My Doctor Made Me Crazy: Can a Medical Malpractice Plaintiff Allege Psychological Damages Without Making Credibility the Issue?

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MY DOCTOR MADE ME CRAZY: CAN A MEDICAL-MALPRACTICE PLAINTIFF ALLEGED PSYCHOLOGICAL DAMAGES WITHOUT MAKING CREDIBILITY THE ISSUE?

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ABSTRACT

In civil cases that include claims of psychological damages, attorneys should not confuse what is discoverable with what is admissible. Although a defendant may discover all information contained in the psychiatric or medical records of a plaintiff, in such a case, misusing that information to prey on the predispositions or stereotypes of a fact finder is inexcusable. When an attorney seeks to embarrass a plaintiff by interjecting details of psychological difficulties rather than rebutting a damages claim—particularly in light of the evolving understanding of what it means to suffer from a mental disability—then the attorney’s purpose is unacceptable.

This article explores one of the last “isms” that can be used to attack the credibility and character of a witness, especially when the witness is a plaintiff in a civil case: “sanism.” Courts must be vigilant in protecting the rights of plaintiffs who suffer psychological damages. Courts must also prevent attorneys from using the very harm caused by defendants in such cases from being used to attack or embarrass party opponents.

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I. INTRODUCTION

A man walked into an ophthalmologist’s office for routine radial keratotomy (RK) surgery. The year was 1993; at that time, the more-advanced Lasik surgery was still in its infancy and was not broadly accessible. The RK procedure was supposed to give the man the benefit of normal vision without glasses or contact lenses. By the time the man left the ophthalmologist’s office, he was blind in one eye. He would undergo numerous corneal transplants, each of which would fail. He would need

1. Definition of Radial keratotomy, MEDICINE.NET.COM, http://www.medterms.com/script/main/art.asp?articlekey=18079 (last visited Jan. 18, 2011) (Radial keratotomy is “[a]n eye surgery designed to flatten the cornea, reducing its optical power, to correct nearsightedness (myopia). In the procedure, incisions (cuts) are made in the cornea. The procedure is said to be radial because the incisions resemble the spokes in a bicycle wheel.”).


Many people are familiar with the term “laser eye surgery” and know it to be a type of corrective surgery to help improve various vision impairments. Lasik has become a very popular solution for many people, since it became widely available about a decade ago, in the mid 1990s.

Unlike older forms of eye surgery, Lasik does not necessitate cutting the eye with a surgical scalpel. Instead, lasers are used to do the job.

Id.


4. See id. vol. 6 at 157, 159.
anti-rejection drugs that, as a side-effect, cost him his sanity.\(^5\) He would litigate the issue of medical malpractice for thirteen years.\(^6\)

Two different juries found that the doctor who blinded him was not liable.\(^7\) Both juries heard about the RK procedure and how it should be performed by any competent ophthalmologist.\(^8\) Both juries were also regaled with tales of the man’s behavior during psychotic episodes brought on by the anti-rejection drugs that he took with the hope that his body would accept a cadaver’s cornea.\(^9\) Why did two juries find for the doctor? Was it because they reached the untenable conclusion that a doctor who blinds a patient during a routine procedure is not liable for malpractice? Or was it because the juries were exposed to evidence of the man’s psychotic behavior, causing them to view him as a deranged “other” who did not deserve their sympathies?

The case described above, *Halverson v. Garrett*, is real.\(^10\) It illustrates the dangers posed when a plaintiff alleges psychological damages in a complaint. And it undergirds the perception among many plaintiffs’ attorneys that a claim for psychological damages opens the door to virtually limitless questioning at trial about a client’s psychiatric and medical records. The warnings to plaintiffs’ lawyers in civil cases have been many, and “[o]ne fact has clearly emerged: by filing suit . . . seeking any form of compensation for psychic injury, a plaintiff runs a substantial risk that her current and past mental health treatment will become a focus of discovery and perhaps of the defense theory at trial.”\(^11\) Even the U.S. Equal Employment Opportunity Commission has stated,

> The claimant should be advised that as a general rule, the defendant will be able to probe in discovery and at trial with respect to all elements of the claimant’s nonpecuniary compensatory damages claim. By including a . . . mental or emotional condition as an element of . . . damages, the claimant is essentially waiving any claim of . . . confidentiality with respect to evidence relevant to the

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5. *See id.* at 30, vol. 8 at 135.
7. *See id.* at *1.
nature and extent of the damages. This waiver may be especially troubling to claimants in the context of psychotherapy treatment.12

This perception is likely one reason why “[p]robably no type of injury is neglected by plaintiff’s counsel as often as psychological injury.”13 But the question arises whether authority exists to support the perception that a claim for psychological damages opens the door for a defendant to exploit a client’s psychiatric or medical information at trial; the perception itself seems to have become governing law, likely leaving many instances of such exploitation, and even attorney misconduct, unchallenged.14

The literature on this issue is sparse. When it comes to the question of defense counsel’s use of plaintiffs’ medical or psychological information,

13. 26 A M. JUR. 3 D Proof of Facts §§ 1, 8 (2008). For a more troubling explanation, see Michael L. Perlin, On “Sanism,” 46 SMU L. REV. 373, 404-06 (1992) [hereinafter Perlin, Sanism]. The author suggests that attorneys who represented mentally disabled clients “were unwilling to pursue necessary investigations, lacked . . . expertise in mental health problems, and suffered from ‘rolelessness,’ stemming from near total capitulation to experts, hazily defined concepts of success/failure, inability to generate professional or personal interest in the patient’s dilemma, and lack of a clear definition of the proper advocacy function. As a result, counsel . . . functioned ‘as no more than a clerk, ratifying events that transpired, rather than influencing them.’” Id. at 404 (quoting Michael L. Perlin & Robert Sadoff, Ethical Issues in the Representation of Individuals in the Commitment Process, 45 LAW & CONTEMP. PROBS. 161 (1982) (alterations in the original)).
14. Indeed, it is illustrative that in Halverson, the court stated, Plaintiffs argue that they were denied a fair trial because of defense counsel’s repeated emphasis and injection, through argument and cross-examination, of irrelevant information concerning details of plaintiff’s psychotic behavior, information which plaintiffs contend was irrelevant and highly prejudicial because it was designed to inflame and prejudice the jurors, thereby distracting them from the merits of the malpractice claim. We agree. Plaintiffs concede that no objection was made to these comments and evidence, and that their own attorney raised the issue of plaintiff’s psychiatric condition during her opening statement and questioning, because plaintiff’s psychiatric condition was relevant to the question of plaintiff’s damages.

Halverson I, 2001 WL 716966, at *1 (emphasis added).
the great weight of scholarship centers on waiver, express or implied, of the physician–patient privilege for purposes of discovery, especially in civil-rights or sexual-harassment cases. This Article examines the exploitation of psychological damages by defense counsel at trial and challenges the perception that a claim for such damages allows defense counsel to use a plaintiff’s psychological past to distract the fact finder from the merits of a case.

In any action in which a plaintiff specifically alleges a mental injury or a psychiatric disorder as an element of damages, a defendant will be entitled to some or all of the medical and psychiatric records of the plaintiff. Whether such records are discoverable in cases specifically alleging psychological damages is not seriously in dispute. But confusion seems to have arisen between the rules of discovery and the rules of admissibility: a defendant’s acquisition of psychiatric records in discovery is not a license (as seems to have been assumed by some) to raise detailed and embarrassing information obtained from those records at trial and in front of a jury.

Part II of this Article provides a detailed account of the Halverson case. Halverson involved three trials and two appeals. Both of the appeals resulted in unpublished opinions from the Michigan Court of Appeals. Although the case carries limited precedential value, I will discuss it in detail because, as the reader will see, a better illustration of the problem addressed in this Article could scarcely be imagined. The case is a perfect exemplar of the hazards attendant to a defense lawyer’s assumption that all that is discoverable is also admissible.

Part III examines the rules of evidence and concludes that when evidence of psychotic behavior relates to episodes that occurred after, and allegedly as the result of, the injury alleged in a complaint, the evidence is

19. I was the attorney who handled the first appeal in the case.
not relevant to a plaintiff’s credibility or perceptions of events that preceded or precipitated the injury. In other words, although an attorney may elicit testimony to show that a plaintiff’s claim of psychological damages is not to be believed, the attorney may not suggest that a plaintiff is not to be believed because the plaintiff suffered psychological damage. To allow an attorney to make such an argument, especially when the psychological damage was allegedly caused by the conduct of the defendant in the first place, would be to seriously undermine any plaintiff alleging psychological harm as an element of damages.

Part IV applies rules of evidence regarding prejudice and analyzes whether evidence of psychotic episodes resulting from an injury alleged in a lawsuit is more prejudicial than probative. Borrowing from the work of another scholar, Part IV of the Article posits that prejudicial evidence is evidence that is likely to cause the finder of fact to “commit inferential error.” Applying this approach, the Article concludes that evidence of psychotic perceptions or episodes is likely to cause inferential error. This is so because jurors are likely to conclude that people who see things that are not real have no credibility. Jurors are also likely to conclude that evidence of psychotic behavior is representative of a plaintiff’s behavior or personality at all times.

Part V examines the question of whether evidence that is inadmissible because it is irrelevant or prejudicial might nonetheless be explored during cross-examination, because an attorney may probe all information regarding a subject to which opposing counsel has opened the door. Part V concludes that cross-examination is limited by the rule that an attorney may not intentionally divert a jury’s attention from the merits of a case. Part V also concludes that an attorney may not question a plaintiff about psychotic episodes to explore the animus, bias, or ulterior motives of a plaintiff because a plaintiff’s conduct during psychotic episodes is not properly characterized as representative of any predisposition or ulterior motive for filing a claim.

Boiled down to its essence, this Article ultimately concludes that the fact that a person suffers from psychotic episodes is not a proper foundation for the inference that the person who suffered from the episodes lacks credibility. Courts should be vigilant in protecting plaintiffs who

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21. Cf. id. at 503 (suggesting that witness credibility may distract jurors from judging the actual strength of the evidence being presented at trial).
have suffered psychological difficulties from being harassed or embarrassed in open court.

II. THE HALVERSON CASE

In *Halverston*, the plaintiff sued the defendant, his ophthalmologist, for perforating his cornea during RK surgery. The plaintiff claimed that the doctor violated the standard of care for informed consent by misrepresenting the risks associated with RK surgery. The plaintiff also claimed that the doctor violated the standard of care for the surgical procedure by perforating his cornea and piercing the iris and lens of his eye, causing trauma that ultimately required a corneal transplant.

The plaintiff in *Halverston* conceded that his own attorney introduced evidence of psychosis because his psychiatric condition was part of his claim for damages. But the plaintiff also claimed that defense counsel went too far in questioning the plaintiff and the plaintiff’s psychiatrist about episodes of psychosis, using the information to embarrass the plaintiff and destroy his credibility.

The defense counsel’s strategy included asking the plaintiff the following series of questions: whether the plaintiff blamed the doctor for his mother’s heart attack; whether he had ever sued a Wisconsin power company for damaging his home in Wisconsin; whether the plaintiff was accusing the hospital of falsifying records; whether the plaintiff had ever threatened to sue the police officer, who served a personal-protection order on the plaintiff, for misconduct or brutality; whether the plaintiff had ever told anyone that the same officer was “a dirty cop”; whether the plaintiff had ever told anyone that the officer was involved in a drug ring; whether the plaintiff had ever told anyone that the doctor controlled the police force; whether the plaintiff had ever told his psychiatrist that he had thought about spray painting the doctor’s office building; whether the

25. See id. at *2.
26. Id.
27. Id. at *1.
28. See id. at *1, *3.
30. See id. at 159-60.
31. Id. at 160.
32. Id. at 173.
33. Id. at 182-83.
34. Id. at 183.
35. Id. at 174.
36. Id. at 174.
plaintiff had ever told anyone that the doctor was a drug runner; \textsuperscript{37} whether the plaintiff had ever accused the doctor of planning to kill him; \textsuperscript{38} whether the plaintiff had purchased equipment to make recordings of phone calls, and had secretly taped conversations with the doctor; \textsuperscript{39} whether the plaintiff considered himself a trained fraud investigator; \textsuperscript{40} whether the plaintiff had a certain level of security clearance from the government, whether he could prove that he had top-secret security clearance, and whether his security clearance had been revoked “like they did to Jay Robert Oppenheimer during the Los Alamos Project”; \textsuperscript{41} whether the plaintiff had ever been the subject of an FBI background check; \textsuperscript{42} whether the plaintiff had told FBI investigators that he had used LSD; \textsuperscript{43} whether the plaintiff considered himself a biblical scholar and had referred to the Bible’s refrain of “an eye for an eye, a tooth for a tooth” as justification for wanting to poke the doctor’s eye out with a hot poker when he spoke to his psychiatrist; \textsuperscript{44} whether the plaintiff was aware that, according to Matthew 5:38, the concept of an eye for an eye was pagan and that we should instead turn the other cheek; \textsuperscript{45} whether the plaintiff had ever told someone at a hospital that he wanted to murder the doctor; \textsuperscript{46} whether, during the course of a fraud investigation, the plaintiff had accused an employer of contractor fraud and cited a portion of the U.S. Code in support of his allegations, whether his report of fraud had endeared him in the eyes of his employer, and whether the plaintiff had reported the fraud to the federal government rather than just internally to his employer; \textsuperscript{47} whether the plaintiff had ever made allegations that the prosecutor was “just a puppet” for the doctor; \textsuperscript{48} whether the plaintiff had ever accused the prosecutor of having a conflict of interest involving part ownership of a business called the Golden Nugget, and whether, “with all [the plaintiff’s] resourcefulness,” the plaintiff had ever “checked to see the so-called public records that would prove that the prosecutor is a part owner of the Golden Nugget”; \textsuperscript{49} whether the plaintiff had penned a letter to defense counsel in which he likened himself to

\textsuperscript{37} See id. at 183.
\textsuperscript{38} See id. at 183-84, 185.
\textsuperscript{39} Id. at 185, 199.
\textsuperscript{40} Id. at 199.
\textsuperscript{41} Id. at 199-201.
\textsuperscript{42} Id. at 202.
\textsuperscript{43} Id.
\textsuperscript{44} See id. at 251.
\textsuperscript{45} Id. at 251.
\textsuperscript{46} Id. at 257.
\textsuperscript{47} Id. vol. 8 at 21-23.
\textsuperscript{48} Id. at 23.
\textsuperscript{49} Id. at 26.
Columbo and stated that others may have thought he was crazy, too;50 whether the plaintiff remembered writing letters to his psychologist in which he opined that he had been victimized by “yet another criminal attack”;51 and whether the plaintiff remembered telling his psychologist that he was robbed in Tampa, Florida and called police, and the police asked him if anyone was hurt, if he had the suspect in custody, and if there was more than $1,000 taken, and that the police told him that they could not be bothered and hung up on him.52

Defense counsel went so far as to ask the plaintiff whether he had once told his psychiatrist that he was upset about going to a public beach and being “propositioned by a forceful queer.”53 Defense counsel also asked whether the plaintiff had once told his psychiatrist that he was upset about two men French kissing and fondling each other in front of him at Disneyland and whether he had told his psychiatrist that ever since that vacation, he did not feel safe anywhere.54 These examples merely touch on the innumerable questions asked about the plaintiff’s background and perceptions.

Defense counsel questioned the plaintiff’s psychiatrist in much the same way that he questioned the plaintiff.55 Defense counsel also asked about the plaintiff’s family history, including whether his parents had been separated at any time and whether his father was abusive.56 Defense counsel got most of the information underlying the questions above from notes obtained from the plaintiff’s psychiatrist.57

In the plaintiff’s first appeal, the Michigan Court of Appeals held that the defense attorney’s exploration of the “excruciating” and “sordid” details of the plaintiff’s psychotic episodes was “designed to inflame the jurors and divert their attention from the merits of the case.”58 The court reversed the jury verdict and remanded the case for a new trial despite the failure of the plaintiff’s trial attorney to object and preserve the issue of attorney misconduct.59 The court concluded that the quantum of

50. See id. at 41-42.
51. Id. at 46.
52. Id. at 47.
53. Id.
54. Id.
55. See id. vol. 5 at 59-134.
56. See id. at 62-63.
57. See generally id.
59. Id.
misconduct in Halverson satisfied the plain-error standard, which is applied to unpreserved error.  

The Halverson case is unpublished and therefore lacks precedential value. Nonetheless, it raises interesting questions. Generally, once counsel has put a plaintiff’s psychiatric condition at issue as an element of damages, the opposing party is permitted to fully explore the extent of those damages and question the plaintiff about the legitimacy of the claim. Furthermore, once a party has opened the door to a subject, the opposing party is generally entitled to fully explore that subject. Finally, it is well settled in Michigan that the scope of cross-examination is broad: an attorney may discredit witnesses by attacking their credibility and exploring whether the witnesses’ testimony is colored by some animus, bias, or ulterior motive. On the other hand, attorneys are expected to

60. Id. at *1.
63. Lewis v. LeGrow, 670 N.W.2d 675, 696 (Mich. Ct. App. 2003) (“[D]efendant’s disclaimer of knowledge concerning emotional distress also opened the door to counsel’s cross-examination concerning defendant’s own claim for emotional distress because it had a bearing on defendant’s credibility.”).

In Powell, the court stated as follows:
Evidence that shows bias or prejudice on the part of a witness is always relevant. Accordingly, “[t]estimony . . . which touches the bias or interest of the witness[ ] is always admissible, and can be shown upon his cross-examination, and, if denied by him, can be proven on rebuttal; the proper foundation being laid for such proof.” As our Supreme Court explained over a century ago:

It is true that where a witness is cross-examined on matters purely collateral, the cross-examiner cannot inquire of other witnesses whether the answers are truthful, because the inquiry would open irrelevant issues. But the interest or bias of a witness has never been regarded as irrelevant. It goes directly to his credit, and must determine with the jury how far facts depending on his evidence are to be regarded as proven. A party cannot be compelled to put up with the statements of a witness concerning his own interest or personal relation to the case and parties, where it becomes necessary to know his position. . . . The administration of justice would be very defective if every witness could, without contradiction, make himself out impartial and disinterested, and run no risk of exposure.

Id. (alterations in original) (internal citations omitted).
refrain from embarrassing or badgering witnesses and from disparaging opposing parties. 65  The Halverson case represents a collision between these principles and begs the question: when a claim for damages includes an element of psychological harm, where is the line between permissible questioning about relevant evidence and impermissible questioning designed to embarrass a party and distract the finder of fact?

III. THE RULES OF EVIDENCE AS THEY RELATE TO PSYCHOLOGICAL RECORDS

Some plaintiffs’ attorneys omit claims of mental or emotional injury from their complaints, recognizing that allegations of mental or emotional distress may open the door to the discovery of unflattering information about their clients. 66  Applying Federal Rule of Civil Procedure 35, which regulates when a court may order the mental or physical examination of a party, one federal court has crystallized the general rule that seems to be emerging: courts allow the discovery of detailed psychiatric information “when 1) there is a separate tort claim for emotional distress, 2) the plaintiff alleges that he suffers from a severe ongoing mental injury or a psychiatric disorder, 3) the plaintiff will offer expert testimony to support the claim, or 4) the plaintiff concedes his mental condition is in controversy.” 67

In any action in which a plaintiff specifically alleges a mental injury or a psychiatric disorder, a defendant will be entitled to all of the medical and psychiatric records of the plaintiff. 68  Whether such records are

65. See Bd. of Cnty. Rd. Comm’rs v. GLS LeasCO, Inc., 229 N.W.2d 797, 800 (Mich. 1975). “While a lawyer is expected to advocate his client’s cause vigorously, ‘parties are entitled to a fair trial on the merits of the case, uninfluenced by appeals to passion or prejudice.’” Id. (quoting Layton v. Cregan & Mallory Co., 257 N.W. 888, 891 (Mich. 1934)).


68. See, e.g., In re Miller, 585 N.E.2d 396, 404-05 (Ohio 1992) (holding that the filing of a lawsuit that puts a person’s physical or mental condition at issue waives a claim of privilege); McCoy v. Maxwell, 743 N.E.2d 974, 976 (Ohio Ct.
discoverable in cases alleging psychological damages is not seriously at issue. Confusion might arise when a defense attorney takes allegations of psychological injury as a license to raise as well as discover detailed and embarrassing information contained in the medical and psychiatric records of a plaintiff who alleges psychological damages.

The reticence of plaintiffs' attorneys to even allege emotional or mental damages may be the result of the boldness of defense attorneys who insist that such allegations will lead to a thorough exploration of a plaintiff's most intimate secrets in open court. The panel in *Halverson*, however, did not accept the argument that the defense counsel was entitled to explore the excruciating and sordid details of the plaintiff’s conduct simply because the plaintiff had alleged psychosis as an element of damages.

Although the court did not squarely address the issue in its opinion, it might have rejected the defendant’s argument because of the difference between rules of discovery and rules of admissibility. A misunderstanding about this distinction is likely the preeminent cause of the perception that a claim for psychological damages opens the door to limitless questioning at trial about a plaintiff’s psychiatric and medical records, and courts should, therefore, articulate that different rules govern the discoverability and admissibility of information regarding a party’s psychological records.

A defendant might argue that because a plaintiff has alleged psychosis in the complaint, and because a plaintiff’s attorney might reference psychological damages in the opening statement, defense counsel is entitled to thoroughly explore all information contained in, or even suggested by, the psychiatric records in possession of the parties.

The leading case on this issue in Michigan appears to be *Hyde v. University of Michigan Regents*. In *Hyde*, the plaintiff sued his employer for racial discrimination and alleged in his complaint that he suffered

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69. See Mich. Ct. R. 2.302(B)(1) (“Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.”).


71. Compare Mich. Ct. R. 2.302(B)(1) (“Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.”), with Mich. R. Evid. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . .”).

“mental anguish, outrage, embarrassment and humiliation.”  

Under Michigan law, “[w]hen a mental . . . condition of a party is in controversy, medical information about the condition is subject to discovery.”  

In *Hyde*, because the plaintiff had alleged mental suffering, the defendant sought discovery of the plaintiff’s mental-health history.  

The plaintiff refused to comply with the defendant’s discovery request, claiming the physician–patient privilege.  

Michigan Court Rules provide:  

[I]f a party asserts that the medical information is subject to a privilege and the assertion has the effect of preventing discovery of medical information otherwise discoverable . . . , the party may not thereafter present or introduce any physical, documentary, or testimonial evidence relating to the party’s medical history or mental or physical condition.  

In *Hyde*, the trial court permitted the plaintiff to testify about certain mental and emotional difficulties even though the plaintiff had invoked the physician–patient privilege.  

The court of appeals held that this was error.  

The court stated:  

Where . . . a plaintiff . . . seeks recovery for anything beyond economic damages . . . , we hold that he has thereby placed his mental condition in issue and consequently open to discovery. In order for a defendant to defend a claim for noneconomic damages, he must be permitted to determine, through discovery, whether factors other than the defendant’s alleged misconduct may have influenced the plaintiff’s emotional and mental condition. To preclude discovery of the plaintiff’s mental or psychological history while permitting the plaintiff to testify regarding noneconomic damages, would deprive the defendant of a fair trial. Thus, if the plaintiff asserts the privilege to prevent discovery on this issue, the plaintiff

73. *Id.* at 40.  
75. *Hyde*, 575 N.W.2d at 41.  
76. *Id.*  
78. *Hyde*, 575 N.W.2d at 41.  
79. *Id.*
must withdraw, or the court must dismiss, any claim for noneconomic damages.  

Defense counsel might cite the *Hyde* holding as a justification for questioning plaintiffs about information contained in their psychiatric and medical records. However, the *Hyde* holding does not support such an argument; the *Hyde* court found that all information regarding a plaintiff’s psychological condition is discoverable—not admissible—when a plaintiff puts his mental or emotional condition at issue. The holding reflects Michigan’s liberal approach of allowing discovery regarding any information that might lead to admissible evidence at trial.

Different rules apply to discovery than to admissibility. A party may obtain information “reasonably calculated to lead to the discovery of admissible evidence” even if “the information sought will be inadmissible at trial.” Thus, to say that information is discoverable is not to say that it is admissible. The admissibility of embarrassing psychological information about a plaintiff is subject to the additional tests of relevance and prejudice, confusion, or waste of time. An attorney who intentionally interjects prejudicial evidence into the deliberations of the fact finder should not be allowed to use *Hyde* and its progeny as a defense; while *Hyde* stands for the proposition that a defendant may possess this information, it does not stand for the proposition that the defendant may use it at trial.

By refusing to accept the ruling in *Hyde* as justification for introducing prejudicial information designed to divert the jury’s attention from the merits of the case, the court distinguished between discoverable and admissible information. Defendants are not entitled to explore every conceivable episode of the psychotic conduct of a plaintiff during trial under the guise that the plaintiff has opened the door to such questioning by alleging mental or emotional harm as an element of damages.

It is clear that the rules of discovery do not entitle a defendant to raise all information regarding a plaintiff’s psychiatric and medical records in

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80. *Id.* at 42.
81. *See id.* (citations omitted).
82. *See Mich. Ct. R. 2.302(B)(1).*
84. *See Mich. Ct. R. 2.302(B)(1).*
86. *See Mich. R. Evid. 403* (discussing various tests to determine when relevant evidence should not be admitted).
87. *See id.*
front of a jury. The question remains whether such information can pass muster when evidentiary rules regarding relevance are applied.

Relevant evidence is admissible, and irrelevant evidence is not. Relevant evidence is any evidence that makes a fact at issue in the case more or less likely true than it would have been without the evidence.

The argument might be made that the psychiatric or medical records of a plaintiff are relevant in two ways. First, one might argue that the evidence is relevant as to damages; a detailed exploration of the evidence might be necessary to rebut a claim for damages or a claim of good health prior to an alleged injury. Second, one might argue that the evidence is relevant because it reflects upon the credibility of the plaintiff. Neither argument justifies the admission of detailed psychiatric or medical records regarding the psychotic conduct of a plaintiff after—and allegedly resulting from—the injury alleged in the complaint.

A defendant should not be permitted to question a plaintiff about psychotic behavior that occurs after, and as the alleged result of, the injury alleged in the complaint. In one case, the Michigan Supreme Court stated:

Serious complaint is made of the court permitting defendant to show that in June 1911, plaintiff was an inmate of the psychopathic ward of the hospital at Ann Arbor, which is urged as error particularly prejudicial to plaintiff’s claim for damages, because unfairly tending to minimize his testimony before the jury by the implication that he was mentally incompetent to testify rationally as to his injuries.

The evidence upon this subject was developed in connection with plaintiff’s cross-examination. Both he and his son had testified that prior to the accident his general health was good. He also testified that his memory was impaired as one of its results, while it was pretty good before. In that connection he was asked in cross-examination if he had been in the psychopathic ward at Ann Arbor in 1911. He replied that he was at Ann Arbor for treatment in 1911; he did not know what for; that he was in the hospital eight or nine days and then his sons brought him home. He denied being taken there by the sheriff on commitment by the probate court of Genesee

91. See discussion infra Part IV. This argument is more appropriately dealt with in a discussion of principles regarding cross-examination.
county, or that he was in the probate court in connection with any such proceedings. Following his denials and while upon that subject counsel for defendant introduced in evidence the files of the probate court relating to his commitment, as bearing generally "on the condition of health prior to the accident and impeachment of plaintiff’s own testimony of that condition." All testimony upon that subject was allowed over the objection that the same was "incompetent and immaterial."

This testimony was not introduced for the purpose of showing plaintiff of unsound mind and incompetent as a witness at the time of the trial, because previously so adjudicated. Neither would the fact that he was an inmate of the psychopathic ward of the Ann Arbor hospital for a short time . . . be evidence that he was then of unsound mind. Such was not defendant’s claim or the avowed purpose of the proof. His sanity at the time of the trial and competency to testify were not questioned. In view of his and his son’s testimony as to his previous good health, memory, ability to work and manage his farm, it was not incompetent to interrogate him on cross-examination as to any matters which might tend to throw light upon his former physical or mental condition as affecting his general health, efficiency, ability to work, and accuracy of memory formerly or at the time he was testifying. A reasonable latitude, in the discretion of the court, is always permissible along those lines in cross-examination of plaintiffs for damages ex delicto, particularly where the witness is evasive or irresponsive, and we do not find the discretion of the court was abused in the particular complained of.92

Thus, if a plaintiff claims that the psychological condition is strictly the result of the injury alleged in the complaint, a defendant may introduce information to show that the plaintiff had psychological difficulties before the injury alleged in the complaint to rebut a claim that the damage was caused by the defendant.

In Halverson, the court noted, “There was no evidence that plaintiff was psychotic prior to taking anti-rejection drugs following the corneal

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transplant." The court further noted, “Plaintiff was taking anti-rejection drugs at the time of each psychotic episode.” Although a defendant may question a plaintiff about psychotic perceptions or episodes occurring before the psychosis that is alleged to be a result of a defendant’s conduct, the court in Halverson stated that “the psychotic episodes [at issue in Halverson] were not relevant to . . . [plaintiff’s] informed consent claim, nor to his allegations of malpractice in the procedure, because—except for damages—the facts underlying those claims had been fully completed prior to plaintiff’s first psychotic episode.” The court concluded that the “specific facts of each episode were irrelevant to the substance of plaintiff’s claims, and irrelevant to his credibility regarding those claims.”

Because the plaintiff in Halverson was questioned at length about psychotic perceptions and episodes that occurred after the alleged injury rather than before it, the episodes about which the plaintiff was questioned were not relevant as rebuttal evidence to any claim of general good health prior to the injury alleged in the plaintiff’s complaint. Similarly, when a plaintiff makes no effort to hide evidence of mental-health problems, it is unnecessary to grill the plaintiff about the details of psychotic episodes to prove that the plaintiff did, in fact, suffer from psychotic episodes.

IV. THE PREJUDICIAL EFFECTS OF PSYCHOLOGICAL EVIDENCE

Like the federal rules and the rules in most states, the Michigan Rules of Evidence provide that evidence that is otherwise admissible may nonetheless be excluded at a court’s discretion if the evidence is more prejudicial than probative.

94. Id.
95. Id.
96. Id.
97. Id. (“[D]efense counsel’s conduct of repeatedly injecting and emphasizing, in arguments and questioning, the sordid details of plaintiff’s various psychiatric episodes requires reversal. The specific facts of each episode were irrelevant to the substance of plaintiff’s claims, and irrelevant to his credibility regarding those claims. Those details, and counsel’s arguments, were designed to inflame the jurors and divert their attention from the merits of the case, and from the issue of defendant’s credibility which was pivotal to his defense.”).
98. See United States v. Gonzalez-Sanchez, 825 F.2d 572, 586 (1st Cir. 1987) (holding that evidence of mental incapacity was irrelevant when it did not affect the witness’s ability to testify and when the trial court found no evidence that the witness deliberately concealed his mental-health history).
99. See, for example, Mich. R. Evid. 403 which is identical to Fed. R. Evid. 403.
prejudicial than probative. The rule requires an analysis of the propensity for a piece of evidence to make a fact at issue more or less likely true and a determination of the risk that it will distract from the jury’s role of deciding the facts of the case.

Commentators acknowledge the difficulty in assessing when evidence is sufficiently prejudicial that, even if it is relevant, it should nonetheless be excluded because it is likely to confuse the jury and disrupt the jury’s fact-finding function. Courts often focus on whether the evidence at issue is likely to elicit an emotional reaction from the jury, and a court may ask whether the evidence at issue is likely to elicit an emotional rather than logical thought process on the part of a jury. “This notion may have derived from the advisory committee’s note to [Federal Rule] 403, which suggests that unfair prejudice is commonly caused by emotion.” Indeed, the Michigan Supreme Court has embraced the advisory committee’s note as the proper framework for analyzing whether evidence is excessively prejudicial.

This approach has been discredited by some because it minimizes the importance of emotional thinking; one of the benefits of the jury system is that it interjects an element of human emotion into the “cold logic of the law.” The approach has also been criticized because it leads to an ad hoc approach to applying Rule 403; an analysis about prejudice grounded solely on the question of whether evidence is emotional leaves courts without a meaningful standard and invites a virtually discretionless application of the rule.

One commentator has suggested an intelligent and workable approach to applying the rule of evidence regarding unfair prejudice. The commentator suggests that “evidence is unfairly prejudicial to the extent it has a tendency to cause the trier of fact to commit inferential error.” Under this approach, error occurs “when the jury incorrectly decides that evidence is probative of an alleged fact or event.” “Inferential error also

100. Mich. R. Evid. 403.
101. Fed. R. Evid. 403 advisory committee’s note.
102. Id.
103. Id.
105. See People v. Vandervliet, 508 N.W.2d 114, 126 (Mich. 1993)
106. Gold, supra note 104, at 504.
107. Id.
108. Id. at 503.
109. Id. at 506; cf. Perlin, Sanism, supra note 13, at 378 (“These generalizations, based upon preconceived and misinformed opinions about the nature of difference,
occurs when the jury decides that evidence is more or less probative of a fact or event than it is.”110

An inference is “[a] conclusion reached by considering other facts and deducing a logical consequence from them.”111 The inferential-error standard seems appropriate because it reflects the notion that courts should not admit evidence from which faulty conclusions might flow. “Detecting unfairly prejudicial evidence requires focusing on the end product of the prejudice, not just on the process by which the prejudice might be created.”112 Thus, the best analytical framework is one that asks whether the evidence sought to be admitted is an appropriate foundation for the fact meant to be inferred.113 The most effective analytical framework is not one that asks simply whether the evidence sought to be admitted is emotional.114

Research in the field of cognitive psychology has identified tools for predicting inferential error.115 “Two important cognitive tools are heuristics and knowledge structures. An understanding of the manner in which heuristics and knowledge structures might be improperly employed by juries provides a basis for estimating the tendency of evidence to lead to inferential error.”116

[T]he representativeness heuristic can lead to error when jurors are asked to infer generalizations about a relatively large amount of data. In making such decisions, people are often insensitive to the amount of evidence they consider and tend to be swayed by a small amount of vivid, anecdotal information. [Political] candidates often capitalize upon this tendency in political debate, where the wisdom of social programs is “established” not by reference to the mass of data demonstrating their value, but by reference to an absurdly small number of colorful case histories. The representativeness heuristic permits voters to infer incorrectly that, since the case histories have been taken from a larger mass of data, those histories must be representative of the mass. In the courtroom, this potential

110. Gold, supra note 104, at 506.
111. BLACK’S LAW DICTIONARY 847 (9th ed. 2009).
112. Gold, supra note 104, at 503.
113. See id.
114. See id.
115. Id. at 510-11.
116. Id. at 511.
for error exists whenever the proper decision of an issue depends upon consideration of a large body of evidence, some vivid parts of which might be used to misrepresent the whole.117

A case involving psychological damages and psychotic episodes as an element of damages is potentially confusing for a jury because it presents a jury with more than one set of a single person’s behavior. In Halverson, for example, the court noted that some of the questioning challenged on appeal related to the plaintiff’s conduct during psychotic episodes.118 The court’s opinion reflected a concern that the plaintiff’s conduct during psychotic episodes would be seen as representative of the plaintiff’s conduct at all times.119 The same concerns would be implicated in any similar case. A defense attorney should not be allowed to suggest to a jury that a plaintiff’s credibility is represented by a limited number of colorful episodes that occurred while the plaintiff was under severe psychological strain. “In such cases, courts should be wary of the prejudicial potential of evidence that may direct the jury’s attention away from the complexities and toward misleading similarities.”120

Michigan courts may have unwittingly crafted language that reflects a subconscious understanding of the representativeness heuristic. It is common for Michigan courts to state that an attorney may not intentionally divert a jury’s attention from the merits of a case in an effort to unfairly prejudice a party.121 As a method of causing unfair prejudice to an opposing party, attorneys have introduced true information intended to cause the jury to make a factual inference unrelated to the purpose for which the information was admitted.122 To the extent that Michigan courts disallow the introduction of evidence that is intended to distract juries from the merits of cases, courts properly exclude evidence that misuses the representativeness heuristic.123

117. Id. at 515.
119. See Gold, supra note 104, at 515.
120. Id. at 516.
123. Cf. Gold, supra note 104, at 513-14 (discussing how the representativeness heuristic can be used to direct attention from other evidence leading to a prejudicial effect).
Courts should craft a rule like the one reflected but not stated in Halverson: evidence of conduct during psychotic episodes that occurred as a result of the injury alleged in the complaint is never admissible by a defendant because it always invites the jury to misuse the representativeness heuristic, creating unfair prejudice. The conduct of a plaintiff during psychotic episodes or during times of extreme emotional distress is not representative of a plaintiff’s conduct throughout life, nor is it representative of a plaintiff’s credibility at the time of trial.124

An analysis of heuristics deals with the procedures by which humans process data. But human understanding may depend less on these procedures than it does on the wealth of general knowledge stored in our brains. Objects and events are seldom evaluated as if sui generis, but are related to past experiences. People use this stored information to form general beliefs or theories about the world and the things in it, such as “trees are bigger than bushes” and “once a thief, always a thief.” These theories are called knowledge structures.

... In the complex social domain in which legal issues arise and must be resolved, however, knowledge structures sometimes lead to inferential error. Some knowledge structures are inaccurate representations of the real world. When we encounter someone who processes information through a knowledge structure we believe is inaccurate, we often regard that person as biased or prejudiced. In fact, all of us possess and are possessed by millions of knowledge structures which form preconceptions influencing how we view the world. These preconceptions tend to make us resist conflicting evidence and accept confirming evidence, coloring the way we interpret everything in between. In addition, these preconceptions may be applied unconsciously, misleading us into believing data is being evaluated objectively. When evidence stimulates a juror’s utilization of an inaccurate or misleading knowledge structure, inferential error, and hence unfair prejudice under rule 403, may result.125

125. Gold, supra note 104, at 521-22 (footnotes omitted).
In cases involving psychological damages or including psychosis as an element of damages, there is a risk that juries will engage an erroneous “knowledge structure.” Our experience tells us, generally, that people who see things that are not real cannot be counted on to behave rationally or to recount real events with any degree of accuracy. Furthermore, there exists the risk that a juror might harbor predispositions about someone who has or has had a mental disability. “From the beginning of recorded history, mental illness has been inextricably linked to sin, evil, God’s punishment, crime, and demons.” “Although ‘isms’ such as racism, sexism, and anti-Semitism have . . . been officially repudiated, the distorted categorizations still frequently dominate our thought processes and decision making. These same distorted thought processes and socially-approved prejudices still dominate our discourse when the subject deals with mental disability.” One of the greatest fears people have is the fear of losing sanity, and people, generally, do not embrace that which they fear:

Reflect for a minute on some of the myths that have developed about persons with mental disabilities:

126. Id.
127. See generally Perlin, Sanism, supra note 13, at 393-95 (discussing commonly held societal myths about mentally ill individuals and their behavior).
128. See generally id. It has been noted that a “jury may assume a protective attitude toward certain witnesses such as children, the elderly and pregnant women.” Alan G. Burrow, Effective Cross-Examination: A Practical Approach for Prosecutors Part II, ADVOC., Jan. 2001, at 8, 10. It appears that juries have no such proclivity as regards to the mentally disabled. Perlin, Sanism, supra note 13, at 397.
129. Perlin, Sanism, supra note 13, at 388.
130. Id. at 381.
131. According to Sander Gilman,

[T]he most elementally frightening possibility is the loss of control over the self, and loss of control is associated with loss of language and thought perhaps even more than with physical illness. Often associated with violence (including aggressive sexual acts), the mad are perceived as the antithesis to the control and reason that define the self. Again, what is perceived is in large part a projection: for within everyone’s fantasy life there exists . . . an incipient madness that we control with more or less success.

Id. at 389 (quoting Sander L. Gilman, Difference and Pathology: Stereotypes of Sexuality, Race and Madness 23-24 (1985) (footnote omitted)).
1. Mentally ill individuals are “different,” and, perhaps, less than human. They are erratic, deviant, morally weak, unattractive, sexually uncontrollable, emotionally unstable, lazy, superstitious, ignorant, and demonstrate a primitive morality. They lack the capacity to show love or affection. They smell different from “normal” individuals and are somehow worth less.

2. Most mentally ill individuals are dangerous and frightening. At worst, they are invariably more dangerous than non-mentally ill persons. Experts can accurately identify such dangerousness. At best, the mentally disabled are simple and content, like children.

5. Mental illness can be easily identified by lay persons and matches up closely to popular media depictions. It comports with our “common sense” notion of “crazy behavior.”

6. It is—and should be—socially acceptable to use pejorative labels to describe and single out the mentally ill. This singling out is not problematic in the way that the use of other pejorative labels to describe women, blacks, Jews, or gays might be.

7. Mentally ill individuals should be segregated in large, distant institutions; their presence threatens the economic and social stability of residential communities.

9. Mentally disabled individuals simply do not try hard enough. They give in to their basest instincts too easily and do not exercise appropriate self-restraint.

What do these myths have in common? In each instance, . . . we are distancing ourselves from mentally disabled persons—the “them”—and we are simultaneously
trying to construct an impregnable borderline between “us” and “them,” both to protect ourselves and to dehumanize what Sander Gilman calls “the Other.” The label of “sickness” reassures us that “the Other”—seen as “both ill and infectious, both damaged and damaging”—is not like us and further animates our “keen . . . desire to separate ‘us’ and ‘them.’”

I use the word “protect” self-consciously. We exaggerate the danger of all mentally ill persons to remove any ambiguity about whether a specific mentally ill person may be dangerous, confounding mental illness with dangerousness in a variety of ways that simply do not comport with any of the best available research. We distance ourselves from persons with mental disabilities so as to protect our self-image that no one will think that they are like us.132

Because of the danger that jurors will engage an inaccurate knowledge structure when making decisions that impact a person who has had psychological difficulties, courts should exclude evidence that emphasizes a plaintiff’s psychological problems.133 Obviously, when a plaintiff claims psychological damages, both parties are entitled to explore whether there really were psychological damages.134 This is not to say that a defendant is entitled to explore the “excruciating” or “sordid details of [a] plaintiff’s various psychotic episodes.”135 The existence of damages and the details

133. See Alexander Pilcz, Mental Pathology, in CATHOLIC ENCYCLOPEDIA, http://www.newadvent.org/cathen/11542b.htm (last visited Jan. 18, 2011) (“In short, the question whether the soul through its passions or burdens can make itself diseased must in general, according to modern experience, be answered negatively, or the possibility of such causative combinations may be acknowledged only with important reservations and the greatest restrictions.”). It is generally accepted that people with mental disorders are not to be blamed for their own difficulties, and it should therefore not be suggested to a jury that someone with a mental disorder is somehow blameworthy. See generally id.
134. See MICH. CT. R. 2.314(B)(1) (“Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.”).
resulting from those damages are two different things. The existence of damages is relevant and should be explored, but the details resulting from those damages only serve to prey on erroneous knowledge structures. For this reason, too, evidence of the conduct during psychotic episodes of a plaintiff who claims psychological damages should be excluded as excessively prejudicial.

V. THE PARAMETERS OF CROSS-EXAMINATION AS THEY RELATE TO RAISING OTHERWISE BARRED EVIDENCE

Cross-examination . . . is limited to the scope of the direct examination. In general terms, cross-examination is for the purpose of: 1) impeaching the credibility of the witness through logic, prior inconsistent statements, and by highlighting possible bias and motivation to fabricate testimony, and 2) bringing out portions of the witness’s testimony that corroborate or are consistent with the cross-examiner’s version of what the facts are.

Neither of these two purposes is served by cross-examining a plaintiff about the details of psychotic episodes that allegedly resulted from the injury at issue in the complaint.

The psychotic perceptions of a plaintiff do not involve logic or prior inconsistent statements. Furthermore, such episodes do not establish that a witness has some motivation to fabricate testimony. To indulge this supposition would be to engage the erroneous knowledge structure discussed in Part IV. Someone who has suffered from psychological troubles is no less truthful than anyone else by virtue of having so suffered.

136. Id.
138. See id. at 29.
139. See id.
140. See generally id.
141. Psychosis, THE COLUMBIA ENCYCLOPEDIA (6th ed. 2008), available at http://www.encyclopedia.com/topic/psychosis.aspx (last visited Jan. 18, 2011). Psychosis is “a broad category of mental disorder encompassing the most serious emotional disturbances, often rendering the individual incapable of staying in contact with reality.” Id. If an individual is out of touch with reality, then the individual is not intentionally seeking to deceive about what is real, but rather is actually perceiving that which is not real. One is, therefore, not a liar for having suffered from psychosis.
Michigan courts have repeatedly cautioned that even though broad cross-examination is generally permitted, “[w]e continue to believe that ‘witnesses should not be subjected to personal attacks and unsubstantiated insinuations.’ Nor will we tolerate studied attempts to ‘prejudice the jury and divert the jurors’ attention from the merits of the case.’” In this Author’s opinion, attempts to emphasize the plaintiff’s psychological difficulties to discredit the plaintiff’s credibility amount to unsubstantiated insinuations because there is no substance to the proposition that a person’s credibility is diminished by episodes of psychological difficulty. Furthermore, attempts to emphasize the plaintiff’s psychological difficulties to discredit the plaintiff’s credibility are invariably calculated to divert the jury’s attention from the merits of the case, because episodes of psychosis are not relevant to whether the injury alleged was caused by the defendant or to whether the plaintiff is credible. In Halverson, the defendant argued on appeal that questions relating to the plaintiff’s psychotic behavior vis-à-vis the defendant doctor were proper because a party is allowed to probe the animus or predisposition of one party toward the other.

The defendant relied principally on People v. Morton, a criminal case. In Morton, the Michigan Court of Appeals considered whether a trial judge erroneously barred a criminal defendant from questioning a victim about whether he was contemplating a civil action against the defendant. The court noted in dicta that “the bias or interest of a witness is always a relevant subject of inquiry upon cross-examination.” The court then held that, “[i]n particular, whether a witness has filed or is contemplating filing a civil lawsuit, the prospects for which may be affected by the outcome of a criminal action, is always relevant to a witness’[s] credibility.”

The argument that defense attorneys may question plaintiffs about their psychological problems to probe their biases or animus is faulty. First, a psychological problem, particularly one that involves paranoia or psychosis, is not a bias or an animus but rather is a disorder over which a

145. Morton, 539 N.W.2d at 773.
146. Id.
147. Id.
person has no control. Second, in a case where the witness is a party to a civil action, rather than a witness in a criminal case who is contemplating a civil action, the jury should be credited with enough intelligence to presume that the witness, whether the plaintiff or the defendant, possesses a pecuniary interest in the outcome of a case, and that as adversaries, the parties likely have a relationship characterized by animus.

The argument also misses the point that, in most cases, a plaintiff will harbor no animus toward a defendant until after the injury alleged in the complaint has occurred; any animus will likely be the direct result of the injury alleged in the lawsuit, not the result of some personal interest, pecuniary or otherwise, arising from collateral matters.

Bias means “[i]nclination; bent; prepossession; [or] a preconceived opinion.” None of the questions at issue in Halverson related to the plaintiff’s preconceived opinions about the case arising from his discrete experience.

An ulterior motive is one characterized by considerations “[b]eyond what is manifest, seen or avowed, intentionally kept concealed.” In most civil cases, the plaintiff’s motive is clear: the plaintiff is suing the defendant and seeks monetary damages. There is no other motive (such as seeking to secure a criminal conviction to make money in a separate case concealed from the purview of the jury).

Had the issue in Halverson been whether the plaintiff hated eye doctors, or whether he had some experience or predisposition that led him to harbor an animus against all medical professionals, then perhaps defense counsel could have introduced testimony to that effect. Instead, the issue that defense counsel explored was whether the plaintiff hated the

148. *Psychosis*, supra note 141 (defining psychosis as “a broad category of mental disorder encompassing the most serious emotional disturbances”).

149. See Prentis v. Bates, 53 N.W. 153, 154 (Mich. 1892) (“[I]t is believed to be entirely safe to credit the jury with at least average intelligence.”).

150. See generally Dom M. Jackson, *Cross-Examination of Plaintiff and Plaintiff’s Witnesses*, in *6 A M. JUR. TRIALS* 201, § 47 (1967) (“Experienced . . . attorneys know that all witnesses, in any lawsuit, will sooner or later become strongly partisan in favor of the party calling them and against the opposing party . . . . Defense counsel should not, however, confuse this partisan feeling with actual bias or prejudice. The witness who is truly biased is ordinarily the one who has an interest, financial or otherwise, in the outcome of the case.”).


defendant for blinding his eye. This was not a collateral, distinct, or external matter to which some bias, ulterior motive, or animus could be attributed.

The Michigan Rules of Evidence provide: “Specific instances of the conduct of a witness, for the purpose of attacking . . . the witness’[s] credibility . . . may not be proven by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness . . . .” At first blush, this rule might seem to justify the questioning of a plaintiff about psychotic episodes to determine whether the plaintiff is credible. However, evidence produced at trial regarding the psychotic episodes resulting from the injury alleged in the complaint is not probative of the truthfulness or untruthfulness of a witness. Rather, it is probative of a witness’s perceptions during psychotic episodes. Even before rules of evidence regarding references to prior conduct of witnesses were enacted, courts generally limited questions about such conduct, “limiting the inquiry to conduct relevant to veracity and honesty.” There is simply no support for the proposition that someone who has suffered from psychotic episodes in the past therefore lacks veracity and honesty. Furthermore, although cross-examination about mental problems may be relevant regarding the accuracy of a witness’s perceptions at certain times given the factual allegations of a case, cross-examination about mental problems is not justifiable on the grounds that it tends to destroy a witness’s credibility, generally. When there is no dispute about whether a witness’s perceptions during psychotic episodes were faulty, it is improper to question a witness about the content about the witness’s

154. See *Halverson I*, 2001 WL 716966, at *3 (“[T]he gist of defense counsel’s closing argument was that this case was about credibility and, due to his emotional condition, plaintiff had none.”).
155. The Michigan rule is substantially similar to Fed. R. Evid. 608(b).
156. Mich. R. Evid. 608(b) (emphasis added).
157. See supra text accompanying note 141.
158. See supra text accompanying note 141.
160. See supra text accompanying note 141.
161. See supra Part V.
psychotic perceptions merely to entertain the jury or divert its attention from the merits of a case.162

Unless there is evidence that the plaintiff is psychotic at the time that the plaintiff testifies, psychotic or paranoid episodes are not relevant to the issue of the plaintiff's credibility.163 Evidence of specific instances of conduct during psychotic episodes is, therefore, neither to be introduced by using extrinsic evidence nor to be inquired into on cross-examination of the witness.

The conclusion of the panel in Halverson makes sense. The plaintiff who claims psychological harm as an element of damages should not be forced to endure the embarrassment of being grilled about irrational conduct that was caused by the very injury alleged in the complaint. If such were not the rule, a tortfeasor would be better served by so severely mangling the victim that the victim is driven to madness; then, the victim might be so maligned in front of the jury that any claim for damages would be dismissed merely as the ranting of a madman. Surely Michigan courts have not meant to suggest that in any case wrongdoers should have the benefit of exploiting their own wrongdoings by using the very injury that they caused to destroy their victim in court after having destroyed the victim in mind or body.

Courts should strive to deal with the issue of cross-examination regarding psychological problems by employing an understandable and manageable test. When the door is opened to a subject, opposing counsel may (1) explore the facts relating to that subject that favor the client, or (2) rebut facts relating to that subject that are not favorable to the client. An

\[162. \text{See supra Parts IV, V.} \]
\[163. \text{See United States v. Hanahan, 442 F.2d 649, 655 (7th Cir. 1971) (holding that evidence of psychological problems was irrelevant in light of the competence of a witness to testify at the time of the trial); Garrett v. State, 105 So. 2d 541, 547 (Ala. 1958) (holding that mental treatment at a time prior to trial was irrelevant as to credibility); Stewart v. State, 398 So. 2d 369, 375 (Ala. Crim. App. 1981) (holding that incapacity was only relevant if it related to the time that the witness testified or the time that he observed the events at issue); Tullis v. State, 556 So. 2d 1165, 1166-67 (Fla. Dist. Ct. App. 1990) (holding that delusions that were not contemporaneous with the testimony were irrelevant); State v. Judge, 758 So. 2d 313, 317 (La. Ct. App. 2000) (holding that medically induced past hallucinations were irrelevant to a witness’s credibility); Bishop v. State, 755 So. 2d 1269, 1272 (Miss. Ct. App. 2000) (holding that a witness’s history of mental illness was irrelevant to the witness’s credibility because there was no allegation that the witness was hallucinating or incoherent at the time of the trial); People v. Beckett, 587 N.Y.S.2d 753, 754 (N.Y. App. Div. 1992) (holding that mental illness was irrelevant because no proof was offered to show that the witness was mentally ill at the time of the trial).} \]
attorney may not, however, emphasize facts accepted by both sides in an effort to do no more than embarrass a witness. In *Halverson*, for example, it did not favor the doctor’s case that the plaintiff had suffered innumerable and devastating psychological difficulties as a result of the doctor’s negligence. The defense attorney was also not seeking to rebut any of the plaintiff’s claims regarding psychological damages. Instead, the defense attorney sought to emphasize the fact of the plaintiff’s psychosis. The *Halverson* panel properly concluded that the defense attorney’s questioning did not explore or rebut facts at issue—the questioning only emphasized the facts that were conceded. The questioning was, therefore, improper.

The holding in *Halverson* reflects the most basic tenet of the interplay between ethics and cross-examination; discrediting a witness is not the same as embarrassing or humiliating a witness by using information that is irrelevant or perhaps marginally relevant, but highly prejudicial. An attorney should “not ask a question designed solely to humiliate or embarrass the witness. It is unprofessional to ask a question if you have no reasonable basis to believe it is relevant to the case, and the purpose of the question is to degrade the witness or another person.” When the conduct of an attorney is consistently unprofessional, such that it distracts the attention of the jury from the merits of the case, it is not only the attorney who pays the price for the perception of impropriety but the client as well. “In such case, the party litigant, in whose favor the statements are made, must bear the consequences.”

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164. *See Halverson I*, No. 223206, 2001 WL 716966 (Mich. Ct. App. Mar. 13, 2001); *see also supra* Part II (discussing the *Halverson* case in detail). In a perfect world, the jury would have realized that the defense attorney was heaping damages on his client with every question he asked—in the real world, the jury apparently concluded that the plaintiff was a lunatic.
166. *Id.* at *3 (“[D]efense counsel’s conduct of repeatedly injecting and emphasizing, in arguments and questioning, [included] the sordid details of the plaintiff’s various psychiatric episodes . . . .”).
167. *See id.* at *1 (explaining that relevant facts had been conceded because the plaintiff’s “attorney [had already] raised the issue of plaintiff’s psychiatric condition during her opening statement and questioning, because plaintiff’s psychiatric condition was relevant to the question of plaintiff’s damages”).
168. *See id.* at *3.
170. *See Prentis v. Bates*, 53 N.W. 153, 158 (Mich. 1892) (Grant, J., dissenting) (explaining that counsel did not present an honest statement to the jury and
VI. CONCLUSION

Attorneys should not confuse what is discoverable with what is admissible. Although a party may be entitled to discover all information contained in the psychiatric or medical records of a party opponent, misusing that information to prey on the predispositions and stereotypes of a fact finder is inexcusable.

Evidence of psychological problems suffered as a result of the injury at issue is not relevant to a party’s credibility; opposing counsel may, however, introduce evidence of prior psychological difficulties to rebut a party’s causation claims. Any rule that does not embody these principles encourages the use of evidence of psychotic episodes as an instrument of prejudice rather than for the legitimate truth-finding role of the jury.

Cross-examination is permitted to explore evidence that helps the cross-examining attorney’s case or to rebut evidence that hurts the cross-examining attorney’s case. Cross-examination that merely emphasizes embarrassing, conceded information that is not at issue is impermissible.

Courts should deal with episodes of attorney misconduct in the same way that the Michigan Court of Appeals dealt with the issue in Halverson. When an attorney’s purpose is to embarrass a plaintiff by interjecting details of psychological damages rather than rebutting a damages claim—particularly in light of the evolving understanding of what it means to suffer from a mental disability—then the attorney’s purpose is unacceptable.

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171. Id.
173. See Burrow, supra note 169, at 1.
175. Perlin, Mental Disability, supra note 132, at 782.