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# State v. Hinnant: Limiting the Medical Treatment Hearsay Exception in Child Sexual Abuse Case

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# RECENT DEVELOPMENTS

## *State v. Hinnant*: Limiting the Medical Treatment Hearsay Exception in Child Sexual Abuse Cases

Child sexual abuse remains an alarming social problem in the United States.[1] Legislatures and courts have attempted to protect child sexual abuse victims by developing modified evidentiary procedures to facilitate the prosecution of alleged perpetrators.[2] Nonetheless, reported accounts of child sexual abuse remain high. In 1998, the U.S. Department of Health and Human Services estimated that 903,000 children were reported as victims of maltreatment.[3] Nearly twelve percent, or 103,845, of these children were sexually abused.[4] These numbers are small, however, when compared to the number of unreported incidents of child sexual abuse.[5]

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1. JOHN E.B. MYERS, LEGAL ISSUES IN CHILD ABUSE AND NEGLECT PRACTICE 8 (Jon R. Conte ed., 2d ed. 1998) [hereinafter MYERS, LEGAL ISSUES](stating that research estimates 500,000 new cases of child sexual abuse occur each year); NAT'L CTR. ON CHILD ABUSE & NEGLECT, THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-3) 3–4 (1996) (noting that the number of substantiated reports of sexual abuse resulting in harm to children more than doubled between 1986 and 1993).

2. Josephine Bulkley, *Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases*, 89 DICK. L. REV. 645, 645–46 (1985) (providing examples of state statutes, including special hearsay exceptions, the elimination of competency qualifications, and the admittance of videotaped testimony by child sexual abuse victims); *see also* Maryland v. Craig, 497 U.S. 836, 857 (1990) (holding that one-way closed circuit television testimony does not violate the Confrontation Clause if the abuser's presence impairs the child's testimony due to the child's trauma).

3. Nat'l Clearinghouse on Child Abuse & Neglect Information, *Child Abuse and Neglect National Statistics*, *at* http://www.calib.com/nccanch/pubs/factsheets/canstats.htm (Apr. 2000) [hereinafter *Abuse and Neglect Statistics*] (on file with the North Carolina Law Review). Although definitions of abuse vary greatly, maltreatment is generally divided into two classifications: child abuse and child neglect. Child abuse includes physical, sexual, emotional or psychological abuse, and child exploitation. Child neglect includes physical and emotional or psychological neglect. INGER J. SAGATUN & LEONARD P. EDWARDS, CHILD ABUSE AND THE LEGAL SYSTEM 16–17 (Dorothy J. Anderson ed., 1995).

4. *Abuse and Neglect Statistics*, *supra* note 3.

5. Ctr. Against Sexual Abuse, *Sexual Assault Statistics*, *at* http://www.syspac.com/~casa/stats.htm (last visited Mar. 22, 2001) (on file with the North Carolina Law Review) (stating that ninety to ninety-five percent of child sexual abuse cases go unreported to the police); *see also* MYERS, LEGAL ISSUES, *supra* note 1, at 8 (stating that the secretive nature of child sexual abuse masks its prevalence); Jessie Anderson et al., *Prevalence of Childhood Sexual Abuse Experiences in a Community Sample of Women*, 32 J. AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY 911, 915

The fact that children are usually the only witnesses to their sexual abuse exacerbates the difficulty in protecting them from sexual abuse.[6] When the child is unable to testify, members of the child's family, physicians, and psychologists are often the only witnesses available to testify to the child's statements.[7] The child's out-of-court

(1993) (reporting that sixty-four percent of women responding to a survey who were sexually abused as children did not disclose the abuse for at least one year and that twenty-eight percent had never disclosed the abuse prior to taking the survey); David Finkelhor, *Current Information on the Scope and Nature of Child Sexual Abuse*, FUTURE OF CHILDREN, Summer/Fall 1994, at 31, 37, *available at* http://www.futureofchildren.org/sac/sac_02/PDF (last visited Mar. 3, 2001) (on file with the North Carolina Law Review) (stating that studies of the prevalence of child sexual abuse "have led most reviewers to conclude that at least one in five adult women in North America experienced sexual abuse during childhood").

6. *See* 1 JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES § 5.1 (3d ed. 1997 & Supp. 2000) [hereinafter MYERS, EVIDENCE].

7. *See* 2 MCCORMICK ON EVIDENCE § 277 (4th ed. 1992) (providing that in addition to members of the child's family, hospital attendants and ambulance drivers may qualify as auditors of the statement under medical treatment or diagnosis exception); 2 MYERS, EVIDENCE, *supra* note 6, § 7.1 (stating that out-of-court statements are often the only method of communicating the allegations of child sexual abuse to the jury). Children are unable to testify themselves when they lack the requisite cognitive ability, are incapable of composing themselves, or would not serve as effective witnesses. 2 MYERS, EVIDENCE, *supra* note 6, § 7.1.

Most states have statutes or rules admitting children's hearsay statements through the testimony of mental health professionals under the medical treatment or diagnosis hearsay exception. ALA. CODE § 12-15-65 (1995 & Supp. 2000) (admissible in juvenile proceedings under certain circumstances); ALA. CODE § 15-25-31 (1995) (admissible in criminal proceedings under certain circumstances); ARIZ. REV. STAT. ANN. § 8-238 (West 1995 & Supp. 2000) (admissible in adoption, dependency, and termination proceedings under certain circumstances); CAL. EVID. CODE § 1228 (West 1995) (admissible in juvenile proceedings under certain circumstances); *id.* § 1350 (admissible in criminal proceedings under certain circumstances); COLO. REV. STAT. § 13-25-129 (2000) (admissible in criminal, delinquency, and civil cases under certain circumstances); DEL. CODE ANN. tit. 11, § 3513 (1995 & Supp. 2000) (admissible in any judicial proceeding under certain circumstances); FLA. STAT. ANN. § 90.803(23) (West 1999) (admissible in any civil or criminal proceeding under certain circumstances); GA. CODE ANN. § 24-3-16 (1995 & Supp. 2000) (admissible under certain circumstances); IDAHO CODE § 19-3024 (Michie 1997) (admissible in child protection and criminal proceedings under certain circumstances); IND. CODE ANN. § 35-37-4-6 (Michie 1998) (admissible in criminal cases under certain circumstances); KAN. STAT. ANN. § 60-460(dd) (1994 & Supp. 1999) (admissible in criminal, delinquency, and child protection cases under certain circumstances); ME. REV. STAT. ANN. tit. 15, § 1205 (West Supp. 2000) (admissible in criminal cases under certain circumstances); MD. CODE ANN., CTS. & JUD. PROC. § 27-775 (1996 & Supp. 1999) (admissible in juvenile and criminal proceedings under certain circumstances); MASS. GEN. LAWS ch. 233, § 82 (Supp. 2000) (admissible in civil proceedings under certain circumstances); *id.* § 81 (admissible in criminal proceedings under certain circumstances); MICH. R. EVID. 803A (admissible in criminal and delinquency proceedings under certain circumstances); MINN. STAT. ANN. § 595.02(3) (West 2000) (admissible under certain circumstances); MISS. R. EVID. 803(25) (admissible under certain circumstances); MO. ANN. STAT. § 491.075 (West 1996) (admissible in criminal proceedings under certain circumstances); NEV. REV. STAT. ANN. § 51.385

statements to psychologists, however, are commonly attacked on the ground that children are very suggestible and thus might falsely report sexual abuse.[8] Thus, when determining whether to admit after-abuse testimony by psychologists, courts must consider whether a child's admittance of sexual abuse is inherently untrustworthy.[9]

Since the early 1980s, courts have been increasingly willing to admit out-of-court statements under the medical treatment or diagnosis[10] exception to the hearsay rule.[11] In North Carolina,

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(Michie 1996) (admissible in criminal proceedings under certain circumstances); N.J. R. EVID. 803(27) (admissible in criminal, juvenile, and civil proceedings under certain circumstances); N.Y. FAM. CT. ACT § 1046(a) (McKinney Supp. 2001) (admissible in child protection proceedings under certain circumstances); OHIO R. EVID. 807 (admissible under certain circumstances); OKLA. STAT. ANN. tit. 12, § 2803.1 (West 1993 & Supp. 2001) (admissible in criminal and juvenile proceedings under certain circumstances); OR. REV. STAT. § 40.460(18a) (1997) (admissible under certain circumstances); PA. STAT. ANN. tit 42, § 5985.1 (West 2000) (admissible in criminal proceedings under certain circumstances); S.D. CODIFIED LAWS § 19-16-38 (Michie 1995) (admissible in criminal and juvenile proceedings under certain circumstances); TEX. CRIM. P. CODE ANN. § 38.072 (Vernon Supp. 2001) (admissible in criminal proceedings under certain circumstances); TEX. FAM. CODE ANN. § 54.031 (Vernon 1996) (admissible in delinquency proceedings under certain circumstances); TEX. FAM. CODE ANN. § 104.006 (Vernon Supp. 2001) (admissible in proceedings affecting the parent-child relationship under certain circumstances); TEX. GOV. CODE ANN. §§ 2001.121–.122 (Vernon 2000) (admissible under certain circumstances); UTAH CODE ANN. § 76-5-411 (1999) (admissible in criminal proceedings under certain circumstances); VT. R. EVID. 804a (admissible in civil, criminal, and administrative proceedings under certain circumstances); WASH. REV. CODE ANN. § 9A.44.120 (West 2000) (admissible in dependency, delinquency, and criminal proceedings under certain circumstances); *see also* 2 MCCORMICK ON EVIDENCE, *supra*, § 277 (stating that members of the child's family, hospital attendants, and ambulance drivers qualify as auditors of the statement); 2 MYERS, EVIDENCE, *supra* note 6, § 7.39 (describing the type and nature of statements admissible under the medical diagnosis or treatment exception). The reliability of hearsay testimony admitted under the medical treatment or diagnosis exception assumes that the child has an incentive to speak truthfully to the caregiver. Robert P. Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C. L. REV. 257, 259 (1989). Whether child-victims understand the purpose of medical treatment when speaking to mental health professionals such as psychologists, however, is questionable. *Id.* at 281; ANN M. HARALAMBIE, CHILD SEXUAL ABUSE IN CIVIL CASES: A GUIDE TO CUSTODY AND TORT ACTIONS 308 (1999).

8. *See* HARALAMBIE, *supra* note 7, at 308.

9. State v. Wright, 775 P.2d 1224, 1228 (Idaho 1989) (stating that the tainting of young children's memories from suggestive questioning is "irremediable"); State v. Michaels, 642 A.2d 1372, 1378 (N.J. 1994) (stating that suggestive questioning debilitates young children's memories); HARALAMBIE, *supra* note 7, at 311 & n.61, n.62 (discussing conflicting research about children's suggestibility). *But see* English v. State, 982 P.2d 139, 146–47 (Wyo. 1999) (refusing to require a pretrial "taint" hearing to consider the effects of suggestive questioning, concluding that a child's testimonial capacity should be addressed in a normal competency hearing).

10. FED. R. EVID. 803(4); Lovejoy v. United States, 92 F.3d 628, 632 (8th Cir. 1996) (holding that the district court did not abuse its discretion by admitting hearsay statements of child-victim's mother because of the mother's interest in promoting her daughter's

statements admissible under this exception include: "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."[12] The medical treatment or diagnosis exception to the hearsay rule is premised on the critical assumption that a patient receiving medical treatment has an incentive to speak truthfully to the caregiver, thereby ensuring the reliability of the testimony.[13]

When a child-victim of sexual abuse makes out-of-court statements to a medical doctor or mental health professional, the child-victim's lack of a selfish-treatment motive calls into question the reliability of the statements.[14] Consequently, several states, including North Carolina, have limited the scope of the medical treatment or diagnosis hearsay exception by requiring an objective two-pronged analysis.[15] First, under the "purpose inquiry" prong, the court must

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treatment); Morgan v. Foretich, 846 F.2d 941, 949 (4th Cir. 1988) ("An individual's statements made for purposes of medical diagnosis or treatment have frequently been admitted into evidence regardless of whether the individual was competent to testify at trial."); United States v. Renville, 779 F.2d 430, 436 (8th Cir. 1985) (recognizing that a factual foundation for a medical diagnosis is sufficiently reliable to satisfy the hearsay prescription); 4 CHRISTOPHER B. MUELLER & LAIRD C. KILPATRICK, FEDERAL EVIDENCE § 442 (2d ed. 1994 & Supp. 2000).

11. "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." State v. Hinnant, 351 N.C. 277, 283, 523 S.E.2d 663, 667 (2000) (quoting N.C. R. EVID. 801(c)). Hearsay may be admissible only if excepted by statute or the Rules of Evidence. *Id.* at 283, 523 S.E.2d at 667 (citing N.C. R. EVID. 802).

12. N.C. R. EVID. 803(4).

13. Mosteller, *supra* note 7, at 257. Notably, the medical treatment or diagnosis hearsay exception "was designed with adults in mind." 2 MYERS, EVIDENCE, *supra* note 6, § 7.41. Legitimate concerns about the truthfulness and reliability of young children's statements exist because some young children do not understand the purpose of medical and psychological procedures. Young children in particular may fail to understand that the session with a psychologist is for treatment purposes because the session is likely to occur in a "play room." *Id.* § 7.39. Yet some young children do understand the need to be truthful and accurate when speaking to mental health professionals such as psychologists. Because some child-victims of sexual abuse do not understand the relationship between their abuse and the need for treatment, one must question whether the treating doctor or mental health professional sought information that was "reasonably pertinent" to treatment. *Id.* § 7.41.

14. 2 MYERS, EVIDENCE, *supra* note 6, § 7.41. By the time young children reach the age of five or six, most of them understand the purpose of medical treatment. *Id.* Because not every five- or six-year-old has the same mental capacity, each child's comprehension of the purpose of medical treatment should be assessed on a case-by-case basis. *Id.*

15. *See, e.g.*, United States v. Iron Shell, 633 F.2d 77, 84 (8th Cir. 1980); R.S. v. Knighton, 592 A.2d 1157, 1161 (N.J. 1991); State v. Barone, 852 S.W.2d 216, 220 (Tenn. 1993).

analyze the declarant's intent.[16] Second, under the "reasonably pertinent to diagnosis or treatment" prong, the court must evaluate the reasonableness of the doctor's reliance on the statement.[17] This two-pronged analysis is intended to ensure that the admitted hearsay statements are trustworthy and reliable.[18]

Recently, in *State v. Hinnant*,[19] the North Carolina Supreme Court clarified its interpretation of the exception when it adopted an "objective circumstances" test to assess the declarant's intent regarding the medical diagnosis or treatment.[20] According to the *Hinnant* court, the medical exception under Rule 803(4) should not apply in cases of child sexual abuse where the statements were made without any view toward obtaining treatment.[21] Despite providing some objective guidelines to assess the declarant's intent,[22] the *Hinnant* court did not address the significance of the caretaker's role in initiating treatment, nor did the court leave any room for the admission of psychological hearsay testimony. The court's limitation on the admissibility of hearsay statements,[23] especially with regard to

16. *E.g.*, *Hinnant*, 351 N.C. at 284, 523 S.E.2d at 668.

17. *Id.* at 289, 523 S.E.2d at 670.

18. *Iron Shell*, 633 F.2d at 83–84 (stating that the patient's selfish-treatment motive ensures trustworthiness); *Knighton*, 592 A.2d at 1160 (stating that a declarant is motivated to accurately describe the events when she knows that she has been injured); *Barone*, 852 S.W.2d at 220 (holding that statements are reliable and trustworthy if made with a motive to improve health).

19. 351 N.C. 277, 523 S.E.2d 663 (2000).

20. *Id.* at 288, 523 S.E.2d at 670.

21. *Hinnant*, 351 N.C. at 285–86, 523 S.E.2d at 668 (citing State v. Stafford, 317 N.C. 568, 574, 346 S.E.2d 463, 467 (1986)). In support of this limitation, critics of the expansive view of the medical treatment or diagnosis hearsay exception allege that courts have engaged in result-oriented jurisprudence to solve the larger social problem of child abuse. Mosteller, *supra* note 7, at 258; Robert R. Rugani, Jr., Comment, *The Gradual Decline of a Hearsay Exception: The Misapplication of Federal Rule of Evidence 803(4), the Medical Diagnosis Hearsay Exception*, 39 SANTA CLARA L. REV. 867, 904 (1999) (arguing that "society's anger" about child sexual abuse fueled the misapplication of Rule 803(4)). *Contra* Benita A. Lloyd, Note, State v. Smith, 9 CAMPBELL L. REV. 437, 470–71 (1987) (arguing that a broad admission of hearsay statements pursuant to N.C. R. EVID. 803(4) is laudable when the likelihood of convicting child sexual abusers is increased); Marilyn J. Maag, Note, Goldade v. State, *674 P.2d 721 (Wyo. 1983)*, 53 U. CIN. L. REV. 1155, 1166 (1984) (discussing the strong public policy in favor of admitting hearsay testimony to convict child abusers).

22. *Hinnant*, 351 N.C. at 288, 523 S.E.2d at 669–70 (noting that courts should consider the setting of the interview, the nature of questioning, and the person to whom the declarant was speaking when determining whether the declarant was speaking for the purpose of receiving treatment). Although the *Hinnant* court held that all objective circumstances surrounding the declarant's statement should be assessed when determining the requisite intent, the use of corroborating physical evidence was rejected. *Id.* at 288, 523 S.E.2d at 670 (citing Idaho v. Wright, 447 U.S. 805, 822 (1990)).

23. *See infra* notes 36–49 and accompanying text.

mental health professionals, makes prosecution of the alleged perpetrator more difficult because it excludes from evidence statements made by the most compelling witness—the child-victim.

Before *Hinnant*, whether the child-victim needed to possess the actual intent to receive treatment was unclear.[24] Although the court recognized that statements admitted under the exception were inherently trustworthy and reliable due to the patient's self-interest in responding truthfully to a doctor or caretaker for purposes of medical treatment,[25] the court did not "squarely address[]" whether the "purpose" prong under the rule was limited to the declarant's intent.[26] Instead, prior to *Hinnant*, the court focused mainly on whether the *physician or psychologist's intent* was to treat or diagnose the child-victim and whether the hearsay statements were "reasonably pertinent to diagnosis."[27] In other words, if the physician or psychologist possessed the intent to treat the child, whether the child

24. State v. Smith, 315 N.C. 76, 85, 337 S.E.2d 833, 840 (1985); 2 KENNETH S. BROUN, BRANDIS & BROUN'S NORTH CAROLINA EVIDENCE § 217 (5th ed. 1998 & Supp. 1999). In 1983, North Carolina adopted the federal version of the medical treatment or diagnosis exception to the hearsay rule. An Act to Simplify and Codify the Rules of Evidence, ch. 701, sec. 1, 1983 N.C. Sess. Laws 666, 676–77 (codified at N.C. GEN. STAT. § 8C-1, Rule 803(4) (1999)). North Carolina is one of twenty-five states that have adopted Federal Rule 803(4) verbatim or with some minor variation. *See, e.g.*, ARIZ. R. EVID 803(4); ARK. R. EVID 803(4); COLO. R. EVID 803(4); HAW. R. EVID. 803(b)(4); IOWA R. EVID. 803(4); ME. R. EVID. 803(4); MINN. R. EVID. 803(4); MISS. R. EVID 803(4); N.D. R. EVID. 803(4); OHIO R. EVID 803(4); TEX. R. EVID. 803(4); UTAH R. EVID. 803(4); WASH. R. EVID. 803(4); W. VA. R. EVID. 803(4).

25. State v. Bullock, 320 N.C. 780, 782–83, 360 S.E.2d 689, 690 (1987) (affirming the trial court's admission of two child-victims' statements to psychologists because "[i]n the context of child sexual abuse or child rape, a victim's statements to a physician as to the assailant's identity are pertinent to diagnosis and treatment"); State v. Aguallo, 318 N.C. 590, 595–96, 350 S.E.2d 76, 79–80 (1986) (concluding that the child had a selfish-treatment motive when a social worker brought the child to a medical examiner, and the medical treatment was not for trial purposes); *Smith*, 315 N.C. at 84, 337 S.E.2d at 839 (1985) (stating that the child's statements to her grandmother about the alleged sexual abuse, coupled with the child's mother taking her to the hospital, satisfied the "purpose inquiry" prong).

26. *Hinnant*, 351 N.C. at 284, 523 S.E.2d at 668.

27. *Aguallo*, 318 N.C. at 596–97, 350 S.E.2d at 80 (citing the nature of the problem, the type of exam performed, and the identity of the perpetrator as evidence that the child's statements were pertinent to treatment); *Smith*, 315 N.C. at 85–86, 337 S.E.2d at 840 (holding that statements made to task force volunteers after medical treatment by a licensed doctor were inadmissible even though the child may have thought the volunteers were medical personnel); *In re* Lucas, 94 N.C. App. 442, 447–48, 380 S.E.2d 563, 566 (1989) (suggesting that even if statements lack trustworthiness, the statements will be deemed trustworthy if relevant to diagnosis or treatment); State v. Oliver, 85 N.C. App. 1, 16, 354 S.E.2d 527, 536 (1987) (stressing that the temporal proximity between the abuse and the psychological examination, and the fact that the trial occurred seven months after the exam, supported admissibility of the hearsay testimony).

actually intended to obtain treatment was not particularly relevant.

*State v. Smith*[28] is indicative of much of the case law from the 1980s and early 1990s in which courts did not inquire into the child-victim's motive, but instead analyzed whether the child-victim had in fact received medical treatment.[29] Although the *Smith* court acknowledged that a patient must have a self-interested motive in seeking treatment, the court admitted that young children do not (and often cannot) independently seek medical treatment.[30] When children rely on their caretakers to seek medical treatment on their behalf, the child's self-interested motive in seeking treatment is satisfied.[31] For this reason, the court admitted statements made by two child-victims to their grandmother about the alleged abuse.[32] Because the statements directly resulted in medical attention, the statements to the grandmother were similar to statements made directly to a medical doctor by a person seeking treatment on their behalf.[33]

The *Smith* court, however, held that the child's statements to two Rape Task Force volunteers assigned to treat "the emotional effects of the incidence" were inadmissible.[34] The court focused on several factors in ruling against admissibility of the statements: (1) the volunteers were not licensed professionals, (2) the statements were made after the child had received medical treatment, and (3) the possibility that the child may not have understood the treatment motive of the volunteers.[35] The *Smith* court was unclear as to which

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28. 315 N.C. 76, 337 S.E.2d 833 (1985).

29. *See, e.g.*, United States v. Joe, 8 F.3d 1488, 1494 n.5, 1495 (10th Cir. 1993) (admitting a statement based solely on the physician's reasonable reliance); Gong v. Hirsch, 913 F.2d 1269, 1274 n.4 (7th Cir. 1990) (holding that reliable facts used to diagnose the patient are sufficiently reliable for hearsay admission); State v. Robinson, 735 P.2d 801, 809 (Ariz. 1987) (en banc) (stating that statements must be reasonably pertinent to treatment because young children may not understand the significance of medical treatment).

30. *See Smith*, 315 N.C. at 84–85, 337 S.E.2d at 840.

31. *See id.* at 84, 337 S.E.2d at 840.

32. *See id.*

33. The court's analysis failed to distinguish which "prong" of the medical treatment or diagnosis hearsay exception it was applying, or whether it was following a specific test. Mosteller, *supra* note 7, at 271. The court did not differentiate between the patient's "self-interest motive" and the statements' "reasonable pertinence" to treatment when determining whether the out-of-court statement was trustworthy. *Id.* Instead of evaluating the child's motive for seeking medical treatment, the court focused on the fact that the children were actually treated by a medical physician in admitting the hearsay testimony. *See Smith*, 315 N.C. at 84, 337 S.E.2d at 840.

34. *Smith*, 315 N.C. at 86, 337 S.E.2d at 840.

35. *Id.*; *see also* Mosteller, *supra* note 7, at 271–72 (suggesting that one interpretation of *Smith* is that the auditor must have formal, specialized training, and another

of these three factors guided its exclusion of the hearsay testimony. In light of the court's emphasis on immediate medical treatment in *Hinnant*, the viability of the *Smith* court's analysis of the Rape Task Force volunteers' testimony is questionable.

In *State v. Hinnant*,[36] the North Carolina Supreme Court clarified its interpretation of the "purpose" prong of Rule 803(4) by focusing solely on the declarant's intent and by admitting after-the-fact statements made to mental-health professionals and psychologists. On December 16, 1995, a four-year-old girl was allegedly sexually assaulted by a man who lived in her mother's home.[37] Approximately five to ten minutes after the alleged abuse, the child's mother called the police.[38] That evening, an external genital examination revealed no signs of genital trauma.[39] Two weeks later, before a follow-up physical examination, a clinical psychologist specializing in child sexual abuse interviewed the child.[40] The psychologist testified that she used an anatomically correct doll and asked leading questions during her interview with the child.[41] The follow-up examination was inconclusive as to sexual abuse but was consistent with the child's statements to the psychologist.[42] Because the child was unable to testify at trial due to her heightened emotional state, the court allowed the testimony of the psychologist in which she admitted using an anatomical doll and asking leading questions.[43] The North

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interpretation is that the treatment must be medical, as opposed to emotional or psychological).

36. 351 N.C. 277, 523 S.E.2d 663 (2000).

37. *Id.* at 280, 523 S.E.2d at 665.

38. *Id.* Notably, the child's mother refused to cooperate with the police when she arrived at the police station, stating that the child was prone to fabrication. *Id.* at 280–81, 523 S.E.2d at 665.

39. *Id.* at 281, 523 S.E.2d at 666. Soon after the alleged abuse, a detective interviewed the child in a separate room where she told him that the defendant had hurt her on her crotch and buttocks. *Id.* The child pointed to these areas on an anatomically correct doll and showed the detective how the defendant had hurt her. *Id.* The court's opinion does not indicate whether the detective was asked to testify to these findings. *Id.*

40. *Id.*

41. *See id.* Most of the questions the psychologist asked only required the child to answer "yes" or "no." *See id.*

42. *Id.*

43. *Id.* at 280–82, 523 S.E.2d at 665–66. Authorities suggest that anatomically correct dolls may be misused, and are not a "test" for sexual abuse. Barbara W. Boat & Mark D. Everson, *Concerning Practices of Interviewers When Using Anatomical Dolls in Child Protective Services Investigations*, 1 CHILD MALTREATMENT, 96, 96–97 (1996); Barbara W. Boat & Mark D. Everson, *Putting the Anatomical Doll Controversy in Perspective: An Examination of the Major Uses and Criticisms of the Dolls in Child Sexual Abuse Evaluations*, 18 CHILD ABUSE & NEGLECT 113, 118–26 (1994); Am. Prof'l Soc'y on the Abuse of Children, Use of Anatomical Dolls in Child Sexual Abuse Assessments (1995)

Carolina Supreme Court held that the trial court erred in admitting the psychologist's testimony.[44]

On appeal, the North Carolina Supreme Court emphasized that two separate prongs of the exception must be satisfied to admit a hearsay statement: (1) the declarant's statement must be "made for purposes of medical diagnosis or treatment and; (2) ... the declarant's statements [must be] reasonably pertinent to diagnosis or treatment."[45] The court clarified its interpretation of the first prong by requiring a "selfish-treatment" motive on behalf of the declarant.[46] The court warned that the "firmly rooted" status of the medical treatment or diagnosis hearsay exception would be eroded if courts continued either to assume that the declarant had a treatment motive or not to require such a motive at all.[47] Without a treatment motive

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[hereinafter APSAC, Use of Anatomical Dolls], *reprinted in* 1 JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES § 1.38, at 120 (3d ed. 1997). Leading questions can also be highly problematic due to the potential for false accusations and falsified memories attributable to the inherent suggestibility of leading questions. DAVID P.H. JONES, INTERVIEWING THE SEXUALLY ABUSED CHILD: INVESTIGATION OF SUSPECTED ABUSE 37 (4th ed. 1992) (discussing the risks associated with the use of leading questions and providing strategies to overcome those risks); Michael E. Lamb, *The Investigation of Child Sexual Abuse: An Interdisciplinary Consensus Statement*, 18 CHILD ABUSE & NEGLECT 1021, 24 (1994) (suggesting that open-ended questions produce the most reliable accounts of sexual abuse from children).

44. *Hinnant*, 351 N.C. at 291, 523 S.E.2d at 672.

45. *Id.* at 284, 523 S.E.2d at 667. The North Carolina Supreme Court has followed an increasing number of jurisdictions that combine the "selfish-treatment" and "reasonable pertinence" rationales for admitting hearsay under the medical treatment or diagnosis exception. 2 MYERS, EVIDENCE, *supra* note 6, § 7.40 (citing Morgan v. Foretich, 846 F.2d 941, 949 (4th Cir. 1988); United States v. Renville, 779 F.2d 430, 436 (8th Cir. 1985); United States v. Iron Shell, 633 F.2d 77, 84 (8th Cir. 1980); State v. Robinson, 735 P.2d 801, 809 (Ariz. 1987)). The analytical soundness of combining the rationales may be questionable when satisfying one rationale would suffice. 2 MYERS, EVIDENCE, *supra* note 6, § 7.40 (stating that the *Renville* court did not justify combining the two rationales). For example, if a child lacks a selfish-treatment motive but her statements are reasonably pertinent to diagnosis, the hearsay statement would not be admitted because the first self-interest rationale is not satisfied. *Id.* Despite the rule's plain conjunctive language, the North Carolina Supreme Court did not conceive of the possibility that the rationales could independently provide a sufficient measure of trustworthiness to justify admitting the hearsay statement. *Cf.* 2 MYERS, EVIDENCE, *supra* note 6, § 7.40 (stating that statements should be admissible under the medical treatment or diagnosis hearsay exception based on each rationale standing alone).

46. *See Hinnant*, 351 N.C. at 287, 523 S.E.2d at 669. The *Hinnant* court did not indicate clearly whether the child's caretaker's participation in seeking medical treatment constituted an objective circumstance. *Id.* at 288, 523 S.E.2d at 670 (stating that courts should consider "all objective circumstances" when determining the child's requisite intent). *But see* State v. Smith, 315 N.C. 76, 84–85, 337 S.E.2d 833, 840 (1985) (providing that young children may rely on their caretakers to seek medical attention because young children are incapable of expressing a selfish-treatment motive).

47. *See Hinnant*, 351 N.C. at 286, 523 S.E.2d at 669; Mosteller, *supra* note 7, at 290

on behalf of the child, statements made to physicians or psychologists would *not* be inherently trustworthy and reliable.[48] Yet, if a young child is simply incapable of comprehending a treatment motive and a caretaker acts on behalf of the child, reasonably relying on the statement for treatment or diagnosis, the source of the statement's untrustworthiness is unclear.[49]

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(arguing that admitting hearsay statements solely under the second prong of Rule 803(4) removes the statements from a "firmly rooted hearsay exception"); Rugani, *supra* note 21, at 891–96 (arguing that the reliability of children's statements to medical personnel decreases when the selfish-treatment rationale is not invoked, and that unpredictability in judgments inevitably results because of the reliance on the doctor's skills).

48. *Hinnant*, 351 N.C. at 286, 523 S.E.2d at 669. A number of other courts recognize the importance of the patient's "selfish-interest" motive in seeking treatment. *See* Oleson v. Class, 164 F.3d 1096, 1098 (8th Cir. 1999) (relying on the patient's "selfish motive" to receive medical treatment as the guarantee of trustworthiness of the statement); United States v. Norman T., 129 F.3d 1099, 1105 (10th Cir. 1997) ("The exception is based on the longstanding assumption [sic] patients have an overriding interest in telling the truth when seeking medical treatment."); Ring v. Erickson, 983 F.2d 818, 820 (8th Cir. 1993) (explaining that the premise of the medical treatment or diagnosis hearsay exception is that the patient is unlikely to lie because treatment is in her self interest); United States v. Renville, 779 F.2d 430, 436 (8th Cir. 1985) (assuming that a patient will accurately describe his symptoms because treatment will stem from his statements); *Iron Shell*, 663 F.2d at 83–84 (stating that the patient's motive in seeking treatment is a guarantee of trustworthiness); R.S. v. Knighton, 592 A.2d 1157, 1160 (N.J. 1991) (stating that "the declarant knows he or she is injured and therefore is motivated to describe accurately his or her symptoms and their source"); *In re* Esperanza M., 955 P.2d 204, 207–08 (N.M. Ct. App. 1998) (noting that the risk of ambiguity and misperception in memory is low when the patient has a self-interest in describing her symptoms for treatment); *In re* Nicole B., 703 A.2d 612, 616 (R.I. 1997) (observing a logical relationship between effective medical treatment and accurate portrayal of the child-victim's symptoms); State v. Stinnett, 958 S.W.2d 329, 331 (Tenn. 1997) ("[A] statement made by a patient to a physician is presumptively trustworthy because a patient is strongly motivated to speak the truth in order to receive proper diagnosis and treatment."); State v. Barone, 852 S.W.2d 216, 220 (Tenn. 1993) (noting that the patient's motivation to tell the truth about her symptoms is stronger than her motivation to lie).

49. *See* State v. J.C.E., 767 P.2d 309, 313–14 (Mont. 1988) (doubting that the selfish-treatment rationale can be applied to young children and rejecting the extension of the medical treatment or diagnosis hearsay exception beyond medical doctors); State v. Florczak, 882 P.2d 199, 205–06 (Wash. Ct. App. 1994) (admitting a child's hearsay statements when the child lacked a motive for treatment, but when the injury was not fabricated and corroborating evidence existed). *Compare* Pamela M. Kato et al., *Reasoning About Moral Aspects of Illness and Treatment by Preschoolers Who Are Healthy or Who Have Chronic Illness*, 19 J. DEVELOPMENTAL & BEHAV. PEDIATRICS 68, 71–74 (1998) (reporting data suggesting that young children cannot easily distinguish illness and treatment from punishment), *with* Melody R. Herbst et al., *Young Children's Understanding of the Physician's Role and the Medical Hearsay Exception*, *in* CHILDREN'S UNDERSTANDING OF BIOLOGY AND HEALTH 235, 245–46 (Michael Siegal & Candida C. Peterson eds., 1999) (finding that five- and six-year-olds were able to describe doctors' treatment function and special skills). Courts that have adopted an "objective circumstances" test assume that a child is capable of having the same "selfish-treatment" motive as an adult, and that children's memories are not inherently unreliable. *See*

In *Hinnant*, as in *Smith*, the child's caretaker alerted the authorities to the alleged abuse and took the initial steps toward medical treatment.[50] The child's mother in *Hinnant*, however, later recanted her belief that her child had suffered sexual abuse.[51] The *Hinnant* court fails to mention the caretaker's subsequent contradiction of her earlier statements in its discussion of the purpose inquiry.[52] Thus, the court leaves unanswered whether a caretaker's doubt that the alleged abuse occurred precludes a finding of a child's selfish-treatment motive.

In addition to the court's requirement of a "selfish-treatment" motive on behalf of the child-victim, the court focused heavily on psychologist interviewing practices tending to produce unreliable and untrustworthy results on behalf of the child-victim.[53] Skepticism about interview methods such as using anatomically correct dolls and asking leading questions motivated, in part, the court's lack of confidence in the reliability and trustworthiness of hearsay statements made to psychologists.[54] Because fabricating descriptions of psychological harms is easier than fabricating descriptions of physical harms, in the court's view, the likelihood of objective verification decreases.[55] Some legal and psychological authorities indicate,

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MYERS, LEGAL ISSUES, *supra* note 1, at 118–19 (stating that developmental, personality, and situational factors influence the suggestibility of young children); David Marxsen et al., *The Complexities of Eliciting and Assessing Children's Statements*, 1 PSYCHOL., PUB. POL'Y & L. 450, 450–51 (1995) (warning that the court's overemphasis on the suggestibility of young children falsely portrays them as inherently unreliable and untrustworthy).

50. *Hinnant*, 351 N.C. at 280, 523 S.E.2d at 665.

51. *Id.* at 280–81, 523 S.E.2d at 665.

52. The court only considered the child's motive for treatment in the contest of the psychological interview. *Id.* at 289–90, 523 S.E.2d at 671. The court never addressed the child's intent with respect to her statements to her mother.

53. *Hinnant*, 351 N.C. at 290, 523 S.E.2d at 671; *see also* Mosteller, *supra* note 7, at 268 & n.36 (stating that psychological hearsay statements are not as reliable as statements relating to somatic ailments).

54. *Hinnant*, 351 N.C. at 289–90, 523 S.E.2d at 671 (stating that the interview was conducted in a "child friendly" room instead of a medical environment, and that the series of leading questions could have planted the idea in the child's mind that she had been sexually abused); Cassidy v. State, 536 A.2d 666, 682–83 (Md. Ct. Spec. App. 1988) (stating that the likelihood of trustworthiness in a statement concerning psychological injuries, as opposed to physical injuries, was greatly diminished because the patient did not fear that inaccurate information would lead to improper treatment when she suffered only psychological injuries).

55. Mosteller, *supra* note 7, at 268; *see* People v. LaLone, 437 N.W.2d 611, 613 (Mich. 1989) (concluding that patients are more likely to provide deceptive information about their symptoms to psychologists rather than medical physicians, and that empirical verification of a patient's symptoms is more difficult in the context of psychological symptoms).

however, that "child friendly" interview rooms, leading questions, and anatomically correct dolls can be very effective tools in psychological treatment of sexually abused children when used in moderation.[56] According the American Professional Society on the Abuse of Children (APSAC), these traditional psychological interviewing tools are reliable and effective in eliciting truthful information from child-victims for treatment purposes.[57] In *Hinnant*, the record did not indicate that the psychologist misused the anatomically correct doll, or that her leading questions were overly suggestive. Thus, the court's holding that the child lacked the requisite intent for psychological treatment or diagnosis may reflect a questionable distrust of psychological interviewing tools.[58]

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56. Although there is agreement that anatomically correct dolls are not a litmus test for the presence of sexual abuse, their use traditionally has been viewed by courts as a tool in suggesting or stimulating children to remember and articulate their memories of the alleged abuse. HARALAMBIE, *supra* note 7, at 23–24 (stating that anatomically correct dolls are correctly used for body part identification and recreating the context of events, but that no quantifiable test exists to determine if the child has been sexually abused); 1 MYERS, EVIDENCE, *supra* note 6, § 1.17 (stating that young children provide more complete information when prompted by contextual factors aided by cues and leading questions about reenactments of events) (citing Gerald P. Koocher et al., *Psychological Science and the Use of Anatomically Detailed Dolls in Child Sexual-Abuse Assessments*, 118 PSYCHOL. BULL. 199, 200 (1995)). Young children's memories are inextricably tied to context and psychologists must use relevant physical and emotional cues to ensure that children are not misled and to ensure that they will not falsify their reports. Margaret-Ellen Pipe et al., *Cues, Props, and Context: Do They Facilitate Children's Event Reports? in* CHILD VICTIMS, CHILD WITNESSES: UNDERSTANDING AND IMPROVING TESTIMONY 25, 26 (Gail S. Goodman & Bette L. Bottoms eds., 1993). *But see supra* note 43 (citing studies that question the reliability of psychological interviewing practices involving alleged victims of child sexual abuse).

57. The American Professional Society on the Abuse of Children (APSAC) Guidelines indicate that most of the "available research does not support the position that the dolls are inherently too suggestive and overly stimulating." APSAC, Use of Anatomical Dolls, *supra* note 43, *reprinted in* 1 JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES § 1.38, at 120 (3d ed. 1997); *see also* Sharon M. Katz et al., *The Accuracy of Children's Reports with Anatomically Correct Dolls*, 16 J. DEVELOPMENTAL & BEHAV. PEDIATRICS 71, 71–76 (1995); Karen J. Saywitz et al., *Children's Memories of a Physical Examination Involving Genital Touch: Implications for Reports of Child Sexual Abuse*, 59 J. CONSULTING & CLINICAL PSYCHOL. 682, 689–90 (1991). Authorities, however, caution against using anatomically correct dolls with children under three-and-a-half years old. Gerald P. Koocher et al., *Psychological Science and the Use of Anatomically Detailed Dolls in Child Sexual-Abuse Assessments*, 118 PSYCHOL. BULL. 199, 217 (1995); APSAC, Use of Anatomical Dolls, *supra* note 43, *reprinted in* 1 JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES § 1.38, at 123 (3d ed. 1997).

58. *Supra* notes 56–57 (discussing the use of anatomically correct dolls in helping children articulate the details of alleged abuse). In addition, the court did not suggest any alternatives to these psychological practices. Suggested guidelines would be helpful both to psychologists administering treatment and to lower courts ascertaining whether the psychologist's statements should be admitted under the exception. Such guidelines might

Instead of acknowledging the utility of reputable psychological interviewing tools, the court examined the "objective circumstances" surrounding the declarant's statements to determine whether the "purposes inquiry" prong had been satisfied.[59] Relevant "objective circumstances" included the setting of the interview, the nature of the questioning, and the person to whom the statements were made.[60] The problem with such an ambiguous "objective circumstances" test is that it provides too much leeway for lower courts to exclude hearsay statements made to psychologists because of unfounded skepticism of psychological techniques.[61] The court's "objective circumstances" test focused solely on the actions of the interviewer, and not on the developmental ability and motive of the child-declarant. Research indicates, however, that an individual child's suggestibility level differs according to the circumstances of the interview.[62] Thus, the court's failure to consider each individual child-declarant's ability to comprehend treatment[63] contradicts legal and psychological authority suggesting that each individual child must be assessed on a case-by-case basis to determine whether the child

include: (1) explicitly explaining to the child the medical purpose of the interview; (2) requesting the child's truthfulness in explaining his answers; (3) limiting leading questions; (4) using only anatomically correct dolls to clarify a child's statement; (5) limiting "child-friendly" toys and fixtures in the interview room; (6) audio or videotaping the interview. *See* HARALAMBIE, *supra* note 7, at 174–83.

59. *Hinnant*, 351 N.C. at 288, 523 S.E.2d at 670.

60. *Id.*

61. The *Hinnant* court may have sought to further limit the medical treatment or diagnosis exception to highly skilled physicians. The court may have been cautious to draw such a conclusion because courts have split over whether to include psychological hearsay statements under the medical treatment or diagnosis hearsay exception. *See also* Mosteller, *supra* note 7, at 272 n.57 (discussing the possibility that the court in *State v. Smith* wanted to limit the medical treatment or diagnosis hearsay exception to highly trained medical experts); Felix v. State, 849 P.2d 220, 249 (Nev. 1993) (citing a distrust of psychological work in general as the source of the split among courts over whether to admit psychological hearsay statements). For cases not admitting psychological testimony under the medical treatment or diagnosis hearsay exception, see State v. Zimmerman, 829 P.2d 861, 864 (Idaho 1992); Cassidy v. State, 536 A.2d 666, 679–80 (Md. Ct. Spec. App. 1988); State v. Harris, 808 P.2d 453, 457 (Mont. 1991); State v. J.C.E., 767 P.2d 309, 313 (Mont. 1988); State v. Barone, 852 S.W.2d 216, 220 (Tenn. 1993); State v. Recor, 549 A.2d 1382, 1387 (Vt. 1988).

62. Mitchell L. Eisen et al., *Memory and Suggestibility in Maltreated Children: New Research Relevant to Evaluating Allegations of Sexual Abuse*, *in* TRUTH IN MEMORY 163, 182 (Steven Jay Lynn & Kevin M. McConkey eds., 1998).

63. *Hinnant*, 351 N.C. at 288, 523 S.E.2d at 670. The court noted the difficulty in applying the test to young children, but ultimately concluded that "the trial court should consider all objective circumstances of record surrounding declarant's statements in determining whether he or she possessed the requisite intent . . . ." *Id.* at 288, 523 S.E.2d at 670.

possessed a "selfish-treatment" motive.[64]

In future cases, courts should consider factors emphasizing the individual declarant's developmental ability and motive, in addition to the psychological interviewing tools, to produce a more reliable assessment of the declarant's intent.[65] The ten-factor test adopted by the Michigan Supreme Court in *People v. Meeboer*[66] is one example of a more encompassing "objective circumstances" framework.[67]

64. *Infra* note 67. Although the court could assume the capability of treatment motive for each child-victim of sexual abuse before considering the objective circumstances, jurors could rely too heavily upon such a presumption. The presumption also contradicts psychological authority indicating that not all children are capable of possessing a "selfish-treatment" motive. *See supra* note 13 (discussing the reliability of young children's statements to medical or psychological caregivers in light the inherent inability of some young children to understand the purpose of medical treatment).

65. *See, e.g.*, United States v. Barrett, 8 F.3d 1296, 1300 (8th Cir. 1993) (stating that "the trial court must examine the totality of the circumstances surrounding the making of the statement and those rendering the declarant particularly worthy of belief"). *But see* United States v. George, 960 F.2d 97, 100 (9th Cir. 1992) ("As a general matter, the age of the child and her other personal characteristics go to the weight of the hearsay statements rather than their admissibility."). The Supreme Court has rejected "mechanical tests" for determining the reliability and trustworthiness of statements under the medical treatment and diagnosis hearsay exception. Idaho v. Wright, 497 U.S. 805, 822 (1990). A lack of a motive to fabricate is one of the objective factors the Court identified to assess the reliability and trustworthiness of hearsay statements made by child-victims of sexual abuse. *Id.* at 821–22 (discussing the relevance of objective factors such as "spontaneity and consistent repetition," "mental state of the declarant," "use of terminology unexpected of a child of similar age," and "lack of motive to fabricate" in assessing the reliability and trustworthiness of hearsay statements made by child-victims of sexual abuse).

66. 484 N.W.2d 621, 627 (Mich. 1992).

67. *Id.* at 627. The Michigan court recognized that the age of the declarant cannot serve as a litmus test for a selfish-interest motive. *Id.*; *see, e.g.*, State v. Logan, 806 P.2d 137, 139 (Or. Ct. App. 1991) (stating that as a matter of law, a four-year-old is not too young to understand the concept of medical treatment); Gail S. Goodman & Beth M. Schwartz-Kenney, *Why Knowing a Child's Age is Not Enough: Influences of Cognitive, Social, and Emotional Factors on Children's Testimony*, *in* CHILDREN AS WITNESSES 15, at 30–31 (Helen Dent & Rhonda Flin eds., 1992) (stating that simply knowing a child's age is not enough); Daniel J. Burbach & Lizette Peterson, *Children's Concepts of Physical Illness: A Review and Critique of the Cognitive-Developmental Literature*, 5 HEALTH PSYCHOL. 307, 308 (1986) (stating that "age simply is not an accurate predictor of cognitive maturity"). The ten objective factors are non-exhaustive and must be analyzed on a case-by-case basis. State v. Stinnett, 958 S.W.2d 329, 331–32 (Tenn. 1997) (analyzing the totality of the circumstances surrounding the hearsay statement—especially those affecting the age and developmental ability of the declarant); State v. Moen, 786 P.2d 111, 119 (1990) (stating that the circumstances in which the statement was made must be analyzed to judge the declarant's motive); Stephen J. Ceci & Mary Lyn Crotteau Huffman, *How Suggestible Are Preschool Children? Cognitive and Social Factors*, 36 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 948, 957 (1997) (stating that "[t]he suggestibility of any particular child is dependent on a host of cognitive and social factors"); Michelle D. Leichtman & Stephen J. Ceci, *The Effects of Stereotypes and Suggestions on Preschoolers' Reports*, 31 DEVELOPMENTAL PSYCHOL. 568, 576 (1995) (finding that children are

Objective factors relevant to evaluating the trustworthiness of the declarant's statement include: (1) the age and maturity of the declarant, (2) the manner of eliciting statements, (3) the manner in which statements were phrased, (4) the use of terminology unexpected of a child of similar age, (5) person who initiated examination, (6) the timing of examination in relation to the assault, (7) the timing of examination in relation to the trial, (8) the type of examination, (9) the relationship between the declarant and the person identified as the perpetrator, and (10) the lack of a motive to lie.[68]

Although an analysis of these ten factors may have resulted in the same conclusion in *Hinnant*, a more specific multi-factored approach would provide a more cohesive framework for lower courts to evaluate the reliability of out-of-court statements made to mental health professionals by child-victims of sexual abuse. Because the factors are non-exclusive and because lower courts in North Carolina would maintain the discretion to weigh certain factors more than others, the multi-factored approach will not unduly constrain trial courts.[69] Moreover, the ten-factor test would enable the child's caretaker to play a significant role in determining the child's "selfish-interest" motive. For example, if the child's caretaker initiated treatment immediately after the alleged sexual abuse, this fact would be one objective circumstance used to determine whether the child's statements to a psychologist were truthful.

The importance of this initial determination of whether the child possessed the requisite intent is underscored by the importance the *Hinnant* court placed on the child-declarant's "motivation to be truthful" in determining the "reasonable pertinence" of hearsay statements made to physicians and psychologists.[70] Although the court emphasized the relationship between truthfulness and the immediacy of medical treatment, it failed to define "immediate medical attention." Furthermore, whether the relationship between the two even applies to mental health professionals such as

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"heavily reliant" on the context of the environment in which the interview takes place).

68. *Meeboer*, 484 N.W.2d at 627. For example, leading questions may threaten the trustworthiness of statements whereas child-like terminology may indicate trustworthiness.

69. Indeed, the Supreme Court has rejected "mechanical tests" for determining the reliability and trustworthiness of statements under the medical treatment and diagnosis hearsay exception. Idaho v. Wright, 497 U.S. 805, 822 (1990). The Supreme Court noted that courts must have "considerable leeway" in determining the significance of the objective circumstances. *Id.*

70. *Id.*

psychologists is unclear.[71] While the court rejected the admissibility of the child's statements to the clinical psychologist in *Hinnant*, the court was silent about the time period in which statements made to a "nontreating clinical psychologist" will be admissible. If the child-victim must need of "immediate medical attention" for the "reasonable pertinence" standard to be satisfied, it is difficult to imagine how the testimony of a "nontreating clinical psychologist" would ever be admissible. By explicitly limiting the context in which child victims' out-of-court statements are admissible, the auditors of these statements are implicitly limited as well. Practically, only paramedics, medical physicians, nurses, and family members would be the recipients of a child-victim's statements in a state of "immediate medical attention" under the *Hinnant* rule. Without explicitly excluding psychologists from the medical treatment or diagnosis hearsay exception, the court implicitly discounted them by requiring a child victims' out-of-court statements to be made when the child needs "immediate medical attention."

The court also failed to distinguish between statements made for purposes of treatment and statements made for purposes of diagnosis in evaluating the reasonable pertinence of the challenged statements.[72] The hearsay exception, however, differentiates between diagnosis and treatment.[73] The Advisory Committee's notes to Rule 803(4) indicate that the exception is usually only applicable when a "*treating* physician or psychiatrist"[74] is the auditor of statements "relevant to diagnosis or treatment."[75] The court's rationale for limiting the exception to "treating" doctors is that "non-treating" examinations are usually investigation-related procedures conducted for trial purposes, or remote in time to the alleged abuse.[76] An examination conducted in close proximity to litigation diminishes the reliability of the hearsay statements because the child-victim does not

71. *Id.*

72. *Id.* at 290–92, 523 S.E.2d at 671–72. The court collapsed "diagnosis" into "treatment" for purposes of analyzing the "reasonable pertinence" prong.

73. *See supra* text accompanying note 12 (quoting N.C. R. EVID. 803(4)).

74. N.C. R. EVID. 803(4) advisory committee's note (emphasis added).

75. *Id.*

76. *Hinnant*, 351 N.C. at 289, 523 S.E.2d at 670. Non-treating physicians or psychologists who examine child-victims when immediate relief is no longer a concern are viewed similarly to investigators at trial even when the purpose of their evaluation is to determine if the child-victim needs treatment. Sharp v. Commonwealth, 849 S.W.2d 542, 543 (Ky. 1993) (stating that a psychiatrist's evaluation of an alleged child-victim of sexual abuse "to determine whether there was a reason for treatment" was inadmissible because the examination occurred too far after the need for treatment had arisen).

have the requisite intent to be treated.[77] Yet one of the major changes in the federal counterpart to North Carolina's medical treatment or diagnosis hearsay exception was to make statements made to *non-treating* doctors admissible.[78] The purpose of Rule 803(4) was to eliminate any distinction in the analysis of an examination for the purpose of treatment and an examination for the purpose of diagnosis only.[79] Thus, Rule 803(4) was amended to acknowledge that the truthfulness of statements made for the purpose of diagnosis—not necessarily relating to treatment—also could be guaranteed if they formed the basis of the medical doctor's or mental health professional's opinion.[80]

*Hinnant* represents North Carolina's rejection of the federal rule's abolition of the distinction between "treating" and "non-treating" examinations of child sexual abuse victims.[81] Although the child-victim's incentive to be truthful dissipates when interviewed solely for purposes of trial preparation, it is less clear why a child-victim's statements to her psychologist would be less reliable when the psychologist is attempting to diagnose the child-victim.[82] A medical professional clearly can diagnose an alleged child-victim of sexual abuse without being specifically retained for trial. The court, however, did not contemplate a separate analysis of "non-treating" doctors under the subdivisions "diagnosis-only" and "trial preparation-only." Instead, the court lumped all "non-treating" medical professionals into the "trial preparation-only" category, thereby eliminating the selfish-treatment motive on behalf of the

77. *See* Mosteller, *supra* note 7, at 275 (arguing that the reliability of statements made to non-treating or diagnosis-only physicians is based on the expert's special skills and not on the child-declarant's selfish-interest in receiving treatment).

78. J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 803(4)[01], at 803-154 (1995) ("Rule 803(4) rejects the distinction between treating and nontreating physicians . . . ."); Mosteller, *supra* note 7, at 261.

79. United States v. Farley, 992 F.2d 1122, 1125 (10th Cir. 1993) (citing United States v. Iron Shell, 63 F.2d 77, 83 (8th Cir. 1980)); Morgan v. Foretich, 846 F.2d 941, 950 (4th Cir. 1988) (quoting United States v. Iron Shell, 633 F.2d 77, 83 (8th Cir. 1980)).

80. Mosteller, *supra* note 7, at 261. In this context, "non-treating" examinations include both diagnostic examinations and examinations for trial purposes. The *Hinnant* court categorically rejected non-treating exams for trial purposes, but did not address the issue of non-treating exams for diagnostic purposes. *Hinnant*, 351 N.C. at 285, 523 S.E.2d at 668.

81. *Hinnant*, 351 N.C. at 289, 523 S.E.2d at 670–71. The court never defined a non-treating doctor as a medical professional retained for trial purposes, but the court categorically rejected hearsay admissions from medical professionals who examined the child-victim in preparation for trial. *Id.* at 670.

82. *See* O'Gee v. Dobbs Houses, Inc., 570 F.2d 1084, 1089 (N.Y. 1978) ("Rule 803(4) clearly permits the admission into evidence of what [plaintiff] told [her doctor] about her condition, so long as it was relied on by [the doctor] in formulating his opinion . . . .").

child-declarant and the inherent reliability of the hearsay statement.[83] Examinations of child-victims for purposes of diagnosis and trial preparation must be analyzed separately to acknowledge the distinction between "treatment" and "diagnosis" in the hearsay exception.

Indeed, the *Hinnant* court's analysis of the reasonable pertinence prong attributed little significance to the possibility that the child made the statements to the psychologist in the course of diagnosis.[84] If the court meant that the "diagnosis" language lacks independent significance, then information received in diagnosis, such as the identity of the alleged perpetrator, would be inadmissible.[85] The inadmissibility of the perpetrator's identity contravenes the rationale behind admitting such hearsay statements: the child's safety may be jeopardized if she remains in close contact with the alleged perpetrator.[86] After *Hinnant*, whether a child-victim's statements about his alleged perpetrator are "reasonably pertinent" when discovered through diagnosis is open to challenge.[87]

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83. *Hinnant*, 351 N.C. at 290, 523 S.E.2d at 671 ("Rule 803(4) was not 'created to except from the operation of the hearsay rule' statements made to a nontreating clinical psychologist two weeks after the alleged victim received initial medical diagnosis.") (quoting State v. Smith, 315 N.C. 76, 86, 337 S.E.2d 833, 840 (1985)); Sharp v. Commonwealth, 849 S.W.2d 542, 544 (Ky. 1993) ("[S]tatements made to a physician who lacks treatment responsibility have less inherent reliability than traditional patient history.").

84. *See Hinnant*, 351 N.C. at 290–92, 523 S.E.2d at 671–72. According to the record, the psychologist's purpose in examining the child was to provide information to a medical doctor prior to a follow-up examination. The follow-up medical examination revealed possible findings of sexual abuse, consistent with the child's statements to the psychologist. *Id.* at 281, 523 S.E.2d at 666.

85. Although statements of fault are not included in the medical treatment exception, statements identifying the alleged perpetrator are traditionally admissible because of their "reasonable pertinence" to diagnosis or treatment. United States v. Renville, 779 F.2d 430, 438 (8th Cir. 1985); Mosteller, *supra* note 7, at 276. In *Hinnant*, the psychologist's testimony was the only evidence the prosecution offered to convict the defendant of first-degree rape. The sheer lack of other evidence of rape may have strongly influenced the court's conclusion that the trial court erred in admitting the testimony. *Hinnant*, 351 N.C. at 291, 523 S.E.2d at 672.

86. The abuser's identity is often pivotal to psychological treatment of the child-victim. 2 MYERS, EVIDENCE, *supra* note 6, § 7.39.

87. The court's first opinion since *Hinnant* indicates that the court's "objective circumstances" purpose inquiry has significantly impacted the way lower courts view psychologists' interviewing practices. State v. Waddell, 351 N.C. 413, 417–18, 527 S.E.2d 644, 647–48 (2000) (citing the non-medical environment, leading questions, "child friendly" toys, the timing of the interview after the medical examination, and the failure of the psychologist to explain the treatment purpose to the child-victim as factors contributing to the lack of reliability and trustworthiness of the child-victim's hearsay statements). Notably, *Hinnant* did not offer any standards for determining when a child-victims' statements to mental health professionals are "pertinent to medical diagnosis."

To comply with the *Hinnant* court's limitation of the rule, specific guidelines for mental health professionals such as psychologists are necessary. These guidelines for psychologists interviewing potential child-victims of sexual abuse should suggest that psychologists (1) determine whether the child understands that the purpose of the interview is to provide diagnosis or treatment, (2) emphasize the importance of accurate and truthful responses, and (3) document how and why the child's statements are "reasonably pertinent to diagnosis or treatment."[88]

In addition, a specific objective circumstance test emphasizing the context of the interview and the developmental and cognitive ability of the child should be adopted to evaluate the child-victim's "selfish-treatment" motive.[89] Because the hearsay statements of medical and psychological professionals may be the only evidence of sexual abuse when a child cannot to testify, the court should explain the "reasonably pertinent" standard for medical diagnosis or treatment[90] and acknowledge the distinction between diagnosis and treatment.[91] The North Carolina Supreme Court must acknowledge child-victims' unequivocal reliance on caretakers to seek medical or psychological treatment for sexual abuse and the importance of psychological hearsay testimony in prosecuting the perpetrators of the abuse. Otherwise, the most important witness will go unheard.

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88. MYERS, LEGAL ISSUES, *supra* note 1, at 163.
89. *Supra* note 65 and accompanying text.
90. *Supra* notes 70–71 and accompanying text.
91. *Supra* notes 72–87 and accompanying text.