STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL O. MOORE, BECKIE S. MOORE, JOHN A. GOLDSMITH, JESSIE PINKHAM, THOMAS GIANNINI, and CHRISTINE M. GIANNINI,

Plaintiffs-Appellees/Cross-Appellants,

v

PAJAY, INC., DEER CREEK HUNT CLUB, INC., and PAUL D. OSELKA,

Defendants-Appellants/Cross-Appellees,

and

THREE OAKS TOWNSHIP, WILLIAM DONNER, Individually and in his capacity as Three Oaks Township supervisor, TIMOTHY H. SHERRILL, Individually and in his capacity as Three Oaks Township Board member, Three Oaks Township Planning Commission member and Three Oaks Township Zoning Commission member, THREE OAKS TOWNSHIP PLANNING COMMISSION, GEORGE A. MANGOLD, Individually and in his capacity as Three Oaks Township Planning Commission Chairman and Three Oaks Township Zoning Board of Appeals Chairman, LARRY OSBURN, individually and in his former capacity as Zoning Administrator, STEPHEN BERGET, in his capacity as Zoning Administrator, and THREE OAKS TOWNSHIP ZONING BOARD OF APPEALS,

Defendants-Appellees/Cross-Appellees.

UNPUBLISHED
February 27, 1998

No. 188693
Berrien Circuit Court
LC No. 93-003481-CE

Before: Neff, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Following a bench trial, defendants Pajay, Inc., Deer Creek Hunt Club, Inc., and Paul D. Oselka appeal as of right the judgment ordering equitable remedies to abate a private nuisance caused by Deer Creek Hunt Club, and plaintiffs cross-appeal the trial court's grant of summary disposition in favor of defendants Township of Three Oaks (Township), the Township Planning Commission and Zoning Board of Appeals (ZBA), and the various individual Township defendants. We affirm.

I

On direct appeal, defendants Pajay, Inc., Deer Creek Hunt Club, and Paul D. Oselka (the Hunt Club defendants) first contend that the trial court erred as a matter of law by refusing to dismiss plaintiffs' nuisance claims[1] against them under § 2 of the Michigan Sport Shooting Ranges Act (the Act), MCL 691.1542; MSA 18.1234(42).

Recently, in *Township of Ray v B & BS Gun Cub*, ___ Mich App ___ ; ___ NW2d ___ (Docket No. 195027, issued December 12, 1997), this Court, in holding that the Act neither violates the title-object clause of the Michigan Constitution nor was void for vagueness, observed:

> The Sport Shooting Ranges Act was originally enacted in 1989. The Act was modeled after the Right to Farm Act, MCL 286.471 *et seq*.; MSA 12.122(1) *et seq*., and was passed in response to problems that arose as urban sprawl brought new development into rural areas, creating conflicts between shooting ranges and their new neighbors. The Act provides various forms of protections to shooting ranges, including providing immunity from certain nuisance actions to shooting ranges that comply with generally accepted operations practices. MCL 691.1542; MSA 18.1234(42). The Legislature amended the Act through 1994 PA 250, which took effect July 5, 1994. [2]

Under the amended version of the Act, § 2 provides:

> (1) Notwithstanding any other provision of law, and in addition to other protections provided in this act, a person who owns or operates or uses a sport shooting range that conforms to generally accepted operation practices in this state is not subject to civil liability or criminal prosecution in any matter relating to noise or noise pollution resulting from the operation or use of the range if the range is in compliance with any noise control laws or ordinances that applied to the range and its operation at the time of construction or initial operation of the range.
>
> (2) In addition to other protections provided in this act, a person who owns, operates, or uses a sport shooting range that conforms to generally accepted operation practices is not subject to an action for nuisance, and a court of the state shall not enjoin or restrain the use or operation of a range on the basis of noise or noise pollution, if the

range is in compliance with any noise control laws or ordinances that applied to the range and its operation at the time of construction or initial operation of the range.

(3) Rules or regulations adopted by any state department or agency for limiting levels of noise in terms of decibel level which may occur in the outdoor atmosphere do not apply to a sport shooting range exempted from liability under this act. However, this subsection does not restrict the application of any provision of the generally accepted operation practices.

The 1994 amendment rewrote subsections (1) and (2), which prior thereto read:

"(1) Notwithstanding any other provision of law, a person who operates or uses a sport shooting range in this state shall not be subject to civil liability or criminal prosecution in any matter relating to noise or noise pollution resulting from the operation or use of the range if the range is in compliance with any noise control laws or ordinances that applied to the range and its operation at the time construction or operation of the range was approved by a local unit of government.

"(2) A person who operates or uses a sport shooting range is not subject to an action for nuisance, and a court of the state shall not enjoin the use or operation of a range on the basis of noise or noise pollution, if the range is in compliance with any noise control laws or ordinances that applied to the range and its operation at the time construction or operation of the range was approved by a local unit of government."

The first question to address is whether the amended or pre-amended version of § 2 applies to this case. In *People v Link*, 225 Mich App 211, 214-215; 570 NW2d 297 (1997), this Court remarked:

> Under Michigan law, a new or amended statute generally applies prospectively unless the Legislature has expressly or impliedly indicated its intention to give it retrospective effect. *People v Russo*, 439 Mich 584, 594; 487 NW2d 698 (1992). However, an exception to the general rule is recognized where a statute is remedial or procedural in nature. *Id.* "Statutes that operate in furtherance of a remedy already existing and that neither create new rights nor destroy rights already existing are held to operate retroactively unless a different intention is clear." *Id.*

Despite the fact that the pre-amended version of the Act was in effect at the time that plaintiffs initiated the instant action, we believe that the 1994 amendment should be applied retroactively because it operates in furtherance of a remedy already existing, neither creating new rights nor destroying rights already existing, and because there is nothing to indicate that the Legislature only intended to give prospective effect to the 1994 amendment to the Act.

However, whether the amended or pre-amended version of § 2 is applied does not affect the analysis in this case because the issue whether the act barred plaintiffs' nuisance claim turns upon

whether the Hunt Club was in compliance with any noise control laws or ordinances that applied to the range at the time of its construction. Although defendants argue that even if the Hunt Club violated the Township noise ordinance, § 2 as amended would still bar a nuisance action against it because the Hunt Club conformed to "generally accepted operation practices," their construal of the amended statute is misconceived. Although the amended version of § 2 added language that ranges that conform to "generally accepted operation practices" are not subject to an action for nuisance, the Legislature retained the language that would subject a range to civil liability relating to noise or noise pollution if the range failed to comply with any applicable noise control laws or ordinances at the time of its construction or operation. Thus, whether the Hunt Club conformed with generally accepted operation practices has no bearing on the outcome of this case. Under either the amended or pre-amended version of § 2, a range may be subject to a nuisance action if the range is not in compliance with any noise control laws or ordinances that applied at the time of the construction or operation of the range.

In this case, the trial court ruled that the Act was inapplicable based upon plaintiff's allegations that the Hunt Club obtained the special use permit on the basis of "misrepresentation, fraud, deceit," giving "false information" to the Planning Commission that there "would be a minimal level of noise activity."[3] A review of the Act reveals nothing to indicate that an allegation of fraud, misrepresentation or deceit in obtaining a special land use permit for the construction of a shooting range thereby nullifies the application of the Act to bar a nuisance action.[4] Accordingly, the trial court committed an error of law in ruling the Act to be inapplicable on the basis of the Hunt Club defendants' alleged fraudulent misrepresentations in obtaining the special use permit.

While the trial court erred in ruling that the Act was inapplicable to this case, reversal is not required because we conclude that § 2 of the Act did not bar plaintiffs' nuisance action since there was sufficient evidence that the Hunt Club was not in compliance with the Township anti-noise and public nuisance ordinance at the time of its construction and operation.

The ordinance in question provides in pertinent part:

> (A) No person, firm, or corporation shall cause or create any unreasonable or improper noise or disturbance, injurious to the heath, peace or quiet of the residents and property owners of the Township of Three Oaks.
>
> (B) The following noises and disturbances are hereby declared to be a violation of this Ordinance; provided, however, that the specification of the same is not thereby to be construed to exclude other violations of this Ordinance not specifically enumerated:

Among the enumerated noises and disturbances, the ordinance lists:

> (2) The playing of any radio, phonograph or any musical instrument in such a manner or with such volume as to annoy or disturb the quiet, comfort or repose of other persons.

(3) Yelling, shouting, hooting or singing on the public streets between the hours of 11:00 P.M. and 7:00 A.M., or at any time or place as to annoy or disturb the quiet, comfort or repose of other persons.

(4) The keeping of any animal, bird or fowl which emanates frequent or extended noise which shall disturb the quiet, comfort and repose of *any* person in the vicinity.

(5) The operation of any automobile, motorcycle, or other vehicle so out of repair, so loaded or constructed as to cause loud and unnecessary grating, grinding, rattling, exhausting, or other noise disturbing to the quiet, comfort or repose of other persons.

* * *

(10) The creation of any loud or excessive noise, unreasonably disturbing to other persons in the vicinity in connection with the loading or unloading of any vehicle . . . .

(11) The use of any drum, loudspeaker, or other instrument or device . . . . which, by the creation of such noise, shall be unreasonably disturbing to other persons in the vicinity.

(12) The operation of any race track . . . where the noise emanating therefrom would be unreasonably disturbing and annoying to other persons in the vicinity.

Despite the fact that the trial court did not address plaintiffs' public nuisance claim based upon their allegation that the Hunt Club violated the Township anti-noise and public nuisance ordinance at the time of its construction and operation in February, 1993, there was sufficient evidence in the record showing that the gunshot sounds emanating from the Hunt Club violated the noise ordinance by creating an "unreasonable or improper noise or disturbance" that was "injurious to the health, peace, or quiet of the residents and property owners of the Township of Three Oaks," annoying or disturbing "the quiet, comfort or repose of other persons," to-wit, plaintiffs Moores and Gianninis. As the trial court itself found:[5]

[P]laintiffs Moores and Gianninis have established by clear and convincing evidence that the gun shots from the Hunt Club substantially and unreasonably interfere with the use and enjoyment of their property. The gun shots can be clearly heard inside the Moore house even with the door and windows closed. Likewise, noise level at the Giannini property is offensive and annoying to the Gianninis who are persons of average sensibilities.

Moreover, besides the Moores and Gianninis, the trial record shows that the "quiet, comfort and repose" of virtually all their neighbors who testified at the trial were disturbed or annoyed by the gunshots emanating from the Hunt Club. In addition, the testimony provided by plaintiffs' experts, Dr.

Clark and Mr. Homans, established that the gunshots heard at the Moores' and Gianninis' properties constituted a "significant level of annoyance." While William Donner, the Township supervisor and Larry Osburn, the Township zoning administrator and building inspector, testified that the Hunt Club was not in violation of the Township anti-noise ordinance and while the Hunt Club defendants claimed that the Township's own commissioned sound study supported their claim that the gunshots emanating from the Hunt Club did not violate the anti-noise ordinance, we note that subsection (A) of the ordinance provides that a violation of the ordinance occurs whenever "the unreasonable or improper noise or disturbance" is "injurious to the health, peace or quiet of the residents and property owners of the Township of Three Oaks." Moreover, as some of the enumerated instances of noise disturbances indicate, an ordinance violation occurs if the sound in question annoys or disturbs "the quiet, comfort or repose of other persons." Accordingly, the Act did not bar plaintiffs' nuisance actions because the Hunt Club was not in compliance with the Township's noise ordinance at the time of its construction and operation in February, 1993.

II

The Hunt Club defendants also contend that the trial court abused its discretion by refusing to admit defendants' sound report into evidence or to allow the defense expert to testify about the results of the sound test. We disagree.

The decision whether to admit expert testimony is within the sound discretion of the trial court and will not be reversed on appeal absent a clear abuse of discretion. The trial court abuses its discretion in an evidentiary matter when its ruling has no basis in law or fact. *Green v Jerome-Duncan Ford*, 195 Mich App 493, 498; 491 NW2d 243 (1992). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

MRE 703[6] provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. The court may require that underlying facts or data essential to an opinion or inference be in evidence.

MRE 705 provides:

> The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

The policy behind MRE 703 is to allow into evidence all probative facts underlying an expert's opinion. *People v Dobben*, 440 Mich 679, 695-696; 488 NW2d 726 (1992); *Mulholland v DEC Int'l Corp*,

432 Mich 395, 412; 443 NW2d 340 (1989). While the facts underlying an expert's opinion are generally admissible, a trial court may require that the underlying facts be in evidence. *People v Pickens*, 446 Mich 298, 334-335, 340; 521 NW2d 797 (1994); *Dobben*, *supra*; *Mulholland*, *supra*.

A review of Michigan civil cases reveals that this Court has not found an abuse of discretion whenever trial courts have excluded or permitted expert testimony on the basis of MRE 703 or 705. See *Koenig v South Haven*, 221 Mich App 711; 562 NW2d 509 (1997); *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 175; 530 NW2d 772 (1995); *Gainey v Seiloff (On Remand)*, 163 Mich App 538; 415 NW2d 268 (1987); *Thomas v McPherson Community Health Center*, 155 Mich App 700, 708-709; 400 NW2d 629 (1986); *Jones v Sanilac Co Rd Comm*, 128 Mich App 569, 579-580; 342 NW2d 532 (1983); *US Aviex Co v Travelers Ins*, 125 Mich App 579, 592; 336 NW2d 838 (1983); *Swanek v Hutzel Hosp*, 115 Mich App 254; 320 NW2d 234 (1982); *Mach v GMC*, 112 Mich App 158, 164; 315 NW2d 561 (1982); *Slocum v Ford Motor Co*, 111 Mich App 127, 135-136; 314 NW2d 546 (1981); *Keefer v CR Bard, Inc*, 110 Mich App 563, 571-572; 313 NW2d 151 (1981); *Dayhuff v GMC*, 103 Mich App 177, 184-185; 303 NW2d 179 (1981); *Tiffany v Christman Co*, 93 Mich App 267; 287 NW2d 199 (1979). Hence, the trial court's ruling in this case will be judged against this broad discretionary standard that this Court has traditionally afforded trial courts.

In this case, defendants contend that the trial court erred because their sound report and the accompanying notes should have been admitted into evidence. According to defendants, they laid a proper foundation for the introduction of the sound study and notes into evidence through Mr. Hartwig because he supervised his associate Mr. Holcomb, who collected the raw data for the sound study using standard protocols and because he conferred with Holcomb about the accuracy of his notes. Here, it was within the discretion of the trial court to reject defendants' attempt to introduce the notes or sound report through Hartwig because "he was not there" and "[h]e did not observe the[ir] accuracy" and because Hartwig could not be cross-examined about the accuracy of the notes or the sound test results.

Nevertheless, defendants contend that the sound report should have been admitted as an exception to the hearsay rule under MRE 803(6). The business records exception to the hearsay rule provides that reports or records kept in the course of a regularly conducted business activity are not to be excluded as hearsay unless the source of information or method or circumstances of preparation indicate a lack of trustworthiness. *Solomon v Shuell*, 435 Mich 104, 115; 457 NW2d 669 (1990); *Price v Long Realty, Inc*, 199 Mich App 461, 467; 502 NW2d 337 (1993). In this case, the trial court did not abuse its discretion in refusing to allow into evidence the notes and the sound report under MRE 803(6) because defendants failed to lay an adequate foundation for admission under this rule since there was no showing that the records in question were prepared in the course of a regularly conducted business activity. *Id.* Further, the trial court agreed with plaintiffs that the records should not be admitted into evidence precisely because the source of information or method or circumstances of preparation indicated a lack of trustworthiness, as it was unknown whether there were any errors or inaccuracies in the documents in question because Holcomb was not listed as a witness to lay a proper foundation for these documents and thus was unavailable for cross-examination.

III

We decline to review defendants' claim that the trial court erred in failing to assess actual attorney fees against plaintiffs on the basis of their failure to prove a public nuisance because defendants did not preserve the issue by raising it before the trial court. *McCready v Hoffius*, 222 Mich App 210, 218; 564 NW2d 493 (1997).

IV

Finally, on cross appeal, plaintiffs argue that the trial court erred in granting the Township defendants' motion for dismissal on the ground that plaintiffs' failure to file a timely claim of appeal from the ZBA deprived the circuit court of jurisdiction to hear their appeal. We disagree.

In this case, plaintiffs appealed the June 17, 1992, issuance of the special land use permit by the Township Planning Commission to the ZBA on April 26, 1993. According to § 14.02(A)(1) of the Township zoning ordinance, appeals from decisions of the Planning Commission regarding special land use permits "shall be taken within a reasonable time of the aggrieved action, not to exceed 60 days" On August 18, 1993, the ZBA properly denied plaintiffs' appeal of the Planning Commission's issuance of the special land use permit as untimely. Thereafter, on October 20, 1994, plaintiffs filed their complaint in circuit court, seeking among other claims a review of the ZBA's denial of their appeal from the Planning Commission's decision. In dismissing plaintiffs' complaint against the Township defendants, the trial court ruled that plaintiffs failed to challenge timely the jurisdiction of the Planning Commission to grant the special use permit.

MCL 125.293a(1); MSA 5.2963(23a)(1) of the Township Rural Zoning Act provides, in pertinent part, that "[t]he decision of the board of appeals rendered pursuant to section 23 [MCL 125.293] shall be final," but that "a person having an interest affected by the zoning ordinance may appeal to the circuit court." Absent from the statute is any period of limitation within which an appeal may be brought.

In the absence of a period of limitations in MCL 125.293a(1); MSA 5.2963(23a)(1), an appeal to circuit court must satisfy the conditions set forth in MCR 7.101(B)(1) or (2), which provide:

> (1) *Appeal of Right*. Except when another time is prescribed by statute or court rule, an appeal of right must be taken within
>
> (a) 21 days after the entry of the order or judgment appealed from;
>
> * * *
>
> (2) *Appeal by Leave.* When an appeal of right is not available, or the time for taking an appeal of right has passed, the time for filing an application for leave to appeal is governed by MCR 7.103.

In *Micenas v Michiana*, 433 Mich 380, 388 n 11; 446 NW2d 102 (1989), the Court, citing *Krohn v Saginaw*, 175 Mich App 193, 196; 437 NW2d 260 (1988), noted:

> Where the statute provides no guidance concerning procedure to be followed, court rules which generally govern such matters are applicable. For example, an appeal of right to circuit court must be claimed within twenty-one days after entry of the order or judgment appealed from. MCR 7.101(B)(1).

In *Krohn*, this Court held:

> "[When] no time frame is established by statute, the court rules which are generally applicable to such matters are to be applied. *Schlega v Detroit Bd of Zoning Appeals*, 147 Mich App 79; 382 NW2d 737 (1985). An appeal as of right to the circuit court must be claimed within twenty-one days after the entry of the order or judgment appealed from. MCR 7.101(B)(1). Thereafter, an appeal can only be taken by leave granted. MCR 7.101(B)(2)

In *Krohn*, this Court affirmed the trial court's dismissal of the plaintiffs' complaint because the trial court did not have subject-matter jurisdiction over the cause of action since the plaintiffs did not appeal their claim within twenty-one days. In so ruling, this Court observed:

> To the extent that plaintiffs argue that the trial court could have treated their complaint as an application for leave to appeal, they are correct that it could have so considered the complaint. At that point, it would have been discretionary with the circuit court whether to hear the appeal. *Schlega*, *supra* at 82. The fact is, however, the trial court did not choose to treat the complaint as an application for delayed appeal and plaintiffs never made such an application themselves. It is inappropriate for us to decide whether a delayed application should have been granted had it been made or had the complaint been treated as such since neither was the case. See *Schlega*, *supra* at 82. [*Krohn, supra* at 196-197.]

In *Schlega, supra*, this Court held that the failure to bring an appeal from a zoning board of appeals within the time provided by the court rules deprives the circuit court of subject-matter jurisdiction and requires dismissal of the action.

In the instant case, the trial court properly dismissed plaintiffs' complaint as to the Township defendants because plaintiffs' failure to file a timely claim of appeal from the ZBA's decision deprived the circuit court of jurisdiction to hear the appeal. Although the trial court could have treated plaintiffs' complaint as a delayed application for leave to appeal to the circuit court, plaintiffs made no application themselves, and we decline to consider it as such. *Krohn*, *supra*. While plaintiffs maintain that "the Court's strict adherence on time requirements for the perfecting of Plaintiffs' appeal before addressing the issue of whether due process requirements were met runs contrary to Michigan law," defendants rightly point out that timely perfection of an appeal from the ZBA's decision is a jurisdictional prerequisite. *Schlega, supra* at 82. Thus, even if the Township did not comply with the Township

Rural Zoning Act by providing proper notice to the owners or occupants within 300 feet of the Hunt Club, the trial court properly dismissed plaintiffs' complaint as to the Township defendants based upon plaintiffs' failure to appeal timely from the ZBA's decision.

Affirmed.

/s/ Janet T. Neff
/s/ David H. Sawyer
/s/ William B. Murphy

[1] Although plaintiffs' original complaint failed to specify whether their claims were founded upon a theory of public or private nuisance, they argued both claims, amending their complaint to plead special damages to avoid defendants' motion for summary disposition as to their public nuisance claim. Plaintiffs' private nuisance claim was based upon a general nuisance theory, while their public nuisance claim was based upon the violation of the Township noise ordinance and Township zoning ordinance. While the trial court seemingly ruled, at the motion hearings on September 12, 1994, and October 24, 1994, that the only issue for trial was plaintiffs' claim for public nuisance against the Hunt Club defendants, the trial court concluded in its opinion that plaintiffs established a private nuisance action, but did not address their public nuisance claim. Although plaintiffs claim in their appeal brief that they pleaded and proved their public nuisance claim by showing a violation of the Township noise ordinance, the trial court, at a post-trial hearing, denied that it found the Hunt Club in violation of any ordinance.

[2] In a footnote, the *Township of Ray* Court remarked:

> The term "generally accepted operation practices is defined in § 1 of the Act as "those practices adopted by the commission of natural resources that are established by a nationally recognized nonprofit membership organization that provides voluntary firearm safety programs that include training individuals in the safe handling and use of firearms, which practices are developed with consideration of all information reasonably available regarding the operation of shooting ranges. MCL 691.1541; MSA 18.1234(41).

In rejecting the plaintiff's vagueness challenge, *Township of Ray* found that the "generally accepted operation practices" standard enunciated in § 2a was adequately defined in § 1a, noting that the commission of natural resources had adopted the National Rifle Association's range manual for this purpose. We note that the instant action arises under § 2, not § 2a, of the Act.

[3] A review of the trial record does not indicate that the Hunt Club defendants procured the special use permit by fraudulent misrepresentation. In this regard, it is important to point out that after the Planning Commission had concluded the public hearing and had voted to approve the special land use permit, George Daniels, the Hunt Club's manager, opined that the gun shots would be similar to "muffled firecrackers." At trial, Daniels testified that, if asked again, "I would say the same thing [because] [t]hat's what it sounds like [to] me." Here, Daniels' statement after the Planning Commission hearing

merely expresses his opinion about anticipated sound levels and cannot form the basis for a claim of fraudulent misrepresentation in obtaining the special use permit.

[4] However, even if the Hunt Club obtained the special use permit by fraud, deceit and misrepresentation, the proper procedural remedy would be to invalidate the special land use permit, not to rule that the Act was inapplicable. See section IV of this opinion, *infra*.

[5] Although the trial court reasoned that the only issue in the case after the Township defendants were summarily dismissed was whether the gunshot sounds emanating from the Hunt Club caused a private nuisance to plaintiffs , the evidence of the Hunt Club's violation of the zoning ordinance and the anti-noise ordinance was essential to establishing a nuisance per se as to show plaintiffs' public nuisance claim against the Hunt Club defendants. We note that a public nuisance claim may be established by showing a violation of the noise ordinance as a nuisance per se, along with special damages, without proving a nuisance in fact. *Towne v Harr*, 185 Mich App 230; 460 NW2d 596 (1990); see also *Adkins v Thomas Solvent Co*, 440 Mich 293, 302-307; 487 NW2d 715 (1992); *Cloverleaf Car v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995).

[6] The first sentence of MRE is identical to the first sentence of FRE 703, but not the second. The second sentence of the FRE 703 provides: "if of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." In *Michigan Courtroom Evidence (Third Edition)*, Rule 703 at 7-73-74, Michael D. Wade and Hon. Dennis C. Kolenda observe that the Michigan Supreme Court rejected the proposed rule for MRE 703 that was identical to the federal rule "because it was inconsistent with prior Michigan law, which held that "[t]here must be facts in evidence which require or are subject to examination and analysis by a competent expert." Wade and Kolenda point out that "[t]he effect of MRE 703 is to allow the trial judge to choose whether to admit expert testimony that is based on facts not admissible in evidence."