

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DAVID CARL BARRETT,

Defendant-Appellee.

Supreme Court No. 133128

COA No. 261382

(On appeal from Circuit
Court for Livingston County;
File No. 04-14530-AR;
Hon. David J. Reader)

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DEFENDANT-APPELLEE'S BRIEF IN OPPOSITION TO PLAINTIFF-APPELLANT'S
APPLICATION FOR LEAVE TO APPEAL

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COUNTERSTATEMENT OF THE JUDGMENT/ORDER APPEALED FROM
AND RELIEF SOUGHT

Defendant-Appellee agrees with the "STATEMENT IDENTIFYING JUDGMENT AND RELIEF SOUGHT" made by Plaintiff-Appellant.

COUNTERSTATEMENT OF QUESTION PRESENTED

I. DID THIS COURT CLEARLY ERR IN ITS DECISION IN *PEOPLE V BURTON* BY HOLDING THAT INDEPENDENT PROOF OF A STARTLING EVENT WAS REQUIRED AS A FOUNDATION FOR THE ADMISSION OF AN EXCITED UTTERANCE CONCERNING SAID EVENT?

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COUNTERSTATEMENT OF PROCEEDINGS AND FACTS

Defendant accepts the statement of facts made by Plaintiff-Appellee, but notes, in addition, that testimony presented in District Court regarding the statements allegedly made by Suzann Barthel was far more extensive than that described by Plaintiff.

ARGUMENT

I. DID THIS COURT CLEARLY ERR IN ITS DECISION IN *PEOPLE V BURTON* BY HOLDING THAT INDEPENDENT PROOF OF A STARTLING EVENT WAS REQUIRED AS A FOUNDATION FOR THE ADMISSION OF AN EXCITED UTTERANCE CONCERNING SAID EVENT?

Defendant-Appellee agrees with the standard of review stated by Plaintiff-Appellant; that is that review of the issue stated is *de novo*. The issue was properly preserved by Plaintiff.

Plaintiff's claim that principles of statutory construction govern this Court's decision in *People v Burton*, 433 Mich 268; 445 NW2d 133 (1989), ignores the explicitly stated basis for the Michigan Rules of Evidence and results in unwarranted criticism of the *Burton* Court and an entirely misdirected focus.

Unlike the Federal Rules of Evidence, the Michigan Rules of Evidence are a judicially-created set of rules whose purpose and limitations are stated in the Court's adopting order of March 1, 1978:

In adopting these rules, the Court should not be understood as foreclosing consideration of a challenge to the wisdom, validity or meaning of a rule when a question is brought to the Court judicially or by a proposal for a change in a rule. See, e.g., *Meek v Centre County Banking Co*, 268 US 426; 45 S Ct 560; 69 L Ed 1028 (1925), and *Mississippi Publishing Corp v Murphree*, 326 US 438; 66 S Ct 242; 90 L Ed 185 (1946). While these rules are binding on Michigan courts, the Court does not intend to preclude evidentiary objection in the trial court based on a challenge to the wisdom, validity or meaning of a rule and development of a separate record so as to properly present the challenge for review by this Court.

The Federal Rules of Evidence are the product of a Congressionally enacted statute and their interpretation is governed by the general rules of statutory construction, *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579 (1993). In many other state

jurisdictions, the rules of evidence are legislatively created, while in many (like Michigan) the rules of evidence are judicially created. In Michigan, the Supreme Court (in adopting the Rules) clearly intended to further develop the rules to do justice and to promote the cause of more reliable and just determinations of fact, the purpose for the Rules; see MRE 102.

Plaintiff's citation to Supreme Court decisions for the proposition that "the interpretation of the evidence rule is a question of law governed by the same principles that govern statutory interpretation" is inaccurate. In *People v Phillips*, 468 Mich 583; 663 NW2d 463 (2003) (cited by Plaintiff), this Court was interpreting a statute, not a provision of MRE. In *People v Katt*, 468 Mich 272; 662 NW2d 12 (2003) (cited by Plaintiff), the Court did consider a provision of MRE, MRE 803(24). It noted that MRE 803(24) was based on Rule 803(24) of the Federal Rules of Evidence and quoted from several federal court opinions which discussed rules of statutory construction; it did not, however, apply those same rules to its decision. It concluded:

We agree with the majority of the federal courts and conclude that a hearsay statement is "specifically covered" by another exception for purposes of MRE 803(24) only when it is admissible under that exception. Therefore, we decline to adopt the near-miss theory as part of our method for determining when hearsay statements may be admissible under MRE 803(24).

In our view, the arguments in favor of the near-miss theory are unpersuasive and do not conform to the language of the rules. *Katt, supra*

Read as a whole, the *Katt* opinion clearly focuses on the policy reasons for its interpretation and eschews a text-dominated

interpretation. In *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999) (cited by Plaintiff), the Court stated only that it reviewed the lower court's application of evidence rules *de novo*, and stated nothing about how it interpreted such rules. This Court clearly did not intend to bind itself by its adoption of the Rules.

Even if the Michigan Rules of Evidence were legislatively imposed, they would not apply to a preliminary determination of admissibility of matters potentially admissible under MRE 803(2). MRE 1101(b) states in part:

(b) The rules other than those with respect to privileges do not apply in the following situations and proceedings:

(1) The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a).

MRE 104(a) states in part:

Preliminary questions concerning the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the Rules of Evidence except those with respect to privileges.

MRE 104(b) relates to relevancy conditioned on fact and is not pertinent here.

To summarize the Rules position, preliminary questions of admissibility are to be decided by the court. The Michigan Rules of Evidence (as published) do not apply to this determination. Nothing in the Rules suggests that a trial court's determination of a preliminary question of admissibility may not be limited by judicially-adopted principles designed to further the cause of

justice and reliability. Certainly, nothing in the Rules suggests that the preliminary determination of admissibility is to be made conclusively by the absent declarant of a hearsay statement.

MRE 803 states in part:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(2) 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.

The rule clearly calls for a preliminary determination of admissibility in two areas: 1) the existence of the startling event or condition; and 2) whether the statement was made while the declarant was under the stress of such event or condition. Note that, even in jurisdictions where the statement itself can be sufficient to make a preliminary determination of admissibility, the trial court may still exclude the statement because of the lack of corroborating evidence:

In light of the volume and persuasiveness of authority bearing on the question, we conclude that an excited utterance may itself be sufficient to establish that a startling event occurred and that the question of corroborating evidence independent of the declaration is needed in a given case to establish the occurrence of such an event is committed to the discretion of the trial judge.

United States v Brown, 254 F3d 454, 460 (CA 3, 2001)

In *Burton*, this Court held that these preliminary questions could not be entirely answered on the basis of the statement alone. The real issue in *Burton* (and here) is whether sound judicial policy is best served by requiring at least some evidence independent of the statement to make this preliminary determination of admissibility.

Burton remains good policy. It can be used to restrict the admission of what is generally highly unreliable evidence. While such evidence is likely always to be deemed valuable by its proponent, it is most valuable (and its use most pernicious) where little or no reliable evidence in support of a proposition is presented to a factfinder on behalf of an emotionally sympathetic position.

Since the decision in *Burton*, other courts have adopted the same or similar positions in analyzing the preliminary determination of admissibility of alleged excited utterances (despite the rarity of such cases; see *Burton*, p 282), *People v Vasquez*, 88 NYS2d 561, 575-576; 647 NYS2d 697; 670 NE2d 1328 (1996) (involves analogous present sense impression, but opinion specifically states reasoning applies to excited utterances as well); *State v Kemp*, 919 SW2d 278, 280-282 (Mo App 1996). The reasoning in those cases conforms to that in the statement relied on by the Texas Supreme Court in *Truck Insurance Exchange v Michling*, 364 SW2d 172, 175 (Tx, 1963) (quoted extensively in *Burton*):

As aptly said in 32 C.J.S. Evidence §405:

"* * * It is proceeding in a circle to use the declarations as proof of facts necessary to constitute declarations part of the res gestae."

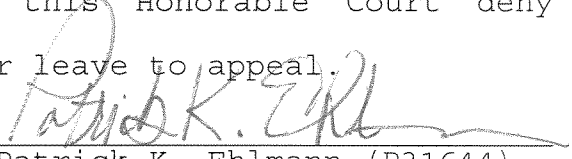
See also Jones, "Necessity, in Criminal Prosecution, of Independent Evidence of Principal Act to Allow Admission, under Res Gestae or Excited Utterance Exception to Hearsay Rule, of Statement Made at Time of, or Subsequent to, Principal Act", 38 ALR4th 1237.

Reconsideration of *Burton* would weaken the interests of justice by inviting the (potential manufacture and) use of evidence that is highly unreliable.

RELIEF REQUESTED

Defendant-Appellee prays that this Honorable Court deny Plaintiff-Appellant's application for leave to appeal.

Date: March 2, 2007


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Attorney for Defendant-Appellee

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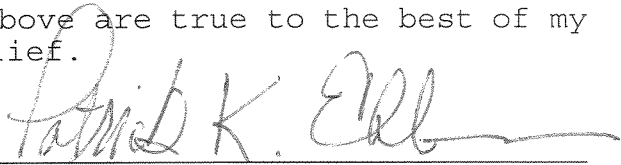
PROOF OF SERVICE

I served a copy of DEFENDANT-APPELLEE'S BRIEF IN OPPOSITION TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL on the attorney for Plaintiff-Appellant on March 3, 2007, by sending it by first-class mail to:

LIVINGSTON COUNTY PROSECUTOR
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I declare that the statements above are true to the best of my information, knowledge, and belief.

March 3, 2007


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Appellee