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## A Sympathetic Vehicle: Michigan v. Katt and Setting Dangerous Precedent

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# A SYMPATHETIC VEHICLE: *MICHIGAN V. KATT* AND SETTING DANGEROUS PRECEDENT

## I. INTRODUCTION

One may imagine that the person seated behind the defendant's table depends on certain notions of justice. Such notions may include the right to remain silent, the right to an attorney, to be presumed innocent until proven guilty, or perhaps most importantly, the right to a fair trial. Therefore, it comes as quite a surprise when a court is willing to sacrifice justice through the interpretation of one small rule of evidence. Whether the charge is petty theft, tax fraud, or child molestation, a defendant must be able to believe that justice will be served in a fair and equitable manner. This Comment provides an example of a case in which the wheels of justice ground to a halt and took a few turns backward.

In *Michigan v. Katt*,<sup>1</sup> the Supreme Court of Michigan held that the "residual exception" of the Michigan Rules of Evidence ("MRE") could be used to admit statements that were similar to, but not admissible under, the categorical hearsay exceptions.<sup>2</sup> The residual exception is a tool incorporated into the rules of evidence that serves to admit certain types of statements into evidence even if there is no specific provision listed. The Court rejected the defendant and dissent's position that the "near-miss" theory and the language of the exception barred similar evidence from being admitted.

In ruling this way, the Court followed the relatively recent trend of federal and state courts and set precedent that may allow evidence that "nearly misses" a categorical hearsay exception to be admitted

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1. *People v. Katt*, 639 N.W.2d 815 (Mich. Ct. App. 2001).

2. *Id.* at 821. For a succinct summary of this and other relevant evidence rules, see chart *infra* pages 1391–92.

under the residual exception.<sup>3</sup> Categorical exceptions are those which are specifically listed in the rules of evidence. The court's interpretation of the residual exception leaves the door wide open for the admission of evidence that fails to conform to any other categorical rule. This broad interpretation of the language could compromise the defendant's right to an equitable trial.

This Comment argues that, even where public policy appears to necessitate it, courts are creating dangerous precedent by allowing evidence in through a broad interpretation of the residual exception. In *Katt*, the evidence clearly met the indicia of trustworthiness requirement of the residual exception.<sup>4</sup> If the court were to interpret the rule as the dissent and the defendant did, however, it would never have considered the evidence under the residual exception to begin with. The testimony at issue in this case clearly satisfied MRE 803A, the "tender years rule."<sup>5</sup> Thus the court reached outside of the categorical exception when it admitted the evidence under the residual exception.

Section II of this Comment presents the pertinent background facts of *Katt* presented at the trial and appellate levels. Section III provides a summary of the Michigan Supreme Court's decision. Section IV analyzes the ruling, while pointing out the weaknesses inherent in the court's reasoning. Section V predicts possible implications of the court's decision, and Section VI concludes.

## II. PROCEDURAL AND SUBSTANTIVE FACTS

In 2001, the Michigan Court of Appeals rejected the defendant's contention that the admission of hearsay evidence under the residual exception was erroneous.<sup>6</sup> More specifically, it held that although the evidence did not fit under the categorical hearsay exceptions, it was admissible because it possessed equivalent circumstantial

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3. *People v. Katt*, 662 N.W.2d 12, 17-18 (Mich. 2003) (because the language of MRE 803(24) mirrors its federal counterpart, Federal Rule of Evidence 807, the Michigan Court of Appeals looked to federal precedent for guidance regarding this theory).

4. *Id.* at 25.

5. *See infra*, note 12.

6. *Katt*, 639 N.W.2d at 819.

guarantees of trustworthiness to render it reliable under the residual exception.<sup>7</sup>

The case arose as a result of sexual assaults against a seven-year-old boy, D.D., and his five-year-old sister, A.D., by the defendant, Terry Katt. In the autumn of 1998, Terry Katt rented a room in the home the children shared with their mother, her ex-husband and another individual.<sup>8</sup> In October of 1998, Angela Bowman, a child protective services specialist with the Family Independence Agency visited D.D. at his elementary school after the Agency received an anonymous phone call alleging that D.D. and his sister were being physically abused by their mother.<sup>9</sup>

Although Miss Bowman did not find sufficient evidence of physical abuse, D.D. told her that "Uncle Terry" was doing "nasty stuff" to him.<sup>10</sup> Miss Bowman further testified that after asking D.D. what he meant by nasty stuff, he was initially guarded, but then told her the details of sexual acts that Katt would perform on the children, or force them to perform on him.<sup>11</sup>

The defendant objected to the admission of Miss Bowman's testimony as to what D.D. had told her about the abuse, claiming that because it did not fit under the tender years rule in MRE 803A,<sup>12</sup> it could not be admitted under the residual hearsay exception.<sup>13</sup> D.D.'s statement to Miss Bowman did not qualify for the tender years rule

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7. *Id.* at 823.

8. *Id.* at 816–17.

9. *Id.* at 817.

10. *Id.*

11. *Id.*

12. MICH. R. EVID. 803A. The tender years rule provides in pertinent part:

A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided: (1) the declarant was under the age of ten when the statement was made; (2) the statement is shown to have been spontaneous and without indication of manufacture; (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and (4) the statement is introduced through the testimony of someone other than the declarant. If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.

MICH. R. EVID. 803A.

13. *Katt*, 639 N.W.2d at 818.

because it was not his first corroborative statement about the abuse, thus his testimony to the Agency “nearly missed” the categorical exception.<sup>14</sup> As such, the trial court and appellate court admitted the testimony under MRE 803(24), the residual exception, because the statement was deemed to have the “equivalent circumstantial guarantees of trustworthiness.”<sup>15</sup>

According to the defendant, Miss Bowman’s testimony regarding the sexual abuse was “specifically covered” by MRE 803A, and thus could not be admitted under the residual hearsay exception.<sup>16</sup> At least one court has characterized this argument as the near-miss theory, meaning that a hearsay statement that is close to, but that does not completely satisfy a recognized hearsay exception is not admissible under the residual hearsay exception.<sup>17</sup> The Michigan court adopted the federal majority interpretation of the rule, holding that if a hearsay statement is inadmissible under one of the established exceptions to the hearsay rule, it is not automatically removed from consideration under MRE 803(24).<sup>18</sup>

The Michigan Court of Appeals, embracing the majority of federal circuits, interpreted “specifically covered” to mean that “if a statement is admissible under one of the hearsay exceptions, that exception should be relied on instead of the residual exception.”<sup>19</sup>

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14. *Id.*

15. MICH. R. EVID. 803(24) (listing “Other Exceptions”):

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..

MICH. R. EVID. 803(24) (emphasis added).

16. *Katt*, 639 N.W.2d at 819.

17. *United States v. Deeb*, 13 F.3d 1532, 1536 (11th Cir. 1994).

18. *People v. Katt*, 662 N.W.2d 12, 21 (Mich. 2003).

19. *Katt*, 639 N.W.2d at 820 (quoting 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein’s Federal Evidence*, §807.03(4) (2d ed. 2000)). *See, e.g.*, *United States v. Earles*, 113 F.3d 796, 800 (8th Cir. 1997) (noting the majority of circuit courts have held language “specifically covered” to mean “only that if a statement is *admissible* under one of the prior exceptions, such prior subsection should be relied upon” instead of the residual exception); *United States v. Clarke*, 2 F.3d 81, 83 (4th Cir. 1993) (court recognized that a liberal

However, the court recognized that not all courts have interpreted the rule's language in the same manner.<sup>20</sup> In footnote nine of the opinion, the court highlighted a few minor cases which read the exception to exclude evidence that did not meet the requirements of a categorical hearsay exception, such that the evidence was not admissible under the residual exception.<sup>21</sup> The Michigan Court of Appeals adopted the federal majority interpretation of the rule, holding that if a hearsay statement is inadmissible under one of the established exceptions to the hearsay rule, it is not automatically removed from consideration under MRE 803(24) (the residual exception rule).<sup>22</sup>

The Michigan Court of Appeals then rejected the defendant's next argument, which challenged the fit of the testimony under MRE 803(24).<sup>23</sup> The defendant maintained that (1) the evidence did not possess equivalent circumstantial guarantees of trustworthiness and (2) it was not more probative on the point for which it was offered than any other evidence that the prosecutor could have procured through reasonable efforts.<sup>24</sup> The court disagreed, and held that in reviewing the totality of the circumstances surrounding the testimony, the evidence did comport with the factors set forth by federal and state precedent to determine trustworthiness.<sup>25</sup>

Therefore, in applying the state and federal precedent to the testimony of Miss Bowman as to what D.D. had told her, the lower courts found the evidence to be trustworthy, and thus admissible under the residual exception. For example, Miss Bowman did not

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interpretation of "specifically covered" is consistent with the underlying purpose of the residual hearsay exception).

20. *Katt*, 639 N.W.2d at 819-21.

21. *Id.* at 821 n.9 (citing *United States v. Turner*, 104 F.3d 217, 221 (8th Cir. 1997) and *Schimpf v. Gerald, Inc.*, 52 F. Supp. 2d 976, 985 (E.D. Wis. 1999)).

22. *Katt*, 639 N.W.2d at 821.

23. *Id.*

24. *Id.*

25. *Id.*; see e.g., *People v. Lee*, 622 N.W.2d 71, 80 (Mich. Ct. App. 2000) (naming the trustworthiness factors as, among others, "1) the spontaneity of the statements; 2) the consistency of the statements . . . ; 3) lack of motive to fabricate or lack of bias . . . ; 6) personal knowledge of the declarant about the matter on which he spoke . . . ; 7) to whom the statements were made."); *Idaho v. Wright*, 497 U.S. 805, 822 (1990) (noting the "unifying principle is that these factors relate to whether the child declarant was particularly likely to be telling the truth when the statement was made").

ask D.D. about sexual abuse.<sup>26</sup> Rather she was there to examine him for physical abuse.<sup>27</sup> Yet D.D. spontaneously spoke up about the "nasty stuff" that Katt was doing to him.<sup>28</sup> Further, the court did not believe that D.D. was coached by anyone to "mouth sentences to Miss Bowman that were not true."<sup>29</sup> The court also considered Miss Bowman's qualifications in interviewing children about abuse, and found that she was fully capable of obtaining reliable information from the child.<sup>30</sup> In addition, the court found nothing to suggest that D.D. had a motive to fabricate the information he relayed to Miss Bowman.<sup>31</sup> Overall, Miss Bowman's testimony contained the trustworthiness guarantees that MRE 803(24) required.<sup>32</sup>

The defendant also argued that the testimony of Miss Bowman was not more probative than other evidence the prosecutor could have brought.<sup>33</sup> Katt contended that the potential testimony of D.D.'s mother on the subject was more probative because D.D. allegedly told her about the sexual abuse a few days before his conversation with Miss Bowman.<sup>34</sup> The trial court rejected this argument and the Court of Appeals affirmed, concluding that Miss Bowman's testimony was more probative both because the information was much less detailed, and because it was factually unclear what had been said to the mother regarding the abuse.<sup>35</sup>

The Court of Appeals affirmed the trial court's rejection of each of the defendant's claims of error regarding the admission of evidence and also affirmed the defendant's convictions. The defendant appealed to the Supreme Court of Michigan.

### III. SUMMARY OF THE DECISION

In review, the Supreme Court of Michigan identified the issue of whether Miss Bowman's testimony was properly admitted as a question of law, and the Court reviewed the lower court's decision de

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26. *Katt*, 639 N.W.2d at 822.

27. *Id.*

28. *Id.*

29. *Id.* at 822-23.

30. *Id.* at 823.

31. *Id.*

32. *Id.*

33. *Id.* at 824.

34. *Id.*

35. *Id.* at 824-25.

novo.<sup>36</sup> The Supreme Court of Michigan concluded that the trial court properly admitted the hearsay statements under MRE 803(24), and accordingly affirmed the judgment of the Court of Appeals.<sup>37</sup>

*A. MRE 803(24) and the Near-Miss Theory*

In affirming the decision of the lower courts that Miss Bowman's testimony was admissible under MRE 803(24), the residual exception, the Supreme Court of Michigan examined the language specifically covered within the context of the near-miss theory. The theory is part of the debate concerning the interpretation of the words "specifically covered" and the admissibility of evidence that is factually similar to a categorical hearsay exception, but not admissible under it.<sup>38</sup>

The court explained the theory as stating, "that a piece of hearsay evidence may be offered only under the exception that most nearly describes it. If it is excluded under that exception, it may not be offered under the residual exceptions."<sup>39</sup> Citing the interpretation of Judge Easterbrook in his concurring opinion in *United States v. Dent*,<sup>40</sup> the court reasoned that MRE 803(24):

Reads more naturally if we understand the introductory clause to mean that evidence of a kind specifically addressed ("covered") by one of the [categorical exceptions] must satisfy the conditions laid down for its admission, and that other kinds of evidence not covered (because the drafters could not be exhaustive) are admissible if the evidence is approximately as reliable as evidence that would be admissible under the [categorical exceptions].<sup>41</sup>

Judge Easterbrook's opinion advocates the position that if the evidence is of the particular type addressed by one of the rules, it must either satisfy the conditions for admission or be inadmissible.

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36. *People v. Katt*, 662 N.W.2d 12, 17 (2003) (holding that a trial court's decision to admit evidence is reversed).

37. *Id.* at 14.

38. *Id.* at 18.

39. *Id.* (quoting *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 302 (3d Cir. 1983)).

40. *United States v. Dent*, 984 F.2d 1453 (7th Cir. 1993).

41. *Katt*, 662 N.W.2d at 18 (quoting *Dent*, 984 F.2d at 1465–66).



The Michigan Supreme Court also agreed that statutory construction controls interpretation. For example, the court cited *Morton v. Mancari*,<sup>42</sup> which stated that it was ““a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.””<sup>43</sup>

Armed with a definition of the near-miss theory,<sup>44</sup> the court determined that a strict application of the theory would preclude too much evidence, rendering the residual exception unavailable under any circumstances.<sup>45</sup> The court concluded that even the few courts in the nation that have adopted the rule have also softened its application.<sup>46</sup> In this case, the hearsay exceptions apply to a relatively broad category of evidence, therefore applying the near-miss theory would negate the application of the residual exception.<sup>47</sup>

Thus, the court rejected the application of the near-miss theory to Miss Bowman's testimony. The court adhered to an interpretation of “specifically covered” that is directly contrary to those courts that adhere to the near-miss theory. The court interpreted the introduction of MRE 803(24) to mean, “[a] statement not admissible under the categorical exceptions would not be ‘specifically covered’ by those exceptions, and thus could be a candidate for admissibility under the residual exceptions.”<sup>48</sup>

The Michigan Supreme Court also held that its interpretation was in accord with the majority of federal circuits.<sup>49</sup> The view of the Fourth Circuit is much the same: “[t]o adopt the ‘near-miss’ theory would create an odd situation where testimony that was equally trustworthy would be distinguishable based merely on its proximity

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42. *Morton v. Mancari*, 417 U.S. 535 (1974).

43. *Katt*, 662 N.W.2d at 19 (quoting *Morton*, 417 U.S. at 550–51).

44. The court reasoned that the near-miss theory was based on a broad reading of the term “specifically covered,” and that under such a theory, a party could never use the residual exception to admit evidence if there was already a categorical exception to which it was related. *Id.*

45. *Id.*

46. *Id.*; see, e.g., *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1190 (E.D. Pa. 1980).

47. *Katt*, 662 N.W.2d at 19.

48. *Id.* at 20.

49. *Id.* at 21.

to a specified exception.”<sup>50</sup> The Sixth Circuit Court of Appeals also declined to adopt a narrow view of FRE 807 and held, “this court interprets Fed. R. Evid. 807, along with the majority of circuits, to mean that ‘if a statement is admissible under one of the hearsay exceptions, that exception should be relied on instead of the residual exception.’”<sup>51</sup>

*B. The Michigan Supreme Court’s Approach to the Residual Exception*

In its review of the admissibility of Miss Bowman’s testimony under the residual exception, the Michigan Supreme Court relied upon the dictionary definition of “covered” in order to better explain the meaning of specifically covered.<sup>52</sup> The court read the two words together, according to the normally understood meaning, and concluded that “specifically covered” requires *more* than to be “covered.”<sup>53</sup>

Therefore, the court interpreted the language in this way:

Since “specific” can mean “conformable to specific requirements” and “cover” can mean “addressing” or “dealing with,” we understand that a statement is only “specifically covered” by a categorical exception when it is *conformable to all the requirements of that categorical exception*. To hold otherwise would read “specifically” out of the rule.<sup>54</sup>

The court’s position was that if the evidence conforms to all the conditions of the exception, then it is specifically covered.

The court also rejected the idea that the residual exception would swallow up the categorical exceptions.<sup>55</sup> The court reasoned, “if a near-miss statement is deficient in one or more requirements of a categorical exception, those deficiencies must be made up by alternate indicia of trustworthiness.”<sup>56</sup> Therefore, the court

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50. *Id.* at 20 (citing *United States v. Clarke*, 2 F.3d 81, 83–84 (4th Cir. 1993)).

51. *Id.* at 20–21 (quoting *United States v. Laster*, 258 F.3d 525, 530 (6th Cir. 2001)).

52. *Id.* at 21.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 23.

maintained that the residual exception does not automatically admit just any evidence.<sup>57</sup> Whether admitted under the categorical exceptions or the residual exception, the evidence must still meet guarantees of trustworthiness, the difference being the actual conditions.<sup>58</sup> The court affirmed that the residual exception may be used to admit evidence that is similar to, but not admissible under, the categorical exceptions.<sup>59</sup>

The Supreme Court of Michigan affirmed the lower court's consideration of factors when determining whether Miss Bowman's testimony satisfied the elements of MRE 803(24)<sup>60</sup> and indicia of trustworthiness.<sup>61</sup> The court also listed additional factors to consider when looking at the "totality of the circumstances."<sup>62</sup> In general, the court declared that the admissibility of evidence under MRE 803(24) must be decided on the facts of each case.<sup>63</sup>

As applied to the case at hand, the court defined specifically covered to mean "admissible."<sup>64</sup> Since the defendant never contended that the testimony was admissible under a categorical exception, the court deemed it a proper candidate for admissibility under MRE 803(24).<sup>65</sup> The Supreme Court of Michigan looked to the findings of the trial court and affirmed that D.D.'s statement to Miss Bowman satisfied each element of MRE 803(24).<sup>66</sup> In particular, the trial court elaborated on the trustworthiness of the statement, finding that it was spontaneous and unanticipated by Miss Bowman and also the most probative evidence available regarding the actual abuse.<sup>67</sup>

The defendant argued that the evidence failed to meet the conditions of MRE 803(24) because D.D.'s statement to Miss Bowman was not his first corroborative statement concerning the

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57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 25.

61. *Id.*

62. *Id.* at 23 n.11.

63. *Id.* at 25.

64. *Id.* at 22.

65. *Id.*

66. *Id.*

67. *Id.*

abuse, alleging that D.D. spoke first to his mother about the abuse.<sup>68</sup> However, the trial court found no concrete evidence or facts concerning D.D.'s conversation with his mother, therefore the court found that it was impossible to compare the two statements for probative worth.<sup>69</sup> The court also maintained that D.D.'s second statement was preferable to later statements he may have made due to the influence that reactions of listeners may have had.<sup>70</sup>

After considering the circumstances under which D.D. made his statement to Miss Bowman, the trial court found that it met the first three elements of the residual exception and that it was not in danger of compromising the interests of justice, and that it therefore was admissible under the exception.<sup>71</sup> The Michigan Supreme Court affirmed the results of the trial court, finding that it did not abuse its discretion in admitting the statement under MRE 803(24).<sup>72</sup>

#### IV. ANALYSIS

Although public policy and the indicia of trustworthiness contained in Miss Bowman's testimony weigh in favor of admission, the Supreme Court of Michigan did not reach the correct result in admitting the evidence under MRE 803(24) (the residual exception). The court's interpretation of MRE 803(24) is of concern, suggesting that perhaps the court should never have considered evidence under the exception in the first place.

In the present case, the Michigan Supreme Court made a broad statement in holding that the residual exception will be used to admit evidence that is similar to, but not admissible under, another categorical exception.<sup>73</sup> It is conceivable that the court would make such a determination due to the heinous nature of child molestation and abuse, but in choosing to set precedent, the court now has a broad rule that admits evidence that nearly misses another exception. Furthermore, while the court should try to stop the sexual abuse of children, a broad interpretation of the residual exception seems to

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68. *Id.* at 25–26.

69. *Id.* at 26.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 23.

suggest that the court will admit hearsay evidence, even if it fails to satisfy another exception.

Judge Young's dissenting opinion in *Katt* advocated a narrower interpretation of the language of MRE 803(24).<sup>74</sup> Judge Young acknowledged his position as the minority view, but he reasoned that a broad interpretation of MRE 803(24) goes against the general prohibition against hearsay, rendering the exceptions and restrictions meaningless.<sup>75</sup> If interpreted broadly, the residual exception functions as a:

"Trojan Horse" that has been set upon the judiciary to wreak havoc and to emasculate the rule against hearsay. Advocates for the exception, like the fated inhabitants of ancient Troy, erroneously believed that the exceptions could be adequately controlled by adding strict requirements for admission.<sup>76</sup>

In other words, Judge Young questions what the point is of having a rule against hearsay if such a wide range of evidence will get in through an exception providing for the admission of the leftovers.

Judge Young also noted that drafters of the rules provided the residual exception for the consideration of "*new and presently unanticipated situations* which demonstrate a trustworthiness within the spirit of the specifically stated exceptions."<sup>77</sup> According to Judge Young, D.D.'s statement to Miss Bowman did not constitute a "*new and presently unanticipated situation*," due to the fact that this sort of testimony was provided for under MRE 803A and failed to meet the criteria for admission.<sup>78</sup>

The majority, on the other hand, read the language of the residual exception more broadly so as to admit D.D.'s testimony due to the factors of trustworthiness surrounding the statement. Although the testimony was trustworthy, the court erred in admitting the evidence under MRE 803(24) because MRE 803A specifically covered the evidence and would have served to admit it had all of the

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74. *Id.* at 26.

75. *Id.* at 27-28.

76. *Id.* at 28 n.5 (quoting James E. Beaver, *The Residual Hearsay Exception Reconsidered*, 20 FLA. ST. U. L. REV. 787, 794-95 (1993)).

77. *Id.* at 28 (quoting FED. R. EVID. 803(24) advisory committee's note, 56 F.R.D. 183, 320 (1973) (emphasis added)).

78. *Id.*

elements been met. The language of the residual exception should be interpreted narrowly so that it does not include all evidence that just misses another exception.

The court found that D.D.'s statement to Miss Bowman satisfied the elements of trustworthiness,<sup>79</sup> yet it is questionable whether the court should have considered the statement under the residual exception at all. MRE 803A provides the circumstances under which a statement regarding the sexual abuse of a child may be admitted<sup>80</sup> and seems to be inclusive of the "anticipated" situations where a child may report instances of abuse.

The dissent and proponents of the near-miss theory would argue that MRE 803A, the tender years rule, covered Miss Bowman's testimony concerning D.D.'s report of abuse.<sup>81</sup> As applied to D.D.'s statement, MRE 803A is the most relevant exception. For example D.D. was under the age of ten when he made the statement describing the sexual acts that Katt allegedly performed on him, the trial court found that the statement was spontaneous, the statement was made soon after the abuse occurred, and the statement was introduced through the testimony of Miss Bowman, rather than D.D. The only condition of MRE 803A that the testimony does not satisfy is that it be the first corroborative statement regarding the abuse. Unfortunately, the testimony failed to meet all the elements of 803A, but that does not mean that it should have been considered under another exception.

Although the testimony failed under MRE 803A, there may have been other probative evidence that the court could have admitted instead. D.D. may have told his uncle or his mother about the abuse first, leaving other avenues open to introduce the evidence. Also, D.D.'s own testimony would have been most useful. Not only could he have described the abuse again, but it is also possible that he could have corroborated his exchange with Miss Bowman and Miss Bowman's testimony would not have been needed at all. The Supreme Court of Michigan rushed forward to apply MRE 803(24) and ended up setting precedent that interpreted the language of the exception so broadly that every bit of evidence could be given a second try.

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79. *Id.* at 26.

80. MICH. R. EVID. 803A.

81. *Katt*, 662 N.W.2d at 18-19.

Judge Young noted that when a court construes a rule, it applies the legal principles that govern the construction of statutes and thus starts with the language of the rule itself.<sup>82</sup> When the language of the rule is unambiguous, however, the court will enforce the meaning expressed without further investigation or judicial construction.<sup>83</sup>

According to Judge Young's statutory construction, the language of MRE 803(24) states: "A statement not *specifically covered* by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness . . . and the interests of justice will best be served by admission of the statement into evidence."<sup>84</sup> Miss Bowman's testimony concerning D.D.'s report of the abuse according to 803A merely failed because it was not D.D.'s first corroborative statement of the abuse.

The tender years rule seems to be part of an effort to include evidence of abuse in situations where the statement was made by a young child to someone else, without the child being led to make such a report. Because the rules have become more specific, MRE 803A was the proper avenue for admitting D.D.'s testimony. The statement would have been admitted had it satisfied all of the conditions of MRE 803A.

The Michigan Supreme Court interpreted the language of MRE 803(24) too broadly and erred in admitting D.D.'s statement to Miss Bowman because such testimony comfortably fit under MRE 803A. The type of testimony at issue in this case, a statement of a young child regarding sexual abuse, is provided for under the tender years rule, and D.D.'s testimony simply failed to satisfy one of the elements. The prosecution had other options for admitting the testimony, and having D.D. testify as to his conversation with Miss Bowman would have been most logical.

#### V. SETTING DANGEROUS PRECEDENT: FUTURE IMPLICATIONS OF A BROAD RESIDUAL EXCEPTION

*Katt* is a sympathetic case, yet the holding of the Supreme Court of Michigan is troubling. As previously stated, too broad an interpretation of MRE 803(24) may provide all hearsay evidence that

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82. *Id.* at 28 (Young, J., dissenting).

83. *Id.* (Young, J., dissenting).

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

fails an element of a categorical exception with a second chance. It is likely that a majority of such evidence satisfies the guarantees of trustworthiness. As a result, the court has created an open door for hearsay evidence that nearly misses an exception.

Where does the court draw the line? Judge Young expressed concern about the effort this ruling will have on the common law rule against hearsay “a rule which may be esteemed, next to jury trial, the greatest contribution of that eminently practical legal system to the world’s methods of procedure.”<sup>85</sup> The holding of *Katt* seems to suggest that in all cases where evidence fails under a categorical exception, yet satisfies indicia of trustworthiness, it will be admitted. Unless the court restricts the application of this precedent and narrows its interpretation in future cases, the days of equitable trials may start to dwindle.

For example, in *People v. Wilson*<sup>86</sup> the trial court admitted hearsay testimony under the catch-all exception (same as residual exception).<sup>87</sup> The defendant in that case was convicted of felony murder, premeditated murder and various counts of arson.<sup>88</sup> The testimony at issue was that of several witnesses to whom the victim allegedly spoke of her fear of her son (the defendant).<sup>89</sup> Although the trial court found substantial basis and sufficient guarantees for a few of the statements, primarily those of police officers, the court nevertheless admitted a statement from the defendant’s aunt without examining or justifying its trustworthiness.<sup>90</sup> On review, the Michigan Court of Appeals called the error harmless.<sup>91</sup>

The Michigan Supreme Court held the *Wilson* application for appeal was suspended pending the decision of *Katt*.<sup>92</sup> Once *Katt* was decided, the court denied appeal and Judge Young dissented in

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85. *Katt*, 662 N.W.2d at 27 (citing 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE § 1364 (Chadbourn Rev. 1974)).

86. *People v. Wilson*, No. 220559, 2001 WL 1167527, at \*2 (Mich. Ct. App. Oct. 2, 2001).

87. *Id.* at \*2–\*4. Also note that the “residual exception,” formerly MRE 803(24), was moved to MRE 804(b)(7) after a 2001 amendment. MICH. R. EVID. 804(b)(7).

88. *Wilson*, 2001 WL 1167527, at \*1.

89. *Id.* at \*1–\*2.

90. *Id.* at \*4.

91. *Id.*

92. *People v. Wilson*, 668 N.W.2d 901, 901 (Mich. 2003).



*Wilson* and again voiced his concern about a broad residual exception.<sup>93</sup> He stated:

[T]he prohibition against the admission of hearsay evidence is necessary to “maintain the integrity of witness testimony.” And this prohibition is utterly eroded when—as in this case—testimony inadmissible under the enumerated exceptions to the hearsay rule is admitted under the catch-all exception to the prohibition against hearsay.<sup>94</sup>

If hearsay testimony that does not satisfy any exception is admitted into evidence, the purpose and intent of the Rules of Evidence will be compromised.

In *Wilson*, Judge Young’s dissent cites the trial court’s transcript in order to point out the dangers that the Michigan Supreme Court’s ruling in *Katt* created. There, the prosecutor, in an attempt to admit the testimony of the defendant’s aunt, argued that it was needed because, “[m]other’s (sic) don’t call and make police reports on their sons saying that he’s going to kill us if we don’t give him money.”<sup>95</sup> The trial court admitted the testimony after hearing this vague argument and stated:

I’m going to admit [the testimony] . . . As I said, we make the record. That’s all I can do. In fact, as far as I’m concerned, this is an exception to the Hearsay Rule, and it is probative of some issue that is up to be proved by the Prosecutor. So, . . . I think under the circumstances, it is admissible.<sup>96</sup>

This is troubling because the court did not explain the “circumstances” or the guarantees of trustworthiness that made it admissible. Judge Young noted that while the *Katt* court was confident that the equivalent guarantees of trustworthiness would keep the catch-all exception under control, it is just an analysis as this that renders such a test meaningless.<sup>97</sup> Judge Young admonished the majority for missing their opportunity to explain how the residual exception could function in the interest of justice.

93. *Id.* (Young, J., dissenting).

94. *Id.* at 901 (Young, J., dissenting) (footnotes omitted).

95. *Id.* at 902 (Young, J., dissenting) (quoting the trial court’s transcript).

96. *Id.* (Young, J., dissenting) (quoting the trial court’s transcript).

97. *Id.*

As the *Wilson* ruling shows, the *Katt* decision may have had the effect of loosening the bolts that hold the hearsay doctrine together. A similar trend is evident in the federal system. For example, in *United States v. Laster*, the Sixth Circuit admitted evidence under the residual (i.e. catch-all) exception of Federal Rule of Evidence 807 that failed to satisfy the conditions of the business records exception of Fed. R. Evid. 803(6).<sup>98</sup> *Laster* dealt with a record of sale for a chemical used in manufacturing methamphetamine. The evidence in this case did not satisfy the business records exception because the government agent testifying to the sale was not familiar with the seller's record keeping system.<sup>99</sup> In a dissenting opinion, Judge Moore contended that the evidence was improperly admitted under the residual exception and cited the near-miss theory.<sup>100</sup>

Judge Moore disagreed with the majority approach to the residual exception. She called it the "close-enough" theory, meaning that if the evidence is close enough to a categorical exception, the residual exception will cover it.<sup>101</sup> She stated, "Such an approach makes little sense given the listing of explicit hearsay exceptions in Rule 803 . . . [an] exception that the drafters of the residual exception thought sufficient to cover anticipated . . . hearsay situations."<sup>102</sup> In *Laster*, the court admitted the records under the residual exception when the evidence failed to meet the low threshold required for the business exception.<sup>103</sup> Judge Moore also did not believe that the majority found the proper guarantees of trustworthiness under the residual exception and stated:

The majority's holding thus appears to make it unnecessary ever to call a sponsoring witness to establish the admissibility of business records, at least so long as there is "no indication' that the records [are] not reliable." This cannot be squared with the language of Rule 803(6), which requires "the testimony of the custodian [of the records] or other qualified witness" to vouch for the existence of the other elements of the business records exception. Nor is it

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98. *United States v. Laster*, 258 F.3d 525, 530 (6th Cir. 2001).

99. *Id.* at 529.

100. *Id.* at 534 (Moore, J., dissenting).

101. *Id.* (Moore, J., dissenting).

102. *Id.* (Moore, J., dissenting).

103. *Id.* (Moore, J., dissenting).

clear how, as a general matter, business records introduced without the testimony of a qualified sponsoring witness can be said to have “circumstantial guarantees of trustworthiness” equivalent to those that exist when a qualified sponsoring witness testifies to the trustworthiness of the records in question.<sup>104</sup>

The majority in *Laster* admitted evidence under the residual exception when it was clear that the evidence fell under a categorical exception, but failed to satisfy the elements required for admission.

The admission of evidence that doesn't fit a categorical exception under the residual exception is questionable due to the language of the exception itself, but also because of the public policy concerns in particular factual situations. In *Katt*, it was in the public interest to admit the testimony of Miss Bowman concerning her interview with D.D. about the sexual abuse, but there is still the concern that doing so may compromise the system. If both the state and federal courts only apply this precedent in accord with the facts of this case, i.e., cases involving the sexual abuse of a child, the rule may be justified. However, it would be in the best interests of both the drafters of the Michigan Rules of Evidence and the Federal Rules of Evidence to meet to define the meaning of those two little words “specifically comes” in MRE 803(24), before things get dangerously out of control.

## VI. CONCLUSION

The Michigan Supreme Court erred in its admission of Miss Bowman's testimony under the residual exception of MRE 803(24). The broad interpretation of the words “specifically covered” renders the categorical exception useless in restricting hearsay when trustworthy evidence may get in anyway under MRE 803(24). D.D.'s testimony was trustworthy, but the court should not automatically deem it admissible based upon that alone. The judicial system has created many specific ways for evidence to be admitted, and when the courts interpret the residual exception too broadly, there does not seem to be a need for specific exceptions at all.

The courts must seize the opportunity to explain the language, to settle the controversy once and for all. It would be in the best

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104. *Id.* at 534–35 (Moore, J., dissenting).

interest of justice to define the residual exception narrowly and create an exception that only deals with those situations that the drafters did not dream of. A court should come forward soon to explain how the residual exception can be used without infringing on the procedural and substantive rights of defendants.

FEDERAL RULES OF EVIDENCE AND MICHIGAN RULES OF EVIDENCE  
USED IN THIS COMMENT

<p>Michigan Rule of Evidence 803A The Tender Years Rule</p>	<p>A prior statement made by a child describing a sexual act performed with or on him by the defendant is admissible if it is the first corroborative statement made by the child and</p> <ol style="list-style-type: none"> <li>1. the child was under the age of ten when the statement was made;</li> <li>2. the statement is shown to have been spontaneous;</li> <li>3. the child made the statement immediately after the incident or delayed because of fear;</li> <li>4. the statement is introduced through the testimony of someone other than the declarant.</li> </ol>
<p>Michigan Rule of Evidence 803(24) The Residual Exception</p>	<p>A statement not <i>specifically covered</i> by any other exception, but having equivalent circumstantial guarantees of trustworthiness, meaning:</p> <ol style="list-style-type: none"> <li>(A) the statement is offered as evidence of a material fact,</li> <li>(B) is more probative on the point for which it is offered than any other evidence that the proponent can offer, and</li> <li>(C) the interests of justice are best served by the admission of the statement.</li> </ol>
<p>Federal Rule of Evidence</p>	<p>Same as 803(24) and have to make</p>

807 The Catch-all Exception	the proffered evidence available to the proponent in advance.
Federal Rule of Evidence 803(6) The Business Records Exception	The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (6) Records of Regularly Conducted Activity. 1. A memorandum, report, record, or data compilation, in any form, 2. of acts, events, conditions, opinions, or diagnoses, 3. made at or near the time by a person with knowledge 4. kept in the course of regularly conducted business, 5. testimony must be by the custodian of records.

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