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# HELP ME DOC! THEORIES OF ADMISSIBILITY OF OTHER ACT EVIDENCE IN MEDICAL MALPRACTICE CASES

## I. INTRODUCTION

The foundation of the admissibility of trial evidence, the issue from which every other admissibility question evolves, concerns whether the piece of information offered by the proponent is relevant to any material element of the case.<sup>1</sup> According to language provided by the federal government, the judge or magistrate presiding over a particular contest needs to ascertain whether proffered evidence has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”<sup>2</sup> Unfortunately for the judicial officer in question, his or her analysis does not end here. Though the judge can admit only relevant evidence, the judge is not required to admit all relevant evidence.<sup>3</sup> The officer has discretion to exclude any evidence if he or she concludes that its probative value is “substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”<sup>4</sup>

A proponent’s use of other act evidence can be of great concern to judicial officers because such evidence can easily implicate the problems noted in

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1. See RONALD L. CARLSON ET AL., EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES 175-82 (5th ed. 2001).

2. FED. R. EVID. 401. To satisfy the rule, a proponent of evidence must satisfy the presiding judge or magistrate that the proffered evidence is related to some material fact in the case. CARLSON, *supra* note 1, at 180-81. The evidence need not be groundbreaking, but must simply have some sort of a positive or negative effect on a desired inference that happens to be material to the case. *Id.* at 175-76.

3. See FED. R. EVID. 403; FED. R. EVID. 404. By its very language, Rule 403 gives trial judges the discretion to keep logically relevant evidence out of their courtrooms. The rule begins with the following language: “Although relevant, evidence may be excluded if” the trial judge, in his or her discretion, deems it necessary to do so. FED. R. EVID. 403.

Similarly, if not expressly then by implication, the language of Rule 404(a) forbids the use of some relevant evidence. FED. R. EVID. 404(a). The rule states that “[e]vidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . .” *Id.* A proponent could assuredly find evidence that was relevant to a person’s character, but, by the language contained within Rule 404(a), the proponent is forbidden from using it to prove that person’s actions on a particular occasion. See *id.*

4. FED. R. EVID. 403.

Federal Rule of Evidence 403.<sup>5</sup> By definition, an "other act" is an act performed by a party, or somehow connected to a party or witness, other than the act with which the case at hand is immediately concerned.<sup>6</sup> Because other acts concern events or actions not immediately before the court, judicial officers may find that their use is less probative than other types of evidence and may unduly prejudice the opponent, confuse the jury, or remove focus from the real issues in the case.<sup>7</sup> Moreover, there is a fear, reflected in the Federal Rules of Evidence, that if other act evidence is freely admitted at trial, solely on the basis of having general relevance to an issue in the case, the jury may be tempted to decide the case based upon a desire to punish a party for the other acts, rather than to decide the case based upon the issue with which the case should be concerned.<sup>8</sup> As a result of this fear, a proponent's use of other act evidence is restricted to a certain degree.<sup>9</sup>

Before the Federal Rules of Evidence were adopted in 1975, courts generally followed one of two opposing policies concerning when to admit

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5. Specifically, Rule 403 discusses "unfair prejudice, confusion of the issues, or misleading the jury, or . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

6. CARLSON, *supra* note 1, at 335-36. Professor Daniel Blinka describes an "other act" in the following manner:

The incident need not have resulted in a conviction or civil judgment, nor must it have been a "bad act." The other act may have occurred prior or subsequent to the incident which is being litigated. Moreover, the other act may be that of a party, a witness, or a third person. The prime criterion for admission is relevance.

Daniel D. Blinka, *Evidence of Character, Habit, and "Similar Acts" in Wisconsin Civil Litigation*, 73 MARQ. L. REV. 283, 303 (1989) (footnotes omitted).

The Federal Rules of Evidence use the concept of other acts in Rule 404(b):

*Other Crimes, Wrongs, or Acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

FED. R. EVID. 404(b).

7. See FED. R. EVID. 403.

8. See 2 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 1:03, at 9 (1998). The reflection mentioned in the text can be seen with respect to Rule 404(a) and (b). Both subsections to the rule state that a proponent cannot use evidence of a person's character or other acts performed by that person to make an argument that the person is predisposed to commit the act in question. FED. R. EVID. 404(a)-(b). By ruling out this use of the evidence, the language also effectively invalidates the use of past evidence to convince the fact-finder to punish for past acts.

9. See FED. R. EVID. 404.

and when to forbid the use of other act evidence.<sup>10</sup> One policy was exclusionary in nature.<sup>11</sup> Under this policy, courts refused to admit other act evidence in general, allowing admission only for a few narrow and well-recognized exceptions.<sup>12</sup> The other policy was inclusionary in nature.<sup>13</sup> Under this policy, a court generally allowed other act evidence to be admitted into trial for any purpose other than to show that the party opposing the evidence acted in conformity with a character trait in the commission of the act that was the subject of the action.<sup>14</sup> Congress codified the inclusionary rule as Rule 404(b) of the Federal Rules of Evidence.<sup>15</sup>

According to Rule 404(b), other act evidence can be offered to demonstrate “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”<sup>16</sup> The use of other act evidence in connection with the listed items of relevance has been addressed to varying levels of detail and continuity by a large number of courts.<sup>17</sup> Though the list within Rule 404(b) contains various manners in which to use other act evidence, many commentators have concluded that the list offered in the rule is merely one of examples and not of the only allowable uses.<sup>18</sup> The courts have followed suit, finding that the list is not exhaustive, but only representative of the relevant purposes for which a proponent can

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10. Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 BYU L. REV. 1547, 1557 (1998); see CARLSON, *supra* note 1, at 337-38.

11. Melilli, *supra* note 10, at 1557.

12. *Id.* Under one formulation of the exclusionary rule, other act evidence “was admissible only if it was logically relevant on such well-recognized theories as motive, identity, and intent.” CARLSON, *supra* note 1, at 337 (citing Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938)).

13. Melilli, *supra* note 10, at 1557.

14. See *id.*; CARLSON, *supra* note 1, at 338. In the context of a criminal trial, “if the facts support a theory of logical relevance other than the ‘verboten’ one, the prosecutor may use the . . . evidence to show” any number of things relevant to the action. CARLSON, *supra* note 1, at 338.

15. Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 781 (1981); see Blinka, *supra* note 6, at 308. In the context of discussing the State of Wisconsin’s version of Rule 404(b), professor Blinka states that “[i]n short, the main concern is that the other incident be relevant to something other than a general disposition or propensity to engage in harmful conduct.” Blinka, *supra* note 6, at 308. See *supra* note 6 for the text of Rule 404(b).

16. FED. R. EVID. 404(b).

17. See Edward J. Imwinkelried, *The Use of Evidence of an Accused’s Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 OHIO ST. L.J. 575, 577 (1990). “Rule 404(b) has generated more published opinions than any other subsection of the Federal Rules.” *Id.*; see Blinka, *supra* note 6, at 302. Issues of the admissibility of other act evidence are “the most frequently litigated question[s] arising under the rules.” *Id.*

18. *E.g.*, MCCORMICK ON EVIDENCE 659 (John W. Strong ed., 5th ed. 1999); Melilli, *supra* note 10, at 1557.

offer other act evidence.<sup>19</sup>

Jurisdictions have failed to treat other act evidence consistently in criminal and civil contexts. Since the Federal Rules of Evidence were promulgated, courts have relied on Rule 404(b) to a great extent in criminal cases.<sup>20</sup> On the other hand, courts have not relied on Rule 404(b) to a great extent in civil cases.<sup>21</sup> By its language, Rule 404(b) would seem to apply equally to both criminal and civil cases.<sup>22</sup> Specifically, the rule is entitled "Other Crimes, Wrongs, or Acts," not simply "Other Crimes."<sup>23</sup> Until now, however, many courts have not read the statute to apply equally to both types of actions.<sup>24</sup> A majority of jurisdictions remain content to hold other act evidence to a higher standard of admissibility in the context of civil trials than in the context of criminal trials, despite the obvious argument that the forbidden propensity of character inference can create greater harm in

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19. *E.g.*, *United States v. Hall*, 312 F.3d 1250 (11th Cir. 2002); *United States v. Miller*, 895 F.2d 1431 (D.C. Cir. 1990); *United States v. Woods*, 484 F.2d 127 (4th Cir. 1973).

20. *See* 2 *Imwinkelried*, *supra* note 17, at 577; *Blinka*, *supra* note 6, at 302.

21. *See* *Blinka*, *supra* note 6, at 302 (noting that the "vast majority" of appellate cases dealing with other act evidence are in the criminal, and not the civil context); 2 *IMWINKELRIED*, *supra* note 8, § 7:01, at 4 ("To date, Rule 404(b) has rarely been invoked by civil plaintiffs.").

22. The rule is subtitled "Other Crimes, Wrongs, or Acts," not simply "Other Crimes." FED. R. EVID. 404(b). Additionally, there is nothing in the language of the rule that limits its application to criminal cases. *See* *Blinka*, *supra* note 6, at 307; 2 *IMWINKELRIED*, *supra* note 8, § 7:01, at 4 ("Rule 404(b) seems to govern the admissibility of uncharged misconduct evidence in civil as well as criminal actions.").

Professor *Blinka* found that the Wisconsin version of Rule 404(b), section 904.04(2) of the Wisconsin Statutes, "also applies to civil actions." *Blinka*, *supra* note 6, at 302. He goes on to note that "the common law rule [of the use of other act evidence] was equally applicable in civil cases. Rule 404(b) has a similar scope, since nothing in the rule limits it to criminal cases." *Blinka*, *supra* note 6, at 307 n.76 (quoting C. WRIGHT & K. GRAHAM, *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* § 5239, at 443 (1978)).

23. FED. R. EVID. 404(b) (emphasis added). It is true that the last portion of Rule 404(b) speaks to the "prosecution in a criminal case." FED. R. EVID. 404(b). The specific language is as follows: "the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any [other act] evidence it intends to introduce at trial." *Id.* It is possible to infer from such language that the rule applies to criminal cases and, because civil cases are not mentioned, not to civil cases. However, an alternate understanding of the language is that the proponent of other act evidence must comply with extra restrictions in the context of criminal cases, and that these restrictions are not applicable to civil cases. Additionally, Rule 404(b) is surrounded by many other Federal Rules of Evidence, none of which specify that they apply only in the criminal context. *See* FED. R. EVID. 401-415. *See generally supra* note 22.

24. *See* *CARLSON*, *supra* note 1, at 353-54. "The standards for admitting evidence of other acts in civil actions are stricter than those applied to the admissibility of evidence of other crimes in criminal prosecutions." *Id.* at 353. The authors also note that courts will often require that the other accidents offered as other acts in tort cases be similar to the accident at issue in the trial in order to be admitted into evidence. *Id.* at 352.

criminal prosecutions.<sup>25</sup>

At present, other act evidence is not used to its full advantage in the context of tort actions.<sup>26</sup> While other act evidence has been used in some areas of tort law, especially in the area of products liability,<sup>27</sup> the use does not appear to have extended to medical malpractice actions, where, currently, the use of this type of evidence is infrequent at best.<sup>28</sup> The possible explanations for this apparent lack of use are numerous. For example, in some instances, the absence of the evidence may be due to unreceptive jurisdictions, unwilling to expand the breadth of admissible evidence. In other instances, the absence may be explained by the differences between medical malpractice law and criminal law.<sup>29</sup> Finally, the lack of use of the evidence may simply be due to a lack of creativity on the part of plaintiffs' attorneys. Regardless of the reasons, there are unexplored and underdeveloped means by which to use other act evidence in the context of medical malpractice cases.

Part II of this Comment will survey how other act evidence has been used in medical malpractice cases decided by various jurisdictions in recent years. Through this exploration, this Comment will discuss how different jurisdictions have approached the problem of other act evidence admissibility.

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25. *Id.* at 353-54. If other act evidence is used in the context of a criminal case, the misuse of the evidence for purposes of proving the defendant's character could result in conviction and incarceration. 2 IMWINKELRIED, *supra* note 8, § 7:01, at 4 ("A criminal conviction has a more devastating effect on the defendant's reputation than an adverse civil judgment, and the criminal defendant may have his life or liberty at stake."). If other act evidence is used in the context of a civil case, the misuse of the evidence would result in, at worst, a lost money judgment for the losing party.

26. See 2 IMWINKELRIED, *supra* note 8, § 7:13, at 53 ("[T]he evolution of the law governing the admissibility of [other act evidence] in civil cases has lagged behind the development of the law in criminal cases."). On the other hand, other act evidence has not been underused in litigation in general. See Blinka, *supra* note 6, at 302.

27. See 2 IMWINKELRIED, *supra* note 8, § 7:01, at 5 n.2. See generally Gail A. Randall, Comment, *Product Liability Litigation: Impact of Federal Rule of Evidence 404(b) Upon Admissibility Standards of Prior Accident Evidence*, 61 WASH. U. L.Q. 799 (1983).

28. As of February 6, 2004, a search on LexisNexis.com returned only ninety-nine results under the following search: no date restrictions; the all federal and state cases database; the terms "(other act evidence or 404(b)) and (medical malpractice or doctor negligence or physician negligence)." See also *supra* note 21; Blinka, *supra* note 6, at 310 (noting that there are few appellate cases dealing with other acts in a general civil case context).

29. For example, Rule 404(b) specifies that a proponent can use other act evidence to shed light on the intent of the other party to commit the act that is the subject of the action. FED. R. EVID. 404(b) ("Evidence of [other acts] . . . may . . . be admissible for other purposes such as proof of . . . intent . . ."). A typical medical malpractice action is going to include a claim for negligence. The plaintiff will not likely have an opportunity to argue that the defendant intentionally failed to act in the manner that a reasonable doctor would have. As a result, it is unlikely that intent is a valid object of the use of other act evidence in medical malpractice cases. See *infra* notes 111-14 and accompanying text.

Part II will also show the importance of the terms selected by the proponent of the other act evidence and the importance of the overall relevance of the evidence.

Part III of this Comment will explore manners in which other act evidence can be used in medical malpractice cases in the future. Specifically, this section will investigate how some of the proper uses of other act evidence listed in Rule 404(b)<sup>30</sup> can be used in medical malpractice cases by analogizing past uses of the items in criminal cases to possible uses in the context of physician negligence cases.

Finally, Part IV of this Comment will explore whether any theories of other act relevance exist in the medical malpractice context outside of those theories mentioned in Rule 404(b).

## II. EXISTING OTHER ACT EVIDENCE JURISPRUDENCE IN MEDICAL MALPRACTICE ACTIONS

This section is intended to act as a general survey of arguments already made by attorneys in support of the admissibility of other act evidence in medical malpractice cases and the rulings made by the courts in response. One matter to note at the outset is that different jurisdictions do not treat this issue consistently. Some jurisdictions are very strict when it comes to admitting evidence that concerns other accidents, as opposed to other crimes.<sup>31</sup> The state of Georgia, for example, seems to follow the exclusionary rule, and it excludes most evidence of other accidents without regard to the purpose for which the evidence is offered.<sup>32</sup> On the other hand, other jurisdictions have admitted evidence of other accidents under a relatively wide range of circumstances.<sup>33</sup> Federal circuit courts, for example, have stated that they will allow evidence of other accidents under the situations described in Rule 404(b).<sup>34</sup>

This section will not attempt to synthesize a general rule from all

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30. Other act evidence can "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." FED. R. EVID. 404(b).

31. See *supra* notes 11-12 and accompanying text, and *infra* note 32 and accompanying text.

32. See *Kutner v. Davenport*, 360 S.E.2d 586 (Ga. 1987) (noting that other act evidence is only allowable to prove intent or motive in select circumstances); *Gunthorpe v. Daniels*, 257 S.E.2d 199 (Ga. Ct. App. 1979) (noting that evidence of other acts is normally not admissible in actions for negligence).

33. See, e.g., *Wilson v. Muckala*, 303 F.3d 1207 (10th Cir. 2002); *King v. Ahrens*, 16 F.3d 265 (8th Cir. 1994) (affirming the district court's ruling that other act evidence could be properly excluded because it was unduly prejudicial, but stating that such evidence could be offered to prove purposes listed under 404(b)).

34. See, e.g., *supra* note 33 and accompanying text.

jurisdictions,<sup>35</sup> but instead will provide a few examples of cases in which other act evidence was at issue in a medical malpractice context. Part A provides a discussion of a North Dakota case in which a proponent of other act evidence was unsuccessful in convincing the courts to admit it. Part B provides a discussion of a Texas case in which a proponent was successful in getting other act evidence admitted. Part C discusses a case in which an Arizona court eventually admitted evidence that could be considered other act evidence, but did so by using unorthodox reasoning. Finally, Part D provides a discussion of a court that was probably overly lenient in allowing the use of certain other act evidence.

*A. North Dakota: Kunnanz v. Edge*

In *Kunnanz v. Edge*,<sup>36</sup> the plaintiff had surgery to remove a kidney stone that had lodged in his upper ureter.<sup>37</sup> The defendant doctor performed a procedure called an ureteroscopy in order to remove the stone, whereby an instrument was inserted into the ureter of the patient.<sup>38</sup> The surgery proved unsuccessful and, as a result, the plaintiff was forced to go to a different doctor in order to have the stone removed.<sup>39</sup> The second surgery also proved unsuccessful.<sup>40</sup> After the second procedure, the plaintiff went to a third doctor who subsequently determined that the plaintiff had suffered serious and irreparable damage to his ureter and to one of his kidneys.<sup>41</sup> As a result of the damage suffered by the plaintiff, the damaged ureter and the connected kidney were removed.<sup>42</sup>

At trial,<sup>43</sup> the plaintiff wished to use previous acts of the defendant doctor<sup>44</sup> as evidence against him.<sup>45</sup> The plaintiff alleged this evidence demonstrated that prior to the operation performed on the plaintiff, the defendant doctor had performed an identical operation on another patient,

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35. In fact, it is doubtful that such a formulation is even possible.

36. 515 N.W.2d 167 (N.D. 1994).

37. *Id.* at 169.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. Prior to the suit in question, the plaintiff brought suit against the second physician to perform the surgery, claiming that the defendant was negligent in performing the ureteroscopy and claiming that he suffered a perforated ureter and a lost kidney as a result. *Id.* The plaintiff was unsuccessful in that suit. *Id.* The suit with which this Comment is concerned is a suit against the first doctor. *Id.*

44. The first doctor in the factual scenario.

45. *Id.* at 171.



resulting in similar damage to that patient's ureter, and the eventual removal of the connected kidney.<sup>46</sup> According to the appellate court, the plaintiff argued that the testimony was offered for the purpose of showing that the defendant lacked the necessary "skill and competence" to adequately perform the ureteroscopy.<sup>47</sup>

In determining whether to admit the evidence, the court relied on the familiar rule that "[n]egligence generally cannot be prove[n] by showing the commission of similar prior acts by the same person."<sup>48</sup> Apparently, the court understood the other act evidence in question to be offered for the sole purpose of proving negligence in the present instance based upon the existence of a similar accident involving the defendant in the past.<sup>49</sup> As a result of its understanding of the intended use of the evidence, the court ruled that the evidence was not admissible at trial.<sup>50</sup>

The plaintiff did not offer the evidence for an acceptable purpose under North Dakota's version of Federal Rule of Evidence 404(b).<sup>51</sup> He made the mistake of attempting to prove that the defendant physician had a character trait for negligently performing the surgery in question.<sup>52</sup> In general, commentators have found such a character inference to be no less dangerous than the related inference in the context of criminal cases that a person committed a crime because he or she has a bad character.<sup>53</sup>

Using the benefit of hindsight, it seems possible that had the plaintiff illustrated the evidence (or had the court understood the evidence) as being relevant to something other than proving a character propensity for negligence, the court would have allowed it. For instance, the plaintiff may have succeeded in convincing the trial court to admit the evidence if he had explained that the purpose of the evidence was to prove that the prior surgical accident put the defendant on notice that a dangerous condition of some sort

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46. *Id.*

47. *Id.*

48. *Id.* (citing N.D. R. Ev. 404(b)); *Lange v. Cusey*, 379 N.W.2d 775, 777 (N.D. 1985).

49. *Kunnanz*, 515 N.W.2d at 171.

50. *Id.* The court did find that the evidence could have been admissible to impeach the defendant's credibility during his testimony. *Id.* at 171-72. Ultimately, however, the appellate court found that the trial court was justified in excluding the evidence for even that purpose on the basis that it would have been unduly prejudicial to the defendant. *Id.* at 172.

51. *Id.* at 171.

52. *Id.*

53. See 2 IMWINKELRIED, *supra* note 8, § 1:03, at 10 ("This danger [of the jury drawing an impermissible inference] also arises in civil actions."); Blinka, *supra* note 6, at 295 ("Although seductively easy to draw, the inference [of conduct in conformity with a character trait] is often a weak one."); Heidi L. Vogt, Comment, *Wisconsin's Uncharged Misconduct Evidence Rule: An Analysis of Section 904.04(2)*, 73 MARQ. L. REV. 319, 324 (1989) ("These inferences, in effect, destroy the presumption of innocence.").

existed in relation to the operation. Specifically, the plaintiff could have introduced evidence that an instrument used in the first operation was flawed, or that the technique used in the first operation was problematic. The plaintiff in the case discussed immediately below makes use of such an argument.

*B. Texas: Farr v. Wright*

In *Farr v. Wright*,<sup>54</sup> the plaintiff underwent medical diagnostic procedures to ascertain the extent of an injury that she had sustained at work.<sup>55</sup> In order to discover the scope of the injury, the defendant doctor performed a three-level discogram on the plaintiff, a procedure in which a needle is inserted into three different spaces between the subject's vertebrae.<sup>56</sup> Soon after undergoing the procedure, the plaintiff began to suffer from severe pain, and the defendant was unsuccessful in discovering the cause of that pain.<sup>57</sup>

After some time, and the worsening of the plaintiff's physical condition, a second physician examined the plaintiff and found that each of the three areas around the spinal column in which the defendant doctor had inserted the needle had become infected.<sup>58</sup> To cure the plaintiff of these infections, the new physician prescribed intravenous antibiotics for a period of two months.<sup>59</sup> In addition to the infections, the plaintiff was found to have suffered severe damage to her spine as a result of the discogram procedure, resulting in significant disabilities.<sup>60</sup>

The plaintiff brought a medical malpractice suit against the defendant doctor, claiming that he had been negligent in his technique of ensuring the sterility of the needles used in the discogram procedure.<sup>61</sup> In support of this allegation, the plaintiff desired to use evidence of past incidents involving the defendant physician, whereby previous patients had become infected in a manner similar to the plaintiff.<sup>62</sup> Specifically, the plaintiff desired to show that the incidence of a patient contracting the infection after having the defendant perform the surgery was considerably higher than the normal incidence of such infection stemming from surgery performed by any other physician.<sup>63</sup> The facts reported in the decision demonstrate that during the

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54. 833 S.W.2d 597 (Tex. App. 1992).

55. *Id.* at 598.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 599.

62. *Id.* at 598-99.

63. *Id.* at 599.

two-month period immediately prior to the procedure performed on the plaintiff, three or four other patients of the defendant had contracted the same infection after undergoing treatment.<sup>64</sup>

According to the appellate court, the plaintiff argued that the evidence of the prior incidents of infection was relevant to prove that the defendant physician had knowledge that his sterility technique was ineffective and, thus, dangerous to patients.<sup>65</sup> In order to strengthen her argument, the plaintiff also emphasized that the circumstances of her injury were very similar to the circumstances surrounding the previous incidents of infection that involved past patients of the defendant doctor.<sup>66</sup> Finally, and importantly, the plaintiff did not use the evidence of the prior infections to prove simply that the defendant doctor had a character trait of performing surgery in a negligent fashion. Ultimately, the court agreed with the plaintiff's arguments and ruled that the evidence was admissible for the purpose of proving the defendant's knowledge of a dangerous condition.<sup>67</sup>

### C. *Arizona: Gasiorowski v. Hose*

The following case, *Gasiorowski v. Hose*,<sup>68</sup> provides an example of other act evidence being admitted in a medical malpractice action, but not through the use of Rule 404(b) or an equivalent.<sup>69</sup> Preceding the filing of the case, the defendant doctor administered an epidural anesthetic to the plaintiff, an expecting mother.<sup>70</sup> Soon after the completion of the procedure the plaintiff began suffering from a wide variety of physical problems, including swelling of, and numbness in her legs.<sup>71</sup> After some time, the plaintiff began to suffer from dystonia, a "cramping, spasmodic condition that . . . left her wheelchair bound."<sup>72</sup>

The plaintiff brought suit against the physician, claiming that he had been negligent in the manner in which he had administered the epidural anesthetic into her spinal canal.<sup>73</sup> At trial, the plaintiff desired to use evidence that fourteen months after the defendant doctor performed the procedure on her,

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64. *Id.* at 598.

65. *Id.* at 599.

66. *Id.*

67. *Id.* at 602-03.

68. 897 P.2d 678 (Ariz. Ct. App. 1994).

69. *See id.*

70. *Id.* at 679.

71. *Id.* at 680. In addition, the plaintiff allegedly felt some discomfort during the actual procedure. *Id.*

72. *Id.* at 679.

73. *Id.*

the defendant's employer suspended his license to administer epidurals, citing the defendant's alleged "difficulty threading the epidural catheter."<sup>74</sup> The suspension report contained information of three prior incidents wherein the defendant had performed the epidural procedure incorrectly.<sup>75</sup> Though the decision does not convey precisely how the plaintiff offered the evidence at trial, the trial court denied its use under the Arizona version of Federal Rule of Evidence 404(b), explaining that the plaintiff was attempting to use the evidence in order to prove that the defendant had acted in conformity with a character trait for negligence.<sup>76</sup>

The Arizona Court of Appeals disagreed with the analysis of the trial court,<sup>77</sup> however, the response of the appellate court was not to simply rule that the evidence was admissible under the Arizona version of 404(b). Instead, the appellate court's admissibility analysis was a little unorthodox.

Instead of treating the suspension of the defendant doctor's license as other act evidence and deciding whether or not it should be admitted under a 404(b) analysis, the appellate court found that 404(b) should not have been invoked at all.<sup>78</sup> The appellate court reasoned that the evidence of the license suspension was not other act evidence, but was, instead, evidence of the defendant's *habit* in the performance of administering epidurals.<sup>79</sup> As a result, the court found that Rule 406 of the Federal Rules of Evidence,<sup>80</sup> and of the Arizona Rules of Evidence, should have been used by the trial court instead of Rule 404(b).<sup>81</sup>

The Arizona appellate court somehow found that the license suspension, a punishment that was based upon three incidents of misconduct,<sup>82</sup> was evidence of habit as opposed to evidence of an other act. In support of this

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74. *Id.* at 680-81.

75. *Id.* at 681.

76. *Id.* Additionally, if the plaintiff did in fact intend to offer the evidence under the guise of 404(b), the case does not note what alternative theory of relevance she claimed the information related to.

77. *Id.*

78. *Id.*

79. *Id.*

80. FED. R. EVID. 406.

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

*Id.*

81. *Gasiorowski*, 897 P.2d at 681.

82. *Id.*

finding, the court began with the following recognized definition of habit: "A habit . . . is [a] person's regular practice of responding to a particular kind of situation with a specific type of conduct."<sup>83</sup> To illustrate its understanding of the definition, the court made use of an example provided by McCormick of a person's habit to "bound[] down a certain stairway two or three steps at a time,"<sup>84</sup> apparently likening that scenario to the defendant doctor's three incidences of misconduct. Beyond this limited explanation of the definition of "habit," and a short comparison of that definition to the legal term of "character,"<sup>85</sup> the court failed to explain in further detail how the three incidents of misconduct were evidence of a habit, as opposed to other acts.

The court neglected to consider that in addition to the above statements of the legal definition of a habit, many commentators and judges alike feel that the action in question needs to be somewhat unconscious in nature in order to be considered a habit.<sup>86</sup> According to one school of thought, for a certain act to be considered a habit it must be almost "Pavlovian" in nature, an unthinking response to a common stimulus.<sup>87</sup> In light of these refinements to the legal definition of "habit," most jurisdictions likely would not find that the actions of the defendant doctor in *Gasiorowski* were evidence of a habit. The threading of an epidural catheter is a dangerous procedure that requires a great deal of skill, very unlike the much quoted example of a habit, where a person switches on a turn signal prior to changing lanes while driving an automobile.<sup>88</sup> Additionally, it seems doubtful that a doctor performing the

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83. *Id.* (citing MCCORMICK ON EVIDENCE § 195, at 825 (4th ed. 1992)).

84. *Id.* at 681 (quoting MCCORMICK ON EVIDENCE § 195, at 826 (4th ed. 1992)).

85. *Id.* at 681-82. According to the text cited by the court, "Character is a generalized description of a person's disposition, or of the disposition in respect to a general trait, such as honesty, temperance or peacefulness . . . ." *Id.* (quoting MCCORMICK ON EVIDENCE § 195, at 825 (4th ed. 1992)).

86. See Blinka, *supra* note 6, at 312. The author explains the two recognized understandings of the legal concept of habit:

First, the narrow psychological denotation describes a classic conditioned response: a semi-automatic reaction repeated almost unvaryingly in the face of certain specific circumstances. Second, a broader, probabilistic conception addresses the frequency and specificity of the occurrence of an act. That is, the more often a person or an organization has behaved in a certain way in a particular context in the past, the more likely it is that the individual or organization will behave the same way when confronted with the same circumstances on another occasion.

*Id.*; see also CARLSON, *supra* note 1, at 333-34 (citing *Washington State Physicians Ins. v. Fisons Corp.*, 858 P.2d 1054 (Wash. 1993)).

87. CARLSON, *supra* note 1, at 333 (citing Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413, 417 (1989)); see also Blinka, *supra* note 6, at 312.

88. Blinka, *supra* note 6, at 311 (citing C. MCCORMICK, EVIDENCE § 195, at 574-75 (3d ed.

surgery would do so in an unthinking manner. It is likely that each new patient that a physician treats presents some variation from the norm that the physician must take into account before and during surgery. As such, it is probable that each patient would desire the utmost care by the doctor in performing the procedure, and not some common, mechanical, one size fits all approach to a very delicate surgery.

Ultimately, the importance of the *Gasiorowski* decision is not that the Arizona appellate court was wrong in its determination of the admissibility of the evidence,<sup>89</sup> but that multiple theories of admissibility are at the disposal of plaintiff's attorneys. It is unlikely that many other courts would be willing to follow the lead of the Arizona court in this decision; however, this case demonstrates that when attempting to have other acts by the defendant admitted into evidence at trial, attorneys should argue for admissibility under theories of both other act evidence and habit evidence. Additionally, the admissibility rules of habit are not concerned with avoiding possible inferences into a subject's character.<sup>90</sup> As such, attorneys wishing to use outside evidence might have an easier time getting the evidence admitted under the guise of habit.<sup>91</sup>

#### D. Ohio: *Siuda v. Howard*

In *Siuda v. Howard*,<sup>92</sup> the claims of seven different plaintiffs were consolidated into one medical malpractice action against the defendant doctor, an ophthalmologist.<sup>93</sup> The plaintiffs, all former patients of the defendant, claimed that the defendant was guilty of negligence in recommending and performing surgery for glaucoma, cataracts, or both.<sup>94</sup> At trial, the plaintiffs wished to use expert testimony to point out that the defendant doctor had previously been cited for operating needlessly, that one patient, outside the group of plaintiffs, was blinded after a procedure performed by the defendant, and that other former patients of the defendant had suffered other serious sight

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1984)).

89. Admittedly, it is quite possible that many people would agree that the court was correct in finding the evidence in question to be admissible as habit, rather than other act, evidence.

90. The language of Rule 406 allows the proponent of evidence to prove that conduct on a particular occasion was in conformity with the person's habit. *See* FED. R. EVID. 406. The language of 404(b), on the other hand, expressly forbids a proponent of evidence from using other act materials to prove that a person acted in conformity with his or her character. FED. R. EVID. 404(b).

91. In fact, there is some evidence that this has already happened. *See* Blinka, *supra* note 6, at 307 ("[T]here is a marked inclination to resort to 'habit' or 'routine practice' as a convenient way of justifying the admissibility of [other act] evidence.").

92. No. C-000656, 2002 Ohio App. LEXIS 2314 (Ohio Ct. App. May 10, 2002).

93. *Id.* at \*3.

94. *Id.*

complications that stopped short of blindness.<sup>95</sup> The defendant claimed that the evidence was unduly prejudicial against him and should have been excluded under Federal Rule of Evidence 404(b).<sup>96</sup> The Ohio appellate court ruled that the evidence was admissible under rule 404(b), concluding that it was relevant to prove the defendant's "motive to perform medically unnecessary surgeries; his knowledge as an ophthalmologist; and an absence of mistake or accident."<sup>97</sup>

Despite the assertion that other act evidence is often incorrectly deemed inadmissible, the Ohio appellate court may have been overly generous in admitting the other act evidence in *Siuda*. In support of its decision to admit the testimony, the appellate court provided only a blanket statement that the expert's opinion may have been relevant to one or more of three things.<sup>98</sup>

In the first instance, the court stated that the expert's testimony might have been relevant to the defendant doctor's motive to perform unnecessary surgeries.<sup>99</sup> From the information given in the opinion, the expert testified only that the defendant doctor did perform unnecessary surgeries;<sup>100</sup> the expert did not explain the reason why the defendant performed the unnecessary surgeries. It is not clear how this simple statement had any bearing on the defendant's motive for operating unnecessarily.<sup>101</sup> Even if the expert's statement had any tendency to prove motive, many courts would surely find that the statement's minimal relevance would be substantially outweighed by the prejudicial effect it could have against the defendant in terms of character. As such, many courts would not admit the evidence under the powers granted by Rule 403.<sup>102</sup>

In the second instance, the court stated that the expert's testimony might have been relevant to prove the defendant's knowledge as an ophthalmologist.<sup>103</sup> The challenged testimony of the medical expert was as follows: "[The defendant is] operating needlessly . . . I have seen four of

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95. *Id.* at \*20-21.

96. *Id.* at \*21-22.

97. *Id.* at \*22.

98. *Id.* at \*23.

99. *Id.*

100. *See id.* at \*20-21. The court quotes the expert as testifying that "[the defendant is] operating needlessly." *Id.*

101. In other words, it does not make sense to say that the doctor was motivated to perform unnecessary surgeries because he performed unnecessary surgeries.

102. *See* FED. 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, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

103. *Siuda*, 2002 Ohio App. LEXIS 2314, at \*22.

[the defendant's] patients with serious . . . complications. One resulted in blindness."<sup>104</sup> The court neglected to make clear how this testimony was relevant to the knowledge of the defendant doctor. The simple allegation that the doctor operated needlessly or that some of his patients suffered complications from surgery does not suggest that the defendant had knowledge of a dangerous condition and ignored that condition to the detriment of reasonable care.

In the third instance, the court stated that the expert's testimony could be used to prove the defendant's absence of mistake or accident.<sup>105</sup> The court, however, does not explain how this item of relevance, listed among the sanctioned uses in Rule 404(b),<sup>106</sup> is useful in the context of a negligence action. Clearly, proof of the absence of a mistake or accident can be relevant in the context of a criminal case by helping to show that whatever occurred must have been the result of an intentional act.<sup>107</sup> However, this logic does not function in a negligence action, where the intent of the actor to cause harm is not at issue.

Ultimately, *Siuda* and *Gasiorowski* can be considered as two examples of courts being overly generous in admitting other act evidence. Though it is unlikely that such generosity extends throughout a large number of jurisdictions, these cases serve as a reminder to attorneys to consider as many theories of relevance as possible to get their evidence admitted at trial.

### III. POSSIBLE RULE 404(B) OTHER ACT USES IN MEDICAL MALPRACTICE ACTIONS

The previous section of this Comment explored some of the few instances wherein appellate courts have addressed the subject of admissibility of other act evidence in a medical malpractice context. This section will explore how some of the alternative areas of relevance listed in Rule 404(b) for use with other act evidence<sup>108</sup> can be used in medical malpractice cases.<sup>109</sup>

At the outset, it should be noted that due to the inherent nature of medical malpractice actions, and the inherent nature of negligence actions in general,

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104. *Id.* at \*20-21.

105. *Id.* at \*23.

106. FED. R. EVID. 404(b).

107. For example, a party can circumstantially prove intent by showing that the event in question could not have been the result of an accidental occurrence.

108. *See* FED. R. EVID. 404(b). The rule states that proponents of evidence can use other act evidence to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.*

109. The purpose of which is to give ideas to attorneys how to proceed when faced with other act issues in this area of law.



many of the alternative areas of relevance listed in Rule 404(b) are not likely to be of much use to a proponent of other act evidence in a medical malpractice action. For example, Rule 404(b) specifies that other act evidence can be used to prove the *intent* of the defendant.<sup>110</sup> Medical malpractice actions are not concerned with whether a physician intentionally harmed a patient,<sup>111</sup> but with whether a physician fell below the standard of care a reasonable doctor would provide in a given situation.<sup>112</sup> Additionally, other items listed by Rule 404(b), including *plan* and, as explained in the previous section,<sup>113</sup> *absence of mistake or accident* will likely be of little use to a party in a medical malpractice action.<sup>114</sup> On the other hand, some of the other items listed in the rule could be useful to a plaintiff in a medical malpractice case. The remainder of this section will explore two of these possibilities.

This section is intended to explore how the alternative uses of other act evidence listed in Rule 404(b)<sup>115</sup> have been employed in cases not involving medical malpractice and how the same uses may successfully be incorporated into medical malpractice cases. Two representative cases have been selected for discussion, not for the context in which the evidence is used,<sup>116</sup> but for the alternative theory of relevance from Rule 404(b) used in each particular case. Part A provides a discussion of the use of *knowledge*, and Part B provides a discussion of the use of *identity*.<sup>117</sup>

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110. FED. R. EVID. 404(b).

111. Such an act would likely be adjudicated under an intentional tort theory, like battery.

112. BARRON'S LAW DICTIONARY 258-59, 333 (1996).

113. See *supra* Part II.D.

114. See FED. R. EVID. 404(b).

115. See *id.*

*Other Crimes, Wrongs, or Acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, or the general nature of any such evidence it intends to introduce at trial.

*Id.*

116. In fact, all of the selected cases happen to be criminal cases.

117. Other items of relevance listed in Rule 404(b) also could be used. See *supra* note 115; *James v. McKenna*, No. 02-318 Section "K"(1), 2003 U.S. Dist. LEXIS 1213, at \*4-7 (E.D. La. Jan. 27, 2003) (ruling that evidence of a defendant doctor's financial condition, offered in an attempt to prove the doctor's *motive* for operating needlessly, was inadmissible under Rule 403 as unduly prejudicial).

*A. Knowledge: United States v. Tringali*

The case of *United States v. Tringali*<sup>118</sup> provides a good example of the use of other act evidence to prove a defendant's *knowledge*. The two defendants were both charged with, and imprisoned as a result of,<sup>119</sup> "conspiring to possess with intent to distribute ten kilograms of cocaine and possession with intent to distribute two kilograms of cocaine."<sup>120</sup> In the process of prosecuting one of the defendants at trial, the government was able to convince the court to take judicial notice of an earlier conviction of that defendant for "conspiracy to possess with intent to distribute four kilograms of cocaine."<sup>121</sup>

The appellate court affirmed the district court's finding that the other act evidence was relevant to the defendant's knowledge.<sup>122</sup> At trial, one of the defendant's original defenses against the charges was that he could not have conspired to possess and distribute the cocaine because he lacked the necessary knowledge to organize a deal of such size.<sup>123</sup> The government argued, and the courts agreed, that the previous conviction for intent to distribute four kilograms of cocaine indicated that the defendant did, in fact, possess the knowledge necessary to organize and complete the charged offense.<sup>124</sup> The court elaborated, explaining that the two events were sufficiently similar in circumstances to assume that knowledge of how to put together the deal, the subject of the 1984 conviction, would translate into knowledge of how to put together the deal that was the subject of the appeal.<sup>125</sup> Finally, the appellate court found that the limiting instruction given by the trial court to the jury, informing the members not to use the 1984 conviction as evidence of the defendant's character, was sufficient to protect

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118. 71 F.3d 1375 (7th Cir. 1995). Numerous other cases also address the use of other act evidence to prove a defendant's knowledge in criminal cases. *See, e.g.*, *United States v. Duong*, No. 03-6028, 2003 U.S. App. LEXIS 25868, at \*6-7 (10th Cir. Dec. 19, 2003) (In a prosecution for money laundering, the government successfully used evidence of the defendant's previous tax returns to prove that the defendant had knowledge that the money he used for various activities was illegally obtained.); *United States v. Halak*, No. 02-1014, 2003 U.S. App. LEXIS 21965, at \*4-5 (2d Cir. Oct. 23, 2003) (In a prosecution for an attempt to export stolen cars, the government successfully used evidence of the defendant's association with other stolen cars to prove that he knew that the vehicles in question were stolen at the time he attempted to export them.).

119. Defendant Tringali pled guilty to reduced charges; defendant Hernandez was convicted of the charges after a jury trial. *Id.* at 1377.

120. *Id.*

121. *Id.* at 1379.

122. *Id.*

123. *Id.* The size of the drug deal that was the subject of the conspiracy charge was ten kilograms. *Id.* at 1377.

124. *Id.* at 1379.

125. *Id.*

against that very possibility.<sup>126</sup>

As *Tringali* demonstrates, it is possible to use other act evidence to prove the defendant's knowledge in criminal cases. The knowledge of a defendant can also be relevant in the medical malpractice context. Two hypothetical scenarios can help to demonstrate when a defendant doctor's knowledge can be relevant, although the concept of knowledge is probably broad enough to encompass an endless number of additional scenarios.

The first scenario concerns the presence of a possible dangerous condition within the operating room.<sup>127</sup> Consider a physician who has witnessed two of her former patients, both of whom she has operated on in the past few months, develop the same infection. Despite knowing about these infections, the doctor continues to perform the same procedure on other patients, changing nothing of the manner in which she sterilizes the instruments necessary to perform the operations. A third former patient of hers develops an infection identical to the one suffered by the two earlier patients. If this third patient were to bring a medical malpractice suit against the doctor, he or she may be able to point to the two previous instances of infection as events that would have put a reasonably prudent doctor on notice that something was amiss with his or her sterilization procedures. In other words, the defendant doctor may have had knowledge that a dangerous condition was present in the operating room, yet failed to act upon that knowledge under circumstances where such failure was malpractice.

The second scenario may present more problems of undue prejudice than the first<sup>128</sup> but, nonetheless, should be explored. Consider a doctor who has just learned a new, but widely accepted, procedure and has begun to perform it on patients. Within the first few months of practicing this procedure, two of the patients on whom he or she has operated suffered complications stemming from some misstep by the doctor during surgery. If another patient later suffers the same complication while under the doctor's care,<sup>129</sup> he or she may wish to use evidence of the earlier accidents in a malpractice claim against the defendant doctor. The proponent of such evidence may be able to convince a

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126. *Id.*

127. This idea was already discussed to some extent in Part II.B, in relation to *Farr v. Wright*, 833 S.W.2d 597 (Tex. App. 1992). See *supra* Part II.B.

128. In other words, the argument may come too close to saying that the defendant committed the current negligent act in question because he or she has a character trait for carelessness. As a result, a court may find the proffered evidence unduly prejudicial towards the defendant and disallow its use in accordance with Rule 403. See FED. R. EVID. 403.

129. As *Tringali* demonstrates, a court may be more likely to accept other act evidence if the other act in question contained many circumstances similar to the act with which the court is directly concerned. 71 F.3d at 1379.

court that the previous instances are relevant to the doctor's *knowledge of his or her own skill* in performing the procedure. In other words, the proponent would be arguing that a reasonable person in the position of the defendant doctor would have known, in effect, that he or she did not know how to correctly perform the procedure in question, based upon the two previous incidents involving other patients. Such an argument could be especially useful under circumstances wherein the particular procedure was highly technical in nature, and the operation was difficult to reconstruct after the fact.

*B. Identity: United States v. Mack*

The case of *United States v. Mack*<sup>130</sup> provides a good example of using other act evidence to prove a defendant's *identity*. In *Mack*, the defendant was ultimately convicted of three counts of armed robbery, in addition to a few other offenses.<sup>131</sup> To aid in the prosecution of the case, the government attempted to use evidence of another armed robbery committed by the defendant that had occurred after the commission of the crime that was the subject of the case, but before the trial began.<sup>132</sup> The government argued that the subsequent robbery committed by the defendant was relevant to proving the defendant's identity and, thus, was admissible under Federal Rule of Evidence 404(b).<sup>133</sup>

The appellate court ultimately affirmed the decision of the district court to allow the evidence of the subsequent bank robbery, agreeing that the evidence was relevant to the identity of the defendant.<sup>134</sup> In the second armed robbery,<sup>135</sup> the defendant was seen wearing a "ski mask in conjunction with a hooded sweatshirt," and committed the crime by jumping over the bank teller line prior to the act of receiving the money, and jumping back over the teller line after having received the money.<sup>136</sup> In the armed robbery that was the subject of the action, the perpetrator, though not seen with his mask off, had

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130. 258 F.3d 548 (6th Cir. 2001). Numerous other cases also address the use of other act evidence to prove a defendant's identity in criminal cases. *See, e.g.,* *United States v. Ford*, No. 01-2158, 2003 U.S. App. LEXIS 15644, at \*9-13 (6th Cir. Aug. 1, 2003) (In a bank robbery prosecution, the government successfully used evidence of a stolen car in the defendant's possession to help prove the defendant's identity as that of the robber.); *United States v. Trenkler*, 61 F.3d 45, 53 (1st Cir. 1995) (Identity can be used if the proponent can "demonstrate that the two acts exhibit a commonality of distinguishing features sufficient to earmark them as the handiwork of the same individual.").

131. *Mack*, 258 F.3d at 551.

132. *Id.* at 553.

133. *Id.*

134. *Id.* at 553-56.

135. The "other act" for purposes of the trial.

136. *Mack*, 258 F.3d at 553-54.

been seen wearing the same clothing and performing the offense in exactly the same manner as the defendant in the subsequent robbery.<sup>137</sup> Because of the similarities between the two offenses, the court found that the identity of the perpetrator in the second instance was relevant to proving the identity of the perpetrator in the first instance.<sup>138</sup>

As *Mack* demonstrates, there is ample opportunity to use other act evidence for the purpose of proving the defendant's identity in the context of criminal trials. Under different factual scenarios, it may be possible to use identity in the context of medical malpractice actions as well.

Consider a hypothetical scenario involving two doctors who were present during an operation upon a patient. During the course of this operation, one of the two doctors committed malpractice, injuring the patient. Assume that the plaintiff won a malpractice judgment against the two doctors as codefendants. The non-negligent doctor now seeks indemnification from the negligent doctor for the part of the damage award he or she paid to the former patient. Assume further that the two doctors are the only witnesses to the operation, and that each one is denying culpability. Under circumstances wherein each doctor had a manner of performing the surgery distinctively from the other, the results of previous surgeries performed by the two could be relevant to prove identity. Specifically, a previous instance of negligence involving one of the doctors, wherein his or her particular distinctive technique was used, could be relevant to prove the identity of the doctor who committed the negligence in the later instance.

#### IV. POSSIBLE NON-404(B) OTHER ACT EVIDENCE RELEVANCE

As found by courts and commentators alike, the list of valid uses of other act evidence contained within Federal Rule of Evidence 404(b) is not exhaustive.<sup>139</sup> The list is intended only as a representative grouping of allowable uses of other acts.<sup>140</sup> Additionally, the federal government codified

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137. *Id.* In other words, the perpetrator in both situations was seen jumping over the teller line both before and after the robbery was completed. *Id.*

138. *Id.*

139. See MCCORMICK ON EVIDENCE, *supra* note 18, at 659; see, e.g., *United States v. Ford*, No. 01-2158, 2003 U.S. App. LEXIS 15644, at \*9 (6th Cir. Aug. 1, 2003) ("Fed. R. Evid. 404(b), 'is actually a rule of inclusion rather than exclusion . . .'" (emphasis omitted) (quoting *United States v. Blankenship*, 775 F.2d 735, 739 (6th Cir. 1985)); *United States v. Young*, 248 F.3d 260, 271 (4th Cir. 2001) ("Rule 404(b) is viewed as 'an inclusive rule . . .'" (quoting *United States v. Van Metre*, 150 F.3d 339, 349 (4th Cir. 1998)); *United States v. Blankenship*, 775 F.2d 735, 739 (6th Cir. 1985) ("The list of permissible uses is not exclusive."); *United States v. Burkley*, 591 F.2d 903, 921 (D.C. Cir. 1978) (allowing the government to use other act evidence of the defendant's predisposition to commit a specific crime in order to counter the defendant's assertion of an entrapment defense).

140. *Mack*, 258 F.3d at 553-54.

the inclusionary rule of the uses of other act evidence in the Federal Rules of Evidence.<sup>141</sup> As such, a proponent may need to satisfy the court only that she is not using the other act evidence in order to show that the defendant doctor has a propensity to commit negligent acts.<sup>142</sup> As a final part of this analysis, one additional mode of relevance, not expressly described within the confines of Federal Rule of Evidence 404(b), will be explored.

Earlier in this Comment, it was explained that the traditional use of other act evidence to prove the absence of accident or mistake would not likely apply to medical malpractice actions.<sup>143</sup> In its normal use, proof of the absence of an accident or mistake can be a sort of backhanded manner of proving that the act in question was intentional.<sup>144</sup> Such absence, used to prove intent, cannot be of much use in negligence actions, where intent is not even an element of the cause of action.<sup>145</sup> However, it may be possible to use a similar concept in a malpractice context. Under certain circumstances, proof of the absence of a *non-negligent* accident or mistake could be used as proof of negligence.

Consider the following hypothetical scenario. In the span of six months, three different patients of the same doctor, out of a total patient pool of ten, suffer the same complication from the same surgery. In other words, thirty percent of the doctor's patients suffered the complication. Assume that the normal rate of occurrence of that complication is well known in the medical community to be, at most, one percent when caused by a non-negligent source. In a situation such as this, because the rate of occurrence suffered by the patients of our doctor is substantially higher than the expected rate of non-negligent occurrence, one could infer that there is a strong likelihood that negligence played a role in the complications. In other words, the high frequency with which the complication occurs can be relevant to show that the complications were caused by the doctor's negligence.

Assume that the third patient who suffered the complication brings a malpractice suit against the doctor and wishes to use the surgeries of the other two injured patients as other act evidence. A court may allow evidence of the

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141. See *supra* note 15.

142. See *supra* notes 15-18 and accompanying text.

143. See *supra* Part III, II.D.

144. See *Estelle v. McGuire*, 502 U.S. 62 (1991) (reversing a decision of the court of appeals excluding evidence of prior incidents of a father beating his child used to show the possibility that the child's death was not an accident); CARLSON, *supra* note 1, at 344. In the latter source, the authors discuss the doctrine of objective chances, wherein "if the defendant suffered a particular type of loss . . . more frequently than the average, innocent citizen would sustain such losses, the defendant's claim of accident is objectively implausible." *Id.* at 344.

145. See *supra* notes 111-14 and accompanying text.

previous incidents, and their rate of occurrence, to prove the absence of a non-negligent cause of injury, thus indicating that the injury was caused by a negligent act.

Of course, it is very possible that a court faced with the argument made immediately above would consider it to run too parallel to the forbidden propensity argument concerning negligent character and, as a result, forbid its use.<sup>146</sup> Additionally, the same court, if it does not forbid the use of the evidence because of its similarity to the propensity argument, may forbid its use by ruling that the admission of the other failed surgeries into evidence would unduly prejudice the defendant doctor in accordance with the balancing test contained within Rule 403.<sup>147</sup> Notwithstanding both of these possibilities, it is also possible that a court faced with this issue for the first time would accept the use of the evidence in the manner laid out above. The only true means to verify what a court will do is to present the argument under relevant circumstances.

## V. CONCLUSION

The use of other act evidence in the context of medical malpractice cases is really an unknown quantity. Since the adoption of the Federal Rules of Evidence, courts and attorneys alike have been quick to make use of the evidence within criminal trials, but for whatever reason have not made great use of the evidence in the realm of medical malpractice cases. There is little reason for this difference. This Comment, by discussing some of the few instances in which the evidence has been litigated, and by discussing some of the possibilities for the future use of the evidence, is meant to encourage attorneys to use other act evidence in medical malpractice cases when doing so is relevant and beneficial to the case at hand.

The use of other act evidence in non-criminal and non-products liability cases seems to be a prime example of an area of law in which the jurisprudence lags well behind the logical end of the applicable legal proposition. Rule 404(b) arguably was intended to codify the inclusionary rule of other act evidence for all areas of law; however, practice has not kept up with theory in the area of medical malpractice law. Part II of this Comment highlighted some of the instances, if very few in number, where proponents of the use of other act evidence have been successful in convincing courts of the propriety of its use. Parts III and IV demonstrated that there are other uses of the evidence that remain to be explored.

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146. See FED. R. EVID. 404(b).

147. See FED. R. EVID. 403.

Other act evidence can benefit both plaintiffs and defendants in medical malpractice suits. In the interests of diligently representing their clients, and of pushing the state of case law to meet the state of statutory law, proponents should make every attempt to use relevant other act evidence in medical malpractice cases in the future.

JOHN GARDNER\*

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