.[455] Further, the jury would have already concluded that the DEQ investigator thought that a crime had been committed by the fact that criminal charges were instituted.[456] Accordingly, the court concluded that the admission of this testimony did not amount to plain error.[457]

VI. 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

450. *See id.* at 166-67, 740 N.W.2d at 538-39 (discussing MICH. COMP. LAWS ANN. § 324.16902(1) (West 1999)).

451. *Id.* at 179, 740 N.W.2d at 545.

452. *See id.*

453. *Id.* at 180, 740 N.W.2d at 545.

454. *Id.* at 179-80, 740 N.W.2d at 545.

455. *Schumacher*, 276 Mich. App. at 179-80, 740 N.W.2d at 545.

456. *Id.*

457. *Id.* at 180, 740 N.W.2d at 545. In two other cases which have already been discussed, the Court of Appeals briefly addressed lay opinion issues. In *Petri*, the court concluded that a police officer could testify under Rule 701 as to his definition of "grooming" for sexual assault, where the testimony was offered to show why the detective continued his investigation, rather than to provide a psychological analysis of child sexual abusers. *See Petri*, 279 Mich. App. at 416, 760 N.W.2d. at 888. And in *Yost*, the court held that the defendant's daughter could give lay opinion testimony under Rule 701 regarding her mother's ability to plan ahead and communicate, because such testimony was based on the daughter's perception and was helpful to explain the defendant's behavior. *Yost*, 278 Mich. App. at 358-59, 749 N.W.2d at 768.

brought to light and exposed by the test of cross-examination."[458] The prohibition on hearsay evidence is deeply rooted in the common law, and is "a rule which may be esteemed, next to jury trial, the greatest contribution of [the common law] system to the world's methods of procedure."[459] The admissibility of hearsay evidence is governed by Article VIII of the Michigan Rules of Evidence.[460] 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."[461] 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.[462] Rule 802 provides simply that "[h]earsay is not admissible except as provided by these rules."[463] Rules 803, 803A, and 804 provide exceptions to the hearsay rules.

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

MRE 803 provides twenty-three distinct exceptions to the hearsay rule for various categories of statements.[464] These rules are applicable regardless of whether or not the declarant is otherwise available to testify at trial.[465] These exceptions embody certain circumstances in which

> the probability of accuracy and trustworthiness of [a] statement is practically sufficient, if not quite equivalent to that of statements tested in the conventional manner [of cross-examination]. This circumstantial probability of trustworthiness is found in a variety of circumstances sanctioned by judicial practice; and it is usually from one of these salient circumstances that the exception takes its name. There is no comprehensive attempt to secure uniformity in the degree of trustworthiness which these circumstances presuppose. It is merely that common

458. 5 WIGMORE, *supra* note 2, § 1362, at 3 (James H. Chadbourne rev. ed. 1974).
459. 5 WIGMORE, *supra* note 2, §1364, at 28.
460. MICH. R. EVID. art VIII.
461. 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).
462. *See* MICH. R. EVID. 801(d).
463. MICH. R. EVID. 802.
464. MICH. R. EVID. 803.
465. 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).

> 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.[466]

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

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."[467] In *People v. Burton*,[468] 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.[469] This rule mirrors the independent evidence of a conspiracy requirement for admission of coconspirator statements under MRE 801(d)(2)(E).[470] During the *Survey* period, the court partially abrogated this requirement, holding in *People v. Barrett*,[471] that the statement itself can be considered, along with independent proof of a startling event or condition, to establish the existence of the startling event.[472]

In *Barrett*, the defendant was tried on charges of domestic assault in connection with the assault of his live-in girlfriend, Suzanne Bartel.[473] On the night of the incident, Bartel pounded on her neighbor's door, indicating to the neighbor that the defendant was chasing her with an ax.[474] The neighbor admitted Bartel, who called 911 and informed the operator that the defendant had beaten her and chased her with an ax.[475] When the police arrived, Bartel told the first responding officer that defendant had hit her, held a hatchet to her neck, and threatened to kill her.[476] Each of the people to whom Bartel made these statements testified

466. 5 WIGMORE, *supra* note 2, § 1422, at 253.
467. MICH. R. EVID. 803(2).
468. 433 Mich. 268, 445 N.W.2d 133 (1989).
469. *Id.* at 294, 445 N.W.2d at 144.
470. MICH. R. EVID. 801(d)(2)(E).
471. 480 Mich. 125, 747 N.W.2d 797 (2008).
472. *Id.* at 139, 747 N.W.2d at 804-05.
473. *Id.* at 129, 747 N.W.2d at 799.
474. *Id.*
475. *Id.*
476. *Id.*

that she was extremely upset and crying at the time of the statements.[477] Bartel refused to testify at the preliminary examination, and the prosecutor accordingly sought to introduce her excited utterances to the neighbor, 911 operator, and responding officer.[478] The defendant argued that the statements themselves could not be used to establish the existence of the startling event, and the magistrate agreed, holding that because there was no independent evidence of the startling event (the assault) apart form the statements themselves, they could not be admitted.[479] The prosecutor appealed to both the circuit court and the court of appeals, both of which affirmed the magistrate's determination on the basis of *Burton*.[480] On the prosecutor's application for leave to appeal, the Supreme Court reversed.[481]

The Court noted that Michigan Rule 803(2) is identical to Federal Rule 803(2), and that the language of both rules merely requires the existence of a startling event or condition.[482] However, nothing in the text of Rule 803(2) "preclude[s] consideration of the statement itself for the purpose of establishing the startling event or condition."[483] Focusing on the *Burton* Court's "wholesale preclusion of the use of the statement to establish the existence of the startling event or condition,"[484] the Court found that the *Burton* Court's conclusion was unsupported and contradicted MRE 104(a) and 1101(b).[485] The Court explained that Rule 1101(b) provides that the rules of evidence do not apply to preliminary questions of fact governing admissibility of evidence, and MRE 104(a) provides that in determining admissibility a court is not bound by the rules of evidence (other than the rules relating to privilege).[486] The Court reasoned that under MRE 1101(b)(1) and 104(a) a court "may consider *any* evidence regardless of that evidence's admissibility at trial . . . in determining whether the evidence proffered for admission at trial is

477. *Barrett*, 480 Mich. at 128-29, 747 N.W.2d at 799.

478. *Id.* at 129, 747 N.W.2d at 799.

479. *Id.* at 129, 747 N.W.2d at 800.

480. *Id.* at 129-30, 747 N.W.2d at 800.

481. *Id.* at 130, 747 N.W.2d at 800.

482. *Id.* at 130-31, 747 N.W.2d at 800.

483. *Barrett*, 480 Mich. at 131, 747 N.W.2d at 800.

484. *Id.* at 133, 747 N.W.2d at 801. The court noted that there was independent evidence of the startling event, including Bartel's nonverbal conduct, the hatchet found by the responding officer, and injuries to Bartel, *id.* at 132 n.8, 747 N.W.2d at 801 n.8, and thus the court did "not need to reach the question whether the statement standing alone could supply the evidence of the startling event or condition." *Id.* at 132, 747 N.W.2d at 801.

485. *Id.* at 133, 747 N.W.2d at 801-02 (citing MICH. R. EVID. 104(a), 1101(b)(1)).

486. *See id.* at 133-34, 747 N.W.2d at 802 (discussing MICH. R. EVID. 104(a), 1101(b)(1)).

admissible," and thus in the excited utterance context a court "can consider the statement when determining whether . . . the startling event or condition has been established."[487]

The Court also rejected the argument that its rule would allow the statement to be "bootstrapped" into admissibility.[488] For example, under the coconspirator exception to the hearsay rule, the bootstrapping rule prevents consideration of the coconspirator statements in determining whether a conspiracy existed.[489] However, 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.[490] Finding *Bourjaily* instructive, the Court rejected the bootstrapping argument.[491] The Court therefore held that the excited utterance exception, "when applied in accordance with MRE 104(a), does not premise the admissibility of an excited utterance on a proponent's ability to establish the existence of a startling event or condition without considering the utterance itself."[492] Because Bartel's statements, coupled with the other corroborating evidence, sufficiently established the existence of a startling event, the statements were admissible under the excited utterance exception.[493]

Justice Cavanagh, joined by Justice Kelly, dissented.[494] In his view, *Burton* should not have been overruled because "it is a prudent decision that defends the integrity of the evidence we admit in our courts."[495] He reasoned that *Burton*'s independent proof requirement served the purpose of the excited utterance exception because the exception is applicable only when two foundational elements: the existence of startling event and the relationship between the startling event and the statement have been established.[496] The *Burton* rule is necessary for these foundational purposes, because "[i]f there is no independent evidence of the nature of the startling event or condition, it is impossible to adequately prove that the statement related to the startling event or condition or to establish that

487. *Id.* at 134, 747 N.W.2d at 802.
488. *Barrett,* 480 Mich. at 134-35, 747 N.W.2d at 802-03.
489. *Id.* at 136 n.11, 747 N.W.2d at 802 n.11.
490. *See* Bourjaily v. United States, 483 U.S. 141, 178-81 (1987).
491. *See Barrett,* 480 Mich. at 135-36, 747 N.W.2d at 803.
492. *Id.* at 137, 747 N.W.2d at 804.
493. *See id.* at 137-38, 747 N.W.2d at 804.
494. *Id.* at 139-52, 747 N.W.2d at 805-11 (Cavanagh, J., dissenting).
495. *Id.* at 139, 747 N.W.2d at 805 (Cavanagh, J., dissenting).
496. *See id.* at 143-44, 747 N.W.2d at 807.

the occasion caused the declarant's excitement."[497] Justice Cavanagh also rejected the majority's conclusion that its holding was compelled by the language of MRE 104(a). In his view, the existence of independent evidence of the startling event is itself a foundation requirement of MRE 803(2), and thus while other inadmissible evidence could be used to establish the preliminary question of whether such independent evidence exists, the statement itself could not be so used because, by definition, it is not independent evidence.[498] Justice Cavanagh concluded that the Court's rule "will undoubtedly permit the admission of statements under this exception that do not meet its criteria and, consequently, do not carry the inherent trustworthiness sought by the exception."[499]

Although Justice Cavanagh's view is not without logic, it simply cannot be squared with the plain language of MRE 104(a). As the Washington Supreme Court observed, although "using the hearsay statement itself to establish the occurrence of a startling event may be 'somewhat unsettling theoretically,' it is justified by the discretion granted to trial courts in [Rule] 104(a)."[500] For this reason, it is the nearly universal view that the statement itself can be considered in determining whether the startling event occurred, and it is the prevailing view that the statement alone can establish the existence of the startling event.[501]

2. Catch-All Exception

In addition to the specifically enumerated exceptions to the hearsay rule set forth in Rule 803, the rule also provides any exception for:

> [a] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be

497. *Barrett*, 480 Mich. at 144, 747 N.W.2d at 807.

498. *See id.* at 145-46, 747 N.W.2d at 808.

499. *Id.* at 148, 747 N.W.2d at 809.

500. State v. Young, 161 P.3d 967, 976 (Wash. 2007) (quoting 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 803.24[2][a] (2d ed. 1996)).

501. *See, e.g., Young*, 161 P.3d at 975-76 n.12 (citing cases); *see also* WEINSTEIN & BERGER, *supra* note 500, at § 803.24[2][a].

> admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.[502]

This residual, or catch-all, exception "provides a vehicle for admitting hearsay in situations unanticipated by other exceptions, but involving equal guarantees of trustworthiness."[503]

To be admissible under the residual exception, the proffered evidence must meet four elements:

> (1) it must have circumstantial guarantees of trustworthiness equal to the categorical exceptions, (2) it must tend to establish a material fact, (3) it must be the most probative evidence on that fact that the offering party could produce through reasonable efforts, and (4) its admission must serve the interests of justice.[504]

With respect to the trustworthiness element, courts should consider a number of factors, including the presence or absence "of the traditional hearsay dangers, i.e., problems in perception, narration, memory and sincerity[;] . . . [t]he existence of corroborating evidence and the declarant's ability to testify."[505] The Michigan Court of Appeals considered the residual exception in one case during the *Survey* period.

In *People v. Yost*,[506] the defendant was convicted of murdering her seven-year-old daughter by poisoning her with an overdose of the antidepressant drug Imipramine.[507] Prior to trial, the court severely

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502. MICH. R. EVID. 803(24).

503. WEISSENBERGER, *supra* note 45, § 807.1, at 619-20 (quotations omitted). Under the Federal Rules, the residual exception found in both Rule 803(24) and Rule 804(b)(7) of the Michigan Rules is found in a single rule, Rule 807. *See id.* at 620.

504. People v. Katt, 468 Mich. 272, 279, 662 N.W.2d 12, 17 (2003); *see also* WEISSENBERGER, *supra* note 45, § 807.2.

505. *Id.* at 621-22.

506. 278 Mich. App. 341, 749 N.W.2d 753 (2008). In addition to the hearsay issue discussed here, the court also considered issues relating to relevance, other acts evidence, expert witnesses, lay opinion testimony, and the Confrontation Clause. These aspects of the case are discussed *supra* notes 79-125 and accompanying text (relevance); *supra* notes 138-169 and accompanying text (other acts evidence); *supra* notes 350-386 and accompanying text (expert testimony); *supra* note 457 (lay opinion testimony); and *infra* notes 589-606 and accompanying text (confrontation).

507. *Yost*, 278 Mich. App. at 344-46, 749 N.W.2d at 761-62.

restricted the testimony of the defendant's expert witness, Dr. Stephen Cohle, preventing him from offering his opinion that the level of Imipramine in the victim's blood was overstated due to postmortem redistribution, that the level of Imipramine was insufficient to cause the victim's death, and that the number of pills the victim would have needed to ingest to account for the blood level of the drug was significantly lower than that estimated by the prosecution's experts.[508] The trial court came to this decision based on its view that Dr. Cohle's opinion was based in part on medical texts which Dr. Cohle used to determine the pharmacological properties of Imipramine, and that these tests were inadmissible hearsay.[509] Because the data upon which an expert relies must be admitted,[510] the trial court ruled that Dr. Cohle could not testify with respect to these matters.[511] The court of appeals disagreed with this reasoning.[512]

The court concluded that MRE 703 applied only to the facts relevant to the particular case, and did not require the introduction of the general background data and methods upon which an expert bases his opinions.[513] And, in any event, the court of appeals concluded that the medical texts relied upon by Dr. Cohle were admissible under the catch-all exception.[514] The court explained that the number of drugs available makes it impossible for a physician to be familiar with the pharmacological properties of all drugs, and thus physicians are required to rely on reference sources to provide this information.[515] Because of this, "those references that have obtained widely recognized acceptance by the community of experts who use them will meet the trustworthiness requirements of MRE 803(24)."[516] The court explained that the prosecution's experts relied on such sources, and that Dr. Cohle testified that the books upon which he relied are widely used and recognized sources for drug characteristic information.[517] Therefore, the references upon which Dr. Cohle relied were admissible under the catch-all

508. *Id.* at 378, 749 N.W.2d at 778. A fuller discussion of the facts relating to Dr. Cohle's testimony can be found in connection with the discussion of the court's expert evidence ruling, *supra* notes 350-386 and accompanying text.

509. *Id.*

510. *See* MICH. R. EVID. 703.

511. *See Yost*, 278 Mich. App. at 388-89, 749 N.W.2d at 783.

512. *Id.* at 389-92, 749 N.W.2d at 783-85.

513. *Id.* at 390, 749 N.W. at 784.

514. *Id.*

515. *See id.* at 391, 749 N.W.2d at 784-85.

516. *Id.*, 749 N.W.2d at 785.

517. *See Yost*, 228 Mich. App. at 391-92, 749 N.W.2d at 785.

exception, and the trial court erred in excluding Dr. Cohle's testimony based on those references.[518]

B. Exceptions to the Hearsay Rule: "Declarant Unavailable" Dying Declarations

In addition to MRE 803, which provides exceptions applicable regardless of whether the declarant is available for trial, MRE 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

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518. *See id.* at 392, 749 N.W.2d at 785. Under the Federal Rules, these reference works would likely have been admissible under the learned treatise exception. This exception provides for an exception:

> [t]o the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

FED. R. EVID. 803(18). The Michigan Rules of Evidence, on the contrary, provide that such learned treatises, when called to the attention of an expert, are admissible for impeachment purposes only. *See* MICH. R. EVID. 707. While the court of appeals analysis of the issue under MRE 803(24) was undoubtedly correct, it seems that the court's resolution raises a potential conflict with MRE 707. The court did not address this conflict, nor did it cite MRE 707.

> (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means, and in a criminal case, due diligence is shown.[519]

One MRE 804 exception 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."[520] 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."[521] 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."[522]

In *People v. Stamper*,[523] the Michigan Supreme Court considered "whether a four-year-old injured child can be sufficiently aware of his impending death so that a statement given when death was imminent qualifies for admission as evidence under the dying declaration exception[.]"[524] In *Stamper*, the defendant was charged with murder in connection with the death of the four-year-old son of his girlfriend, who was severely beaten and sexually assaulted.[525] The defendant was giving the victim a bath, when the victim's mother heard him crying out. After the bath, the victim was losing consciousness, and when his mother told him to open his eyes, he responded that he could not because he was dead.[526] The victim made a similar statement to the defendant's daughter. Later, at the hospital, the victim told a nurse that "Mike," who he

519. MICH. R. EVID. 804(a). The rule provides that a witness is not "unavailable" for purposes of the rule where the witness' 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.*

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

521. WEISSENBERGER, *supra* note 45, § 804.17, at 584.

522. 5 WIGMORE, *supra* note 2, § 1438, at 289 (emphasis omitted); *see also* WEISSENBERGER, *supra* note 45, § 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").

523. 480 Mich. 1, 742 N.W.2d 607 (2007) (memorandum).

524. *Id.* at 2, 742 N.W.2d at 608.

525. *Id.* at 2-3, 742 N.W.2d at 680-09.

526. *Id.*

identified as his "mom's wife," had given him his bruises. The victim died shortly thereafter.[527] The trial court admitted the victim's statements under the dying declaration exception, and the court of appeals affirmed.[528] Acting on the defendant's application for leave to appeal, the Supreme Court likewise affirmed.[529]

The Court explained that a dying declaration concerning the cause or circumstance of the declarant's impending death may be admitted if the circumstances surrounding the making of the declaration "establish that the declarant was *in extremis* and believed that his death was impending."[530] Under this standard, the Court concluded, the victim's statement identifying the defendant as his assailant were admissible.[531] The Court explained that the victim was unavailable as required by MRE 804(a)(4), and that his statement to his mother that he was "dead," coupled with his injuries, indicated a belief in impending death.[532] Further, his statements to the nurse regarding the cause of his injuries related to the circumstances leading to his impending death.[533] More specifically, the Court rejected the defendant's argument that the victim could not have been aware of his impending death because of his age.[534] The Court held that "[a] declarant's age alone does not preclude the admission of a dying declaration."[535] Rather, the determination of whether a child victim was conscious of his impending death must be determined, as with an adult victim, on a case-by-case basis.[536]

C. Confrontation Issues

Although the admission of hearsay evidence is generally governed by the hearsay evidence rules discussed above, in criminal cases the use of hearsay evidence also raises issues under the Confrontation Clause of the Sixth Amendment.[537] Although a full treatment of the Confrontation

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527. *Id.*
528. *Id.* at 3, 742 N.W.2d at 609.
529. *Stamper,* 480 Mich. at 3, 742 N.W.2d at 609.
530. *Id.* at 4, 742 N.W.2d at 609.
531. *Id.*
532. *Id.*
533. *Id.* at 4-5, 742 N.W.2d at 609.
534. *Id.*
535. *Stamper,* 480 Mich. at 5, 742 N.W.2d at 610.
536. *See id.* No court or commentator appears to have addressed this issue, although the Arkansas Supreme Court did permit introduction of a four-year-old victim's dying declaration, without explicitly discussing the age issue, in a case similar to *Stamper. See* Boone v. State, 668 S.W.2d 17, 21 (Ark. 1984).
537. 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

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*,[538] 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.[539] 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."[540] If the evidence does not fall within such an exception, "the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."[541] The Court abrogated this rule in *Crawford v. Washington*,[542] establishing a dichotomy between "testimonial" and "nontestimonial" hearsay.[543] 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."[544] Explaining that *Roberts* departed from this proper understanding of the Confrontation Clause,[545] 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."[546]

During the prior *Survey* period, the Supreme Court further explicated the testimonial/non-testimonial distinction in *Davis v. Washington*.[547] 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

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applicable to the states through the Due Process Clause of the Fourteenth Amendment. *See* Pointer v. Texas, 480 U.S. 400, 406 (1965).

538. 448 U.S. 56 (1980).

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

540. *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).

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

542. 541 U.S. 36 (2004).

543. *Id.*

544. *Id.* at 59.

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

546. *Id.* at 68-69.

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

testimonial or nontestimonial."[548] Rather, the Court found it sufficient to simply hold that:

> [s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[549]

Further, the *Davis* Court explicitly addressed the question of "whether the Confrontation Clause applies only to testimonial hearsay,"[550] 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,[551] the *Davis* Court explained that "[a] limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its 'core,' but its perimeter."[552] Thus, where nontestimonial hearsay is at issue, the Confrontation Clause is not implicated at all, and need not be considered.[553] During the *Survey* period, the Michigan courts continued to develop the law under *Crawford*, and the United States Supreme Court again considered an issue left open by its decision in *Crawford*.

1. Testimonial and Non-Testimonial Hearsay

The Michigan Court of Appeals applied the Court's *Davis* decision in *People v. Jordan*.[554] The defendant in that case was convicted of

548. *Id.* at 823.
549. *Id.* at 822.
550. *Id.* at 823.
551. *See id.* (discussing *Crawford*, 541 U.S. at 51).
552. *Id.*
553. *See* Hodges v. Commonwealth, 634 S.E.2d 680, 689 (Va. 2006).
554. 275 Mich. App. 659, 739 N.W.2d 706, *appeal denied*, 480 Mich. 950, 741 N.W.2d 322 (2007). In addition to the *Jordan* decision discussed here, the court of appeals considered the tesitmonial/non-testimonial distinction in People v. Taylor, 275 Mich. App. 177, 737 N.W.2d 790 (2007), *appeal granted*, 480 Mich. 946, 741 N.W.2d 24 (2007), *order granting leave to appeal vacated*, 481 Mich. 943, 752 N.W.2d 454 (2008), a case decided in the prior *Survey* period but not released for publication until the current period. Because the court's discussion of the testimonial issue is tied to its more important discussion of the dying declaration issue, the case is discussed under the dying declaration heading, *infra* notes 613-632 and accompanying text.

criminal sexual conduct and home invasion.[555] The victim called 911 to indicate that someone was breaking into her home, but the police went to the wrong address and the defendant robbed and raped the victim.[556] After the defendant left her apartment, the victim went outside and yelled for help.[557] A service station owner across the street, Ronald Ferris, came to the victim's aid, and she told him that she had been raped.[558] When the police eventually arrived, the victim told the police that she had been robbed, but did not mention the rape.[559] A friend of the victim, Merl Avery, arrived, and she told him about the robbery but not the rape. After Avery spoke to Ferris, he asked the victim why she had failed to tell the police about the rape.[560] At trial, the court admitted the statements the victim made to Avery and Ferris, and the defendant appealed. The court of appeals affirmed, concluding that the statements were not testimonial hearsay, and thus were not barred by the Confrontation Clause.[561]

The court began by rejecting the defendant's argument that Ferris and Avery were agents of the police for the purpose of the confrontation analysis.[562] The court explained that Ferris did nothing more than relay to the police information provided to him by the victim before he had any contact with the police.[563] At most, therefore, Ferris was an agent of the victim, not the police.[564] Further, Avery was a long time friend of the victim, and it was clear that the victim did not consider Avery to be an agent of the police.[565] The court also reasoned that, even if Ferris and Avery were agents of the police, the statements made by the victim were not testimonial because the primary purpose of the statements was to meet an ongoing emergency, rather than to generate evidence for use in a later trial.[566] The court explained that, at the time the bulk of the statements were made, the victim was calling for help, a police response had not yet occurred, and the victim was in need of medical attention.[567] In these circumstances, "'any reasonable listener would recognize that [the victim] was facing an ongoing emergency.'"[568] Accordingly, the

555. *Jordan,* 275 Mich. App. at 661, 739 N.W.2d at 708.
556. *Id.*
557. *Id.*
558. *Id.*
559. *Id.*
560. *Id.* at 661-62, 739 N.W.2d at 708-09.
561. *Jordan,* 275 Mich. App. at 664, 739 N.W.2d at 710.
562. *Id.*
563. *Id.*
564. *Id.* at 663, 739 N.W.2d at 710.
565. *Id.* at 664, 739 N.W.2d at 710.
566. *Id.* (citing *Davis*, 126 S. Ct. at 2273-74).
567. *Jordan,* 278 Mich. App. at 664, 739 N.W.2d at 710.
568. *Id.* (quoting *Davis*, 126 S. Ct. at 2276) (alteration in original).

court concluded that the victim's statements to Ferris and Avery were not testimonial, and therefore their admission was not barred by the Confrontation Clause.[569]

One question that has arisen in the aftermath of *Crawford* is whether a laboratory report, presented in a criminal trial through a witness who did not prepare the report and generally admitted under the business or public record exceptions to the hearsay rule, constitutes testimonial hearsay. On one extreme, some courts have held that such reports, so long as they come within the business regards exception, categorically are not testimonial hearsay.[570] This conclusion is suggested by language in *Crawford* itself.[571] At the other extreme, some courts have held that forensic laboratory reports categorically are testimonial, because such reports are generally prepared in anticipation of litigation and thus not true business records.[572] Finally, a third group of cases has adopted a middle ground, holding that data contained in laboratory reports are not testimonial, but that impressions or observations of the person conducting the test may be testimonial depending on the circumstances.[573] The Michigan Court of Appeals appears to have adopted this approach.[574]

Both the Michigan and United States Supreme Courts will soon address these issues. During the *Survey* period, the Michigan Supreme Court granted leave to appeal to address "whether [a] serologist's testimony regarding nontestifying technicians' findings and reports was

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569. *Id.* at 664-65, 739 N.W.2d at 710. The defendant also claimed that the trial court erred in admitting the hearsay testimony of the detective to whom the victim spoke and the 911 supervisor who made a tape of the 911 call. *Id.* With respect to these witnesses, the court concluded that the defendant's claims were barred by the defendant's failure to object without substantively discussing the confrontation issue. *Id.* at 665-66, 739 N.W.2d at 710-11.

570. *See, e.g.*, United States v. Felix, 467 F.3d 227, 233-36 (2d Cir. 2006).

571. *See Crawford*, 541 U.S. at 56 (noting that business records were admissible at common law because such records "by their nature were not testimonial"); *id.* at 76 (Rehnquist, C.J., concurring in the judgment) (describing the Court"s definition of "testimony" as excluding business and official records).

572. *See, e.g.*, United States v. Crockett, 586 F. Supp. 2d 877, 887, (E.D. Mich. 2008) (adopting this rule and noting that it is the almost universal view of commentators); State v. Johnson, 756 N.W.2d 883, 889-92 (Minn. Ct. App. 2008).

573. *See, e.g.*, United States v. Burgos, 539 F.3d 641, 644 n.2 (7th Cir. 2008); Wimbish v. Commonwealth, 658 S.E.2d 715, 719-20 (Va. Ct. App. 2008) (citing cases).

574. *See* People v. Jambor, 273 Mich. App. 477, 488, 729 N.W.2d 569, 575 (2007) (fingerprint cards not testimonial because they did not contain any subject assertions, but only raw data). For a more in depth discussion of these issues, *see* Thomas F. Burke III, *The Test Results Said What? The Post-Crawford Admissibility of Hearsay Forensic Evidence*, 53 S.D. L. REV. 1 (2008).

'testimonial' within the meaning of *Crawford*."[575] Similarly, the United States Supreme Court granted *certiorari* to consider an identical issue.[576] The Courts' decisions in these cases should provide some much needed clarity with respect to this issue.

2. "Non Hearsay" and the Confrontation Clause

In *Crawford*, the Supreme Court explicitly noted that the Confrontation Clause imposes no bar on "the use of testimonial statements for purposes other than establishing the truth of the matter asserted."[577] The court of appeals applied this rule in *People v. Chambers*,[578] a case in which the defendant was convicted of armed robbery and assault. The defendant approached the victim at an automated teller machine, and hit and kicked her, taking her money and purse.[579] The police obtained still photographs from the machine's video suerveillance tape, and aired them on local television stations.[580] A confidential informant working for the FBI contacted an FBI agent and identified the defendant as the perpetrator shown in the photographs, and the FBI agent contacted the detective handling the case.[581] On appeal, the defendant argued that his confrontation right was violated when the detective testified about the call from the FBI agent and the informant's identification of the defendant.[582] The court of appeals rejected this argument.[583]

The court noted that although "[a] statement by a confidential informant to the authorities generally constitutes a testimonial statement,"[584] the Confrontation Clause is simply inapplicable when the statement is introduced "for purposes other than establishing the truth of the matter asserted."[585] Applying this rule, the court concluded that the admission of the informant's and FBI agent's statements to the detective did not violation the Confrontation Clause, because the statements were not offered to prove the truth of the matter asserted, i.e., that the

575. People v. Horton, 480 Mich. 987, 742 N.W.2d 124 (2007).

576. Melendez-Diaz v. Mass., 128 S. Ct. 1647 (2008).

577. *Crawford*, 541 U.S. at 59 n.9 (citing Tennessee v. Street, 471 U.S. 409, 414 (1985)).

578. 277 Mich. App. 1, 742 N.W.2d 610 (2007).

579. *Id.* at 2, 742 N.W.2d at 611.

580. *Id.*

581. *Id.* at 2-4, 742 N.W.2d at 611-12.

582. *See id.* at 10, 742 N.W.2d at 616.

583. *Id.*

584. *Chambers*, 277 Mich. App. at 10, 742 N.W.2d at 616 (citing United States v. Cromer, 389 F.3d 662, 675 (6th Cir. 2004)).

585. *Id.* at 11, 742 N.W.2d at 616 (citing *Crawford*, 541 U.S. at 59 n.9).

defendant was the perpetrator reflected in the surveillance photographs. "Rather, it was offered to establish and explain why the detective organized a surveillance of defendant's home and how defendant came to be arrested."[586] Thus, the admission of the statements was not improper under the Confrontation Clause.[587]

3. Prior Opportunity for Cross Examination

As the *Crawford* Court explained, the Confrontation Clause bars the use of testimonial hearsay only where the defendant did not have the prior opportunity to cross-examine the declarant.[588] Where such an opportunity has been afforded, the hearsay statement—i.e., the "testimony" at trial—has been subject to the adversarial testing protected by the Confrontation Clause, and thus there is no Confrontation Clause violation. In *People v. Yost*,[589] the court of appeals considered this rule.

In *Yost*, the defendant was convicted of first-degree felony murder in connection with the death of her daughter from an overdose of the antidepressant Imipramine.[590] Amongst numerous other claims on appeal, the defendant claimed that the trial court violated her right to confront the witnesses by permitting the prosecution to present the prior testimony of Marisol Sarmiento, her cell mate following her arrest.[591] Prior to trial, the prosecution sought to preserve Sarmiento's testimony, because she scheduled to be deported.[592] The trial court held a hearing, at which it allowed the prosecutor to preserve Sarmiento's testimony.[593] The prosecutor questioned Sarmiento, who testified that while they were incarcerated together, the defendant had told her that the defendant had put Imipramine in the victim's drink.[594] Defense counsel then cross-examined Sarmiento, who admitted that the defendant had also said that she did not kill her daughter, and that she did not know how her daughter had gotten the medication.[595] At trial, the defendant objected to the

586. *Id.*
587. *Id.*
588. *See Crawford*, 541 U.S. at 59, 68.
589. 278 Mich. App. 341, 749 N.W.2d 753 (2008). Other evidentiary issues involved in *Yost* are discussed *supra* notes 79-125 and accompanying text (relevance); *supra* notes 138-169 and accompanying text (other acts evidence); *supra* notes 350-386 and accompanying text (expert testimony); *supra* note 457 (lay opinion); and *supra* notes 506-518 and accompanying text (hearsay).
590. For a full discussion of the factual background of the case, see *supra* notes 79-89.
591. *Yost*, 278 Mich. App. at 366, 749 N.W.2d at 772.
592. *Id.*
593. *Id.*
594. *Id.*
595. *See id.* at 367-69, 749 N.W.2d at 772-73.

introduction of Sarmiento's prior testimony, arguing that she did not have an opportunity to cross-examine Sarmiento on the basis of the testimony of other inmates who testified at trial.[596] The trial court overruled the objection, concluding that the defendant had a sufficient opportunity to cross-examine Sarmiento.[597]

On appeal, the court of appeals rejected the defendant's claim that the introduction of Sarmiento's testimony violated her right to confront the witnesses against her.[598] After setting forth the *Crawford* standard, the court noted that there was no question that Sarmiento's deportation rendered her unavailable at trial, and thus the only question was whether there was a prior opportunity for cross-examination.[599] The court found that there was such an opportunity, noting that the trial court held a hearing specifically for the purpose of preserving Sarmiento's testimony, and that counsel had a full opportunity to cross-examine Sarmiento at that time.[600] The court rejected the defendant's argument that she did not have an opportunity for effective cross-examination because counsel could not question her about the testimony of two other inmates.[601] The court explained that Sarmiento testified that the conversation occurred when no one else was listening, and the two other inmates testified that they did not overhear the conversation between the defendant and Sarmiento.[4602] Thus, "it is difficult to see how defendant could have impeached Sarmiento's testimony with knowledge of the specific details of the other witnesses' testimony."[603] Further, the court explained, counsel effectively cross-examined Sarmiento, raising the possibility that Sarmiento had prior knowledge of the circumstances of the crime and that the defendant may have merely said that she had been accused of putting the Imipramine in her daughter's drink.[604] Defense counsel also elicited from Sarmiento that the defendant denied killing her daughter.[605] "Thus, on the whole, defendant's trial counsel properly and effectively cross-examined Sarmiento on all the relevant issues," and the introduction of her prior testimony therefore did not deny the defendant her right to confront Sarmiento.[606]

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596. *Id.*
597. *See Yost*, 278 Mich. App. at 369, 749 N.W.2d at 773.
598. *Id.* at 371, 749 N.W.2d at 775.
599. *Id.* at 370, 749 N.W.2d at 774.
600. *Id.*
601. *Id.*
602. *Id.* at 370-71, 749 N.W.2d at 774.
603. *Yost*, 278 Mich. App. at 371, 749 N.W.2d at 774.
604. *Id.*
605. *See id.* at 371, 749 N.W.2d at 774-75.
606. *Id.* at 371, 749 N.W.2d at 775.

This decision was correct. As the Supreme Court has explained, "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[607] And the Court has never held that "a prior opportunity to cross-examine must meet precise standards, such as, for example, that the right and scope of cross-examination of a witness at a preliminary hearing be identical to the right and scope of cross-examination that would take place at trial."[608] Thus, "[t]hat the earlier cross-examination did not cover every detail and every possible avenue of impeachment that counsel would now like to pursue does not change the fact that the defendant had the requisite opportunity for cross-examination."[609] Because the defendant in *Yost* had the opportunity and motive to fully cross-examine Sarmiento regarding her bias, credibility, and perception, and because the witnesses at trial did not offer anything new to the areas explored by counsel, the defendant was not denied her right to confront Sarmiento merely because the testimony of the other witnesses may have provided additional questions for counsel to pursue.[610]

4. Admission of Hearsay Notwithstanding Its Testimonial Nature

Determining that a hearsay statement is testimonial and that there was no prior opportunity for cross-examination does not always end the Confrontation Clause inquiry under *Crawford*, because in some circumstances a hearsay statement may be admitted under the Clause notwithstanding its testimonial nature. The Supreme Court has "acknowledged that two forms of testimonial statements were admitted at common law even though they were unconfronted."[611]

a. Dying Declarations

The first category of testimonial statements which were admitted at common law notwithstanding their testimonial nature "were declarations made by a speaker who was both on the brink of death and aware that he was dying,"[612] the so-called dying declaration. The Michigan Court of

607. Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam).
608. Larrimore v. Scribner, 2008 WL 2397580, *11 (C.D. Cal. June 12, 2008).
609. Commonwealth v. Sena, 809 N.E.2d 505, 515 (Mass. 2004).
610. *See* State v. Stano, 159 P.3d 931, 942 (Kan. 2007); *Sena*, 809 N.E.2d at 515-16; Farmer v. State, 124 P.3d 699, 705-06 (Wyo. 2005).
611. Giles v. California, 128 S. Ct. 2678, 2682 (2008).
612. *Id.*

Appeals considered the dying declaration exception in *People v. Taylor*.[613]

In *Taylor*, the defendant was convicted of first degree murder in connection with the shooting death of Buel Lasater.[614] 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.[615] Lasater hesitated, and the officers told him he might not survive and should identify the shooter. Lasater then identified the defendant.[616] On the defendant's appeal, the court of appeals rejected his claim that the introduction of this evidence violated the Confrontation Clause.[617]

The court first concluded that the dying declaration was not testimonial.[618] 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*."[619] 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 given 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.[620] Importantly, the police repeatedly asked the victim who had shot him, and explicitly told him that he was dying.[621] 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.

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

613. 275 Mich. App. 177, 737 N.W.2d 790 (2007), *appeal granted*, 480 Mich. 946, 741 N.W.2d 24 (2007), *order granting leave to appeal vacated*, 481 Mich. 943, 752 N.W.2d 454 (2008).

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

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

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

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

618. *Id.*

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

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

621. *Id.*

Confrontation Clause.[622] In *Crawford*, the Court suggested that testimonial dying declarations may be admissible notwithstanding the rule that case established.[623] 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*.[624]

Based on this language, the *Taylor* court concluded that dying declarations are admissible under the Confrontation Clause regardless of whether they are testimonial.[625] 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.[626] Because *Crawford* read the Confrontation Clause as embodying "those exceptions established at the time of the founding,"[627] the court concluded that "'it follows that the common law pedigree of the exception for dying declarations poses no conflict with the Sixth Amendment.'"[628]

Although the majority of courts have interpreted the *Crawford* language as allowing admission of testimonial dying declarations under the Confrontation Clause,[629] 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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622. *Id.* at 184, 737 N.W.2d at 795.

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

624. *Id.* at 55 n.6 (citations omitted).

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

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

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

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

629. *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*, 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.[630] In *Taylor*, the Michigan Supreme Court initially granted leave to appeal to explicitly consider this issue,[631] but later vacated its order granting leave to appeal.[632]

b. Forfeiture by Wrongdoing

The second doctrine which permitted introduction of testimonial hearsay without an opportunity for cross-examination—the forfeiture by wrongdoing doctrine: "permitted the introduction of statements of a witness who was 'detained' or 'kept away' by the 'means or procurement' of the defendant."[633] As the Court explained in *Crawford* and *Davis*, this doctrine "extinguishes confrontation claims on essentially equitable grounds"[634] when the declarant's unavailability has been procured or caused by the defendant. As the Supreme Court explained, "[w]hile defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system."[635] Although the Court did not itself rule on the standards applicable to finding a forfeiture by wrongdoing, the Court did note that, under the hearsay rule's codification of the standard,[636] the federal and state courts have generally applied a preponderance of the evidence standard.[637]

Following *Crawford*, a number of courts, including the Michigan Court of Appeals, adopted an expansive view of the forfeiture by wrongdoing exception, holding that the exception is applicable whenever the defendant procured the witness' absence regardless of motive. Thus, in a murder case the victim's prior statements could be admitted, regardless of whether the defendant killed the victim for the purpose of preventing her from testifying.[638] In *Giles*, the Supreme Court rejected this expansive view of the forfeiture by wrongdoing exception. Rather, the Court explained, "[t]he terms used to define the scope of the forfeiture rule [at common law] suggest that the exception applied only

630. *See* United States v. Mayhew, 380 F. Supp. 2d 961, 965-66, 966 n.5 (S.D. Ohio 2005); *Jordan*, 2005 WL 513501 at *3; *see also* Michael J. Polelle, *The Death of Dying Declarations in a Post-Crawford World*, 71 MO. L. REV. 285, 289-307 (2006).

631. *See Taylor*, 480 Mich. at 946, 741 N.W.2d at 24.

632. *See Taylor*, 481 Mich. at 943, 752 N.W.2d at 454.

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

634. *Davis*, 126 S. Ct. at 2280 (quoting *Crawford*, 541 U.S. at 62).

635. *Id.*

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

637. *See Davis*, 126 S. Ct. at 2280.

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

when the defendant engaged in conduct *designed* to prevent the witness from testifying."[639] The court noted "[c]ases and treatises of the time indicate that a purpose-based definition of [the] terms [used to describe the doctrine] governed,"[640] and that the cases applying the rule at common law made "plain that unconfronted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying."[641] The Court further observed that, not only was the expansive view of the doctrine not the prevailing law at the time the Confrontation Clause was adopted, "it is not established in American jurisprudence *since* the founding. American courts never prior to 1985 invoked forfeiture outside the context of deliberate witness tampering."[642] Accordingly, under *Giles*, "the fact that a defendant causes a declarant to be unavailable to testify at trial operates as a waiver of the defendant's Sixth Amendment right to confrontation only if the defendant *intended* to make the declarant unable to testify."[643]

VII. CONCLUSION

The Michigan courts were less active in issuing decisions on evidentiary decisions during the current *Survey* period than they have been in the last few *Survey* periods. Nevertheless, the courts did provide some clarity regarding other acts evidence, expert testimony, and hearsay and confrontation issues. The next *Survey* period will hopefully provide further guidance on issues of evidence law affecting Michigan practitioners.

639. *Giles*, 128 S. Ct. at 2683 (emphasis in original).

640. *Id.* at 2683-84.

641. *Id.* at 2684 (emphasis in original).

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

643. Dednam v. Norris, 2008 WL 4006997, *6 (E.D. Ark. Aug. 25, 2008).