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THE RULING ON A MOTION *IN LIMINE*: PRESERVING THE ISSUE FOR APPEAL

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ABSTRACT

Although the distinction between motions *in limine* based in fact and those rooted in law is widely recognized in Ohio, courts generally use a "one size fits all" approach when it comes to preserving the issues for appeal. Under that approach, an attorney must challenge the pretrial ruling at trial to ensure that the issue will be preserved for appeal. This Article argues that Ohio should modify its practices to conform to the federal method and follow in the footsteps of its neighbors by specifying that a definitive pretrial ruling on a motion *in limine* will preserve the issue for appeal.

In coming to this conclusion, the Article discusses a current trend in Ohio and its parallels with earlier federal cases, which culminated in a 2000 amendment to Rule 103 of the Federal Rules of Evidence that preserves definitive pretrial rulings for appeal. It then examines the pros and cons of the federal policy and the ways to determine whether the ruling on the motion was definitive or precautionary. Finally, the Article considers how a ruling on a motion *in limine* might effectively be appealed in cases that do not go to trial.

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INTRODUCTION

The motion *in limine* is a valuable device that attorneys can use to obtain a pretrial ruling on the admissibility of a specific item or category of evidence. The idea behind the motion is simple and effective. Rather than having to wait until the middle of trial to find out whether a pivotal piece of evidence is admissible, a party can move for a ruling before trial, have the matter heard, and obtain the court's answer. In civil litigation, the decision on the motion might help produce a settlement. In a criminal case, it can lead to a plea agreement. And if the case does go to a jury, knowing in advance how key evidence will be treated makes for a better trial procedurally, with fewer sidebar interruptions and less risk that jurors will hear evidence that ultimately will be ruled inadmissible.

But, in practice, a motion *in limine* can also be a procedural trap for the unwary. Suppose, for example, that the motion raises a legal issue, such as whether a party's refusal on Fifth Amendment grounds to answer civil discovery requests can be used in evidence against him in a civil case. One might expect, if the court squarely rules against allowing the Fifth Amendment-based refusal to be used as evidence, that the issue is decided and the subject is closed. But one would be wrong. In the case that presented this scenario, the court held that the proponent of the evidence had to try to have the evidence admitted again at trial. And the result of failing to do so meant that the issue was not preserved for appeal.[1]

Yet why was that so? The court's decision seems counterintuitive. Attorneys and judges alike expect—not unreasonably—that when an issue has been briefed, argued, and the court has made an unequivocal decision on the record the decision will be controlling, and that unless there is some subsequent change in circumstances further argument is both unnecessary and unwelcome.[2]

Despite that expectation, many Ohio courts reflexively apply a rule requiring the party who lost at the motion-practice stage to raise the issue again during the trial. This is based on the theory that the *in limine* decision is but a "tentative, preliminary or presumptive ruling about an evidentiary issue that is anticipated but has not yet been presented in its full context" at trial.[3]

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[1] Orbit Elecs., Inc. v. Helm Instrument Co., 855 N.E.2d 91, 97-98 (Ohio Ct. App. 2006).

[2] *See, e.g.*, State v. Grubb, 503 N.E.2d 142, 147 n.3 (Ohio 1986) ("At oral argument, appellant suggested that it might be 'unwise' to again bring to the trial court's attention an evidentiary matter forming the basis of a motion *in limine* which was previously presented to the court and granted. Appellant's rationale was that the proffer might irritate the judge, in that the judge had previously indicated that such evidence was inadmissible."); Proctor v. NJR Props., LLC, 887 N.E.2d 376, 381 (Ohio Ct. App. 2008) (responding to a proffer of excluded evidence, the trial court complained: "Damage to the residue is not an issue in this trial. How many times do I have to tell you that?"); Vespoli v. Encompass Ins. Co., No. 94305, 2010 WL 4351817, at *2 (Ohio Ct. App. Nov. 4, 2010) ("[T]he trial court declined to admit the evidence with the belief that he was bound by the previous judge's ruling on the motion in limine.").

[3] *See Orbit Elecs.*, 855 N.E.2d at 97 (quoting State v. Maurer, 473 N.E.2d 768, 788 n.14 (Ohio 1984)).

In some instances, that theory is correct, because the ruling truly is a tentative one. For example, when a court must balance the probative value of evidence against the danger of unfair prejudice,[4] the context of a trial might well be necessary.[5] The same is true of evidence offered for impeachment purposes or "other acts" evidence.[6] Even relevance can depend on what happens at trial: the newly presented words of a witness or text of a document might suddenly make relevant that which had been irrelevant before.

But there are also instances in which the theory is wrong: the ruling was not tentative, because the court did not need the context of a trial to make a definitive decision on admissibility. Can a guilty plea to a charge of domestic violence that was later dismissed be used to prove an element of a felony charge for a subsequent assault on the same victim?[7] Is evidence of an oral agreement made during mediation admissible, or is it subject to the statutory privilege for mediation communications?[8] Does expert testimony about an amphetamine-induced psychotic disorder fall within the statutory prohibition against using voluntary intoxication as a defense to a criminal charge?[9] In each of these examples, the court ruled on the motion *in limine* as a matter of law, or, at least, the ruling was akin to a legal decision. So why should it be treated as a tentative one, as though it were contingent on what would happen with the evidence at trial?

The thesis of this Article is that it does not have to be—at least, not always—because motions *in limine* come in two distinct kinds. One kind is closely tied to the facts of the case. The other is anchored in the law, whether substantive or procedural. And that distinction calls for different treatment, as the preservation of an issue for appeal is concerned.

Ohio law has always recognized this difference in kind. As the Ohio Supreme Court noted in its first extended discussion of the subject:

> "A motion *in limine* may be used in two different ways. First, it may be used as the equivalent of a motion to suppress evidence, which is either not competent or improper because of some unusual circumstance. Second, it may be used as a means of raising objection to an area of inquiry to prevent prejudicial questions or statements until the admissibility of the questionable evidence can be determined during the course of the trial."[10]

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[4] *See* OHIO R. EVID. 403.

[5] *See* Estate of Beavers v. Knapp, 889 N.E.2d 181, 204 (Ohio Ct. App. 2008) (ruling on a motion *in limine*, the trial court "tentatively" excluded evidence of prior OMVI convictions and alcohol rehabilitation).

[6] OHIO R. EVID. 607; OHIO R. EVID. 404; *see also* State v. Charley, No. 05 BE 34, 2007 WL 745115, at *6-10 (Ohio Ct. App. Mar. 6, 2007).

[7] State v. Echard, No. 24643, 2009 WL 4830001, at *1 (Ohio Ct. App. Dec. 16, 2009).

[8] City of Akron v. Carter, 942 N.E.2d 409, 413 (Ohio Ct. App. 2010).

[9] State v. Johnston, No. 26016, 2015 WL 502322, at *1-2 (Ohio Ct. App. Feb. 6, 2015).

[10] State v. Maurer, 473 N.E.2d 768, 788 n.14 (Ohio 1984) (quoting PALMER, OHIO RULES OF EVIDENCE MANUAL 446 (1984)).

But while this distinction has long been understood, case law has tended to obscure it. A general rule has developed under which the subject of the motion must be raised again at trial, either through a proffer or an objection (depending on whether the pretrial ruling excluded or admitted the evidence), to preserve the issue for appeal.[11]

Unfortunately, this "one size fits all" rule for motions *in limine* has made many difficulties for Ohio lawyers and judges. Scores of appeals address the topic each year.[12] In some instances, errors predicated on purely legal or procedural rulings about evidence are waived because the proponent did not proffer the evidence at trial.[13] In others, the proffer or objection is made at the wrong time or in the wrong way, defeating a conscientious effort to make a record for appeal.[14] At the extreme, the proffer concept has been so grossly misunderstood as to allow deliberate introduction to the jury of evidence that was precluded by an *in limine* ruling—on the theory that the ruling was only tentative— so that "in bringing up the matter

[11] *See, e.g.*, Wilhoite v. Kast, No. CA2001-01-001, 2002 WL 4524, at *9 (Ohio Ct. App. Dec. 31, 2001) ("[A]ny claimed error regarding a trial court's decision on a motion *in limine* must be preserved *at trial* by an objection, proffer, or ruling on the record when the issue is actually reached and the context is developed.").

[12] A Westlaw search shows that in 2014 motions *in limine* were discussed in 106 opinions of the Ohio courts of appeals. And in the five-year period from 2010 through 2014, a trial court's decision on a motion *in limine* was the subject of 172 assignments of error—an average of 30 cases a year.

[13] *See, e.g.*, Schultz v. Duffy, No. 93215, 2010 WL 1611111, at *2 (Ohio Ct. App. Apr. 22, 2010) (the trial court granted Duffy's motion *in limine* to exclude an expert's testimony because the expert's report was not timely filed; error was waived because Schultz failed to proffer the expert's testimony at trial); Carmen v. Madden, No. L-89-285, 1990 WL 174321, at *2 (Ohio Ct. App. Nov. 9, 1990) (motion *in limine* to exclude medical bills paid by insurer was granted because, as to them, Carmen was not the real party in interest; Carmen failed to preserve the issue for appeal because she did not attempt to introduce evidence of the subrogated medical bills at trial)*; see also* Allphase Restoration & Constr. v. Youngblood, No. 15AP-75, 2015 WL 5772197, at *1-4 (Ohio Ct. App. 2015) (seller's motion *in limine* argued that cancellation of a contract was an election of remedy that limited the buyer's recovery to the sum paid; magistrate agreed and precluded evidence of other damages; the appeals court viewed this law-based decision as "a tentative, precautionary request to limit inquiry into a specific area until admissibility is determined during trial").

[14] *See, e.g.*, Orbit Elecs., Inc. v. Helm Instrument Co., Inc., 855 N.E.2d 91, 98 (Ohio Ct. App. 2006) (even though the motion *in limine* was discussed after the jury was impaneled, Helm did not properly preserve the issue for appeal because "the motion was discussed prior to the presentation of any evidence and before the court could determine from the evidence presented whether it would be admissible"); Ponder v. Kamienski, No. 23270, 2007 WL 2781197, at *3 (Ohio Ct. App. Sept. 26, 2007) (issue was not preserved for appeal because although Ponder moved *in limine* during lunch break to preclude a DVD from being shown to the jury in the afternoon session and the trial court ruled on the motion during the lunch break, Ponder "did not object directly before or during the showing of the DVD"); Proctor v. Cook, No. 4-07-28, 2008 WL 4901831, at *4-5 (Ohio Ct. App. Nov. 17, 2008) (holding that objections were improper as they were not made with the witness on the stand; because they were made during an earlier recess, the appellate court treated them as an "oral motion in limine" that opposing counsel argued against and the trial court "implicitly overruled . . . by simply telling the bailiff to bring in the jury").

again, the prosecutor was doing nothing more than what was required to make that process work."[15]

Yet this general rule that has developed through case law is not absolute. As this Article will show, Ohio courts have always recognized that *some* liminal rulings can be conclusively decided before trial and, as to those rulings, no "second try" at trial is needed. Those decisions often occur in criminal cases. Within that setting, this idea was formalized in the 1995 amendments to Rule 12 of the Ohio Rules of Criminal Procedure, which specifically allows "any . . . evidentiary issue . . . that is capable of determination without the trial of the general issue" to be raised by pretrial motion[16] and also allows the ruling on that pretrial motion to be appealed after a no-contest plea.[17] And in civil cases, several recent appellate opinions recognize that some liminal motions can be conclusively decided before trial and holding that, as to those motions, a proffer or objection at trial is not needed to preserve the issue for appeal.[18]

These developments in Ohio law track an earlier trend in the federal courts, which began with case law and culminated in a 2000 amendment to Rule 103 of the Federal Rules of Evidence, under which definitive pretrial rulings are automatically preserved for appeal. First, this Article looks at why and how the federal case law and the rule developed as they did, and identifies similar concepts within Ohio law.

Next, this Article considers whether Ohio should follow the federal model and evaluates some of the arguments pro and con. It will analyze how to distinguish a definitive ruling on a motion *in limine* from a precautionary one. Then this Article shifts its focus to cases that do not go to trial, and considers how a pretrial ruling on a motion *in limine* might be appealed in that circumstance.

Finally, this Article encourages the continued development of the common-law trend that permits a definitive pretrial ruling to preserve error and recommends that Ohio carefully study whether to join its neighboring states and amend its Evidence Rule 103 to correspond to the federal rule.

I. DEVELOPMENT OF THE MOTION *IN LIMINE* IN OHIO

A. Laying the Groundwork: The Early Cases

Legal scholars suggest that the use of the motion *in limine* developed in Texas in the 1940s and 1950s,[19] and in 1966, the liminal motion was a novel legal topic in

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[15] State v. Kobelka, No. 01CA007808, 2001 WL 1379440, at *1 (Ohio Ct. App. Nov. 7, 2001).

[16] OHIO R. CRIM. P. 12(C).

[17] OHIO R. CRIM. P. 12(I).

[18] *See, e.g.*, City of Akron v. Carter, 942 N.E.2d 409, 413 (Ohio Ct. App. 2009); *see also* Giannini-Baur v. Schwab Ret. Plan Servs., Inc., C.A. No. 25172, 2010 WL 5548784, at *8 (Ohio Ct. App. Dec. 29, 2010) (Dickinson, J., concurring); State v. Ibn-Ford, No. 26386, 2013 WL 2326985, at *17 (Ohio Ct. App. May 29, 2013) (Belfance, J., concurring) ("I write separately to note that this Court has stated that not all motions in limine are preliminary in nature.").

[19] Douglas L. Colbert, *The Motion in Limine: Trial Without Jury - A Government's Weapon Against the Sanctuary Movement*, 15 HOFSTRA L. REV. 5, 10-15 (1986); Candace C. Fetscher, *The Motion in Limine – A Useful Procedural Device*, 35 MONT. L. REV. 362, 363-66 (1974).

Ohio.[20] From the outset, motions *in limine* were used to raise both evidentiary and legal issues. So it is not a coincidence that the first Ohio Supreme Court decision to mention a motion *in limine* (in 1972) dealt with an evidentiary issue,[21] while the second (in 1974) addressed an issue that was legal in nature.[22]

An evidentiary issue happened to be at the center of the first Ohio appellate decision giving detailed treatment to a motion *in limine*: *State v. Spahr*.[23] In *Spahr*, the defendant, who was charged with possession of marijuana in Shelby County, moved *in limine* "for an order instructing the prosecutor to refrain from any mention, in the presence of the jury, of evidence or a statement relating to marijuana found in Darke County."[24] The trial court not only sustained the motion but, in the appellate court's view, "proceeded beyond the motion and issued a prospective ruling that the subject matter was irrelevant and prejudicial, and could not be submitted as evidence at trial."[25]

Treating the motion *in limine* as if it were a motion to suppress evidence, the prosecution appealed.[26] But the Second District Court of Appeals held that the appeal was premature because the purpose of the defense's motion "was clearly spelled out as a request for a precautionary instruction and not one for a pre-trial ruling on admissibility."[27] Expanding on the notion of a precautionary instruction, the Second District wrote:

> There is no provision under the rules or the statutes for a motion in limine. The request was no more and no less than an appeal to the trial court for a precautionary instruction to opposing counsel to avoid error or prejudice, such instruction to be effective until admissibility was resolved. Such a request lies in the inherent power and discretion of the trial judge to control the proceedings.[28]

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[20] *Cf.* Tom H. Davis, *Motions in Limine*, 15 CLEV.-MARSHALL L. REV. 255, 255 (1966).

[21] State v. Broadnax, 287 N.E.2d 804, 805 (Ohio 1972) (dealing with the admissibility of prior convictions).

[22] Richley v. Jones, 310 N.E.2d 236, 240 (Ohio 1974) (ruling on the motion *in limine* that Ohio eminent domain law would not allow evidence of damages due to loss of left-turn access).

[23] 353 N.E.2d 624 (Ohio Ct. App. 1976).

[24] *Id.* at 625.

[25] *Id.* at 626.

[26] Under Rule 12(K), which at the time of the *Spahr* trial was Rule 12(J), the prosecution may appeal "from an order suppressing or excluding evidence" if the prosecutor certifies that the pretrial ruling "has rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed." OHIO R. CRIM. P. 12(K). Absent this rule, the State would have had to try the case without the evidence before it could appeal, and if the result was an acquittal, a retrial would have been impossible even if the prosecution prevailed on appeal. *See* State v. Malinovsky, 573 N.E.2d 22, 25 (Ohio 1991).

[27] *Spahr*, 353 N.E.2d at 626.

[28] *Id.* at 626-27.

Explaining why a party would seek a precautionary instruction, the *Spahr* court stated:

> A liminal motion presents a threshold question as to the propriety of evidence that may be so detrimental that it would be impossible to remove it from the minds of the jury if it is offered in the courtroom and an objection is sustained. The thrust of a liminal motion is to avoid error by alerting the court and counsel and by removing a discussion of the subject from the presence of the jury until an appropriate time or times during the trial when the court makes a ruling on its admissibility.[29]

As the Second District concluded, a motion *in limine* involves a two-stage procedure. The first stage, "an order to avoid reference to the subject matter" until the court can address the problem, is "exclusively precautionary": it "decides nothing and resolves nothing."[30] The second stage, by contrast, "involves the ruling of the court on the admissibility of the evidence prior to the time it is mentioned and submitted to the jury."[31] The Second District suggested that this definitive decision usually would be made during trial, because "[a]s with so many other evidential questions, a ruling depends on other testimony and often cannot be made until the trial is in progress."[32]

The *Spahr* case, in the court's view, had not reached that second stage. Rather, the defendant's motion was for a precautionary request only.[33] So, as the court concluded, the prosecution's appeal was premature:

> [A]n evidential ruling remains within the authority of the court and may be changed or reversed at any time as the trial proceeds. If, after an objection has been sustained, opposing counsel presents a foundation for the rejected evidence or discovers some better law, he may request reconsideration of the ruling. There is no finality to the action of the court on a liminal motion or on other evidential rulings until the trial is completed and reduced to a final judgment.[34]

Interestingly, the court in *Spahr* chose to rest its decision on what the defendant (apparently) asked for—a tentative, precautionary ruling about the Darke County marijuana—rather than the unequivocal, preclusive ruling that he got. But what if the *Spahr* court had directly addressed the subject presented to it? If a trial court did make a conclusive pretrial ruling on a motion *in limine*, would Ohio law require the losing party to raise the issue again at trial?

The Ohio Supreme Court's first answer to that question was "No."[35] *Hall v. Bunn* involved a motion *in limine*, filed by defendant, Ford Motor Company ("Ford"), to

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[29] *Id.* at 627.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at 627-28.

[35] Hall v. Bunn, 464 N.E.2d 516, 521 (Ohio 1984).

exclude from evidence all matters relating to any design defect in the parking-brake system on a Ford dump truck.[36] As the basis for its motion, Ford contended that the case focused on a claimed manufacturing defect in the master cylinder until the week before trial when the third-party plaintiff O'Brien set forth the new, unexpected theory of a parking-brake design defect.[37] The trial court granted Ford's motion, and the trial resulted in a verdict for Ford.[38]

The appeals court reversed, flatly holding "that a pretrial motion *in limine* is not a proper vehicle for making a final determination as to the admissibility of evidence."[39] But the Ohio Supreme Court concluded that the real problem lay elsewhere. It held that instead of precluding the design-defect evidence, the trial court should have followed Civil Rule 15(B), allowed the pleadings to be amended to conform to the evidence, and granted Ford a continuance to prepare for trial on O'Brien's second theory.[40]

Yet Ford had another argument: Bunn (another third-party plaintiff) could not "object to the trial court's ruling on the motion *in limine* as he failed to oppose the motion at the trial level."[41] As we have seen, many recent appellate panels have found that sort of argument to be persuasive. But the Ohio Supreme Court did not. And the reason why is important. As the court explained, Bunn did not have to take that second step because "Civ. R. 46 provides that whenever a matter has by any means been called to the attention of the trial court and the court has ruled thereon, no further exception for purposes of review is required."[42]

Notably, the motion *in limine* in *Hall* raised an issue that, although directed at evidence, was really procedural in nature: namely, an argument that it was unfair to spring a new theory of liability on Ford the week before trial.[43]

The Ohio Supreme Court's next significant decision involving a motion *in limine* was different: the motion dealt with a purely evidentiary matter, the court's pretrial ruling allowed the evidence in, and the losing party failed to object to it when it came up at trial.[44] And there the court reached a different result.

The question at issue in *State v. Maurer* was whether the prosecution could use testimony that was the product of a hypnotic process.[45] At a hearing on the motion *in limine*, after the State agreed to limit the witnesses' trial testimony to their pre-hypnotic observations, the trial court "tentatively resolved the evidentiary issue by overruling [Maurer's] motion *in limine*."[46] On appeal, though, Maurer argued that

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[36] *Id.* at 518.

[37] *Id.*

[38] *Id.*

[39] *Id.* at 519.

[40] *Id.* at 520-21.

[41] *Id.* at 520.

[42] *Id.*

[43] *See id.*

[44] State v. Maurer, 473 N.E.2d 768, 787-88 (Ohio 1984).

[45] *Id.* at 787.

[46] *Id.*

any testimony by those witnesses was improper because their memories had been hypnotically refreshed. But the Ohio Supreme Court held Maurer waived that argument by failing to object at trial.[47]

As the court explained, a motion *in limine* (if granted) operates to avoid injecting irrelevant or inadmissible matters into a trial by adding a procedural step by allowing the court to consider the evidence, outside the presence of the jury, before is offered.[48] If the motion *in limine* is denied, the extra step is not added—the proponent of the evidence may offer it at trial in the normal manner—and it is up to the opponent to object to it then.[49]

But the court in *Maurer* did not suggest that *all* motions *in limine* must follow that two-step pattern. Instead, as we have seen, the court in *Maurer* noted that there were "two different ways" to use a motion *in limine*.[50]

First, the *Maurer* court explained, a motion *in limine* "may be used as the equivalent of a motion to suppress evidence, which is either not competent or improper because of some unusual circumstance."[51] That is what happened in the *Hall* case, where the trial court precluded evidence of a parking-brake design defect as improper because Ford did not know about that theory until the week before trial.

Second, it may be used to obtain "a preliminary interlocutory order precluding questions being asked in a certain area until the court can determine from the total circumstances of the case whether the evidence would be admissible."[52] If a motion to preclude questions is granted, the losing party must proffer the excluded evidence at the proper time during trial and have a second determination as to its admissibility. If the motion is denied, the losing party must object at trial. And if the party who loses at the motion-practice stage fails to take that necessary second step at trial, the issue will not be preserved for appeal. Why? Because, as to that kind of motion *in limine*, a court's pretrial decision is only a "tentative, preliminary or presumptive ruling about an *evidentiary issue* that is anticipated but has not yet been presented in its full context."[53]

Eight months after *Maurer*, the Ohio Supreme Court considered yet another motion *in limine* on a procedural issue: whether the trial court properly granted a motion to exclude a surprise expert witness. As in *Hall*, the losing party in *Huffman v. Hair Surgeon, Inc.* failed to proffer its expert testimony at trial or object to the expert's exclusion.[54] And, as in *Hall*, the court determined that the issue was preserved for appeal anyway. Why? Because the motion *in limine* "expressly requested a final court order preventing introduction of the challenged evidence during the trial," rather than a tentative ruling against it, and because "the hearing on

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[47] *Id.* at 787-88.

[48] *Id.* at 787 (citing Redding v. Ferguson, 501 S.W.2d 717, 722 (Tex. Civ. App. 1973)).

[49] *See id.*

[50] *Id.* at 787 n.14 (quoting PALMER, OHIO RULES OF EVIDENCE MANUAL 446 (1984)).

[51] *Id.*

[52] *Id.*

[53] *Id.* (emphasis added).

[54] Huffman v. Hair Surgeon, Inc., 482 N.E.2d 1248, 1249 (Ohio 1985).

the motion was held immediately prior to trial, and . . . the motion was sustained," which indicated that the trial court intended its ruling to be definitive.[55]

One year later, the Ohio Supreme Court had before it another evidentiary motion *in limine*, this time in a failure-to-proffer context. In *State v. Grubb*, a case involving felonious assault and a weapons charge, the defendant and the police were involved in an altercation at a police station.[56] The prosecution moved *in limine* to prevent testimony about the altercation on purely evidentiary grounds, contending that its probative value was outweighed by the danger of confusing or misleading the jury on the issues of the case.[57] After an oral hearing the court granted the motion, and at trial, Grubb failed to proffer the testimony.[58]

Focusing on the precautionary aspect of this particular liminal motion, the *Grubb* court held that the defendant was only temporarily prohibited from referring to evidence of the altercation.[59] Accordingly, the defendant had to seek to introduce the evidence at trial (by proffer or otherwise) to enable the court to make a conclusive determination as to its admissibility and to preserve the issue for appeal.[60]

Once again, the *Grubb* court was careful to note that, in some instances, "finality" does attach when a motion *in limine* is granted.[61] But that was not true in the case before it, so the defendant could have (and should have) proffered evidence of the altercation:

> The instant motion made at the state's insistence was not the functional equivalent of a motion to suppress and, therefore, was nothing more than a tentative, interlocutory order. As such, [Grubb] *could have* proffered the temporarily prohibited evidence outside the presence of the jury when the issue arose during the trial and, if the proffered evidence was then excluded, he could have perfected an appeal as of right from the trial court's final judgment at the conclusion of the case.[62]

To summarize these early cases: during the first two decades of motion *in limine* practice in Ohio, the Ohio Supreme Court marked out two broad categories of those motions.

The first category involves a liminal motion that is "used as the equivalent of a motion to suppress evidence, which is either not competent or improper because of some unusual circumstance."[63] For the purposes of this Article, we will refer to this

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[55] *Id.* at 1251 n.5.

[56] State v. Grubb, 503 N.E.2d 142, 143-44 (Ohio 1986).

[57] *Id.* at 144. This type of argument invokes the evidentiary balancing test of Rule 403 of the Ohio Rules of Evidence. *See* OHIO R. EVID. 403.

[58] *Grubb*, 503 N.E.2d at 144.

[59] *Id.* at 143.

[60] *Id.*

[61] *See id.* at 145.

[62] *Id.* at 146 (emphasis added).

[63] State v. Maurer, 473 N.E.2d 768, 787 n.14 (Ohio 1984); *see Grubb*, 503 N.E.2d at 146; *see also* State v. Davidson, 477 N.E.2d 1141, 1144-45 (Ohio 1985) ("[W]e hold that any motion which seeks to obtain a judgment suppressing evidence is 'a motion to

category as the "one-step type." This type of motion, if granted, results in a stop sign: the judge definitively precludes the evidence. The reason for that definitive preclusion typically is outside the scope of the Rules of Evidence—the evidence is barred because of a statute, a rule of procedure, or for some other reason that is akin to a ruling on a question of law. And there is no need to proffer the precluded evidence at trial: the record of the ruling on the motion *in limine* itself is sufficient to preserve the matter for appeal.

The second category involves using a liminal motion to seek a precautionary instruction to keep certain disputed evidence away from the jury until a court can see it in full context at trial and make a definitive ruling on its admissibility.[64] For the purposes of this Article, we will refer to this category as the "two-step type." In effect, this type of motion, if granted, puts up a yield sign: the judge instructs the proponent of the evidence not to mention it in the jury's presence without the court's prior approval. Obviously, in that circumstance, if the proponent does not proffer the evidence at trial, the matter cannot be preserved for appeal. And if the motion is denied, no traffic control is imposed: the proponent of the evidence may use it at trial (and, to preserve error, the opponent must object) just as if no motion *in limine* had been filed.[65]

B. The Amended Criminal Rule 12: Encouraging Pretrial Evidentiary Motions in Criminal Cases

In civil cases, only four defenses (or objections) need to be raised by motion before trial, and the subject of each of them is a technical issue affecting jurisdiction.[66] All other defenses or objections to a "claim" *may* be made at trial.[67] Further, motions making objections to discrete items (or classes) of evidence are not even mentioned in the Ohio Rules of Civil Procedure. In criminal cases, by contrast, pretrial motion practice to address evidentiary issues is encouraged by the Ohio Rules of Criminal Procedure,[68] and if a motion seeks to suppress evidence, timely pretrial filing is required.[69]

Before Rule 12(B) of the Ohio Rules of Criminal Procedure was amended in 1995, it allowed any "defense, objection, or request which is capable of

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suppress'… where that motion, if granted, effectively destroys the ability of the state to prosecute. The fact that the motion is not labeled 'motion to suppress' is not controlling.").

[64] *See Grubb*, 503 N.E.2d at 145.

[65] Appellate opinions often speak of an appealed issue being "waived" without a timely objection or proffer at trial. It's more accurate to say that the standard of review for that issue is "plain error," which is extraordinarily difficult to meet. *See*, *e.g.*, State v. Krull, 796 N.E.2d 979, 986 (Ohio Ct. App. 2003); Ponder v. Kamienski, No. 23270, 2007 WL 2781197, at *4 (Sept. 26, 2007).

[66] The defenses of "lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process" are waived if not asserted in a pretrial pleading or motion. OHIO R. CIV. P. 12(H)(1).

[67] *See* OHIO R. CIV. P. 12(H)(2).

[68] *See* OHIO R. CRIM. P. 12(C).

[69] OHIO R. CIV. P. 12(D).

determination without the trial of the general issue" to be raised by pretrial motion.[70] And, as noted above, a motion "to suppress evidence . . . on the ground that it was illegally obtained" *had* to be raised before trial.[71] Meanwhile, Rule 12(H) provided that a plea of no contest would not preclude a criminal defendant "from asserting on appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a pretrial motion to suppress evidence."[72]

Accordingly, as long as the matter raised by a pretrial motion was something that could be determined without a trial, the ruling on the motion itself would be appealable after a no-contest plea. But was it possible for a decision on a pretrial motion *in limine* to rise to the level of an appealable "ruling?" This question was answered in the affirmative by the Ohio Supreme Court's 1992 opinion in *State v. Ulis*.[73]

Ulis filed a pretrial motion to prevent a psychologist from testifying about what a victim told him. He styled it as a "motion to suppress," and argued that the testimony would be hearsay and would violate his constitutional rights under the Confrontation Clause.[74] After the motion was overruled, Ulis agreed to a stipulation under which he "would plead no contest in order to preserve the motion-to-suppress issue for appeal."[75] However, the Sixth District held "that the motion to suppress was in fact a motion *in limine*, which resulted in a preliminary ruling of the court *and as such was not final*."[76]

As a remedy, the Sixth District remanded the case to allow Ulis to withdraw his plea (and face a reinstatement of the original charges, which included multiple death specifications). However, that approach conflicted with an Eighth District Court of Appeals decision, so the Sixth District certified the record to the Ohio Supreme Court for review.[77]

In *Ulis*, the Ohio Supreme Court acknowledged that Ulis's motion was not really a motion to suppress because there was no claim that the evidence was obtained illegally.[78] But that did not matter to the court, because the subject of the motion was fully presented to the trial court.[79] Indeed, the trial court's decision on the motion was the result of a "full-blown hearing . . . [where] both parties were provided with cross-examination," and the parties had stipulated that any error in the ruling would be preserved for review.[80] And so, even though the defense motion truly was a

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[70] OHIO R. CRIM. P. 12(B) (amended 1995).

[71] OHIO R. CRIM. P. 12(C)(3) (amended 1995).

[72] OHIO R. CRIM. P. 12(H) (amended 1995).

[73] 600 N.E.2d 1040 (Ohio 1992).

[74] *Id.* at 1040.

[75] *Id.*

[76] *Id.* at 1040-41 (emphasis added).

[77] *Id.* at 1041.

[78] *See id.*

[79] *See id.* at 1042.

[80] *Id.*

motion *in limine*, the *Ulis* court held that the trial court's ruling on it was *not* preliminary.[81]

Allowing the pretrial ruling to be appealed, as the *Ulis* court explained, was consistent with the intent of the Criminal Rules to "determine matters before trial when possible."[82] That "policy of early determination" was not limited to constitutional issues only, but also reached "non-constitutional claims capable of determination without a trial on the general merits."[83] And the policy would be thwarted if a trial always had to happen, even in a situation where "the case hinges upon an evidentiary issue capable of determination without additional evidence being elicited by either party."[84]

The 1995 amendments to Rule 12 essentially approved (and codified) the reasoning and results of *Ulis*. Rule 12(C) was amended to allow any "*evidentiary issue* . . . that is capable of determination without the trial of the general issue" to be raised by motion before trial.[85] Concurrently, Rule 12(F) was amended to allow a court to adjudicate a pretrial motion "based upon briefs, affidavits, the proffer of testimony and exhibits, a hearing, or other appropriate means."[86] Rule 12(F) also requires a trial court to determine motions to suppress (and motions on other specified subjects) before trial.[87] Meanwhile, any other Rule 12(C) motions should "be determined before trial whenever possible."[88] And, because the amendments expressly listed a motion on an "evidentiary issue" as a type of "pretrial motion," under Rule 12(I) the ruling would be appealable after a no-contest plea.[89]

C. Changing the Focus: Can the Evidentiary Issue Be Determined Without a Trial?

The intent of the 1995 amendments to Rule 12, as indicated by the official Staff Notes, was to "encourage the state and the defendants to seek pretrial resolution of critical evidentiary and constitutional issues."[90] In criminal cases, resulting in no-contest pleas, the amendments changed the focus of the debate about appeals of pretrial motion rulings. Instead of asking whether the ruling was on a "motion to suppress" (or "functional equivalent of motion to suppress"),[91] as opposed to a "motion *in limine*," appellate courts were tasked with deciding whether the pretrial

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[81] *See id.*

[82] *Id.* at 1041 (quoting City of Defiance v. Krentz, 573 N.E.2d 32, 34 (Ohio 1986)).

[83] *Id.* at 1041-42 (citing State v. Hennessee, 469 N.E.2d 947, 950 (Ohio 1984)).

[84] *Id.* at 1042

[85] OHIO R. CRIM. P. 12(C) (emphasis added).

[86] OHIO R. CRIM. P. 12(F).

[87] *Id.*

[88] *Id.*

[89] OHIO R. CRIM. P. 12(I).

[90] OHIO R. CRIM. P. 12 staff notes to 1995 amendment.

[91] *See* State v. French, 650 N.E.2d 887, 891 (Ohio 1995) (distinguishing between using a motion *in limine* "as a preliminary means of raising objections to *evidentiary issues*" and "as the *functional equivalent* of a motion to suppress evidence" because it is not competent or improper for some other reason, usually statutory in nature).

ruling decided an evidentiary issue that was *capable of determination without the trial of the general issue*. But changing the focus of the debate did not mean that all debate was eliminated. Courts still had to decide whether a given evidentiary issue was capable of being determined before trial.

In *State v. Echard*, for example, the defendant moved *in limine* to preclude evidence of his guilty plea in a prior domestic violence case (which the prosecution intended to use to enhance the current charge to a felony) because the past charge was dismissed after he completed a diversion program.[92] Echard's motion seemed to present a legal issue: whether a guilty plea to a (subsequently) dismissed charge was competent evidence. But a majority of the Ninth District Court of Appeals panel held that the question really went to his guilt or innocence of the offense charged, and thus was not capable of determination without a trial.[93] Fortunately for Echard, however, the panel majority also found that everyone—prosecutor, defense counsel, and the court—erred by giving him the mistaken impression that he could appeal the issue after his no-contest plea.[94] And that made the plea invalid, because it was not made knowingly or intelligently.[95]

Yet Judge Clair Dickinson, in dissent, maintained that Echard's motion *in limine* was a pretrial motion under Rule 12(C) and that the ruling on it was appealable under Rule 12(I).[96] Why? Because the motion sought a definitive pretrial ruling that excluded the evidence of the plea.[97] No trial was needed to make that ruling: the court could decide the motion without knowing what other evidence the prosecution or defense would present.[98] That was because the motion presented a legal question, not an "evidentiary" one:

> Mr. Echard's motion presented a single, simple *question of law*: If a defendant pleads guilty to a charge of domestic violence and the State dismisses that charge before a final judgment is entered, may his guilty plea be used for enhancement purposes when he is again charged with domestic violence based on a subsequent attack on his girlfriend?[99]

And, in the dissent's view, the answer to the legal question was negative: when the charge in the previous case was dismissed, the guilty plea became void, as if it never happened.[100]

Judge Dickinson's dissent included an insightful analysis of motions *in limine*. Drawing on the work of legal commentators, he described three varieties.

The first two varieties come within what this Article refers to as "two-step type" because neither motion *in limine* seeks a definitive ruling on the evidence in

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[92] State v. Echard, No. 24643, 2009 WL 4830001, at *1 (Ohio Ct. App. Dec. 16, 2009).

[93] *Id.* at *2.

[94] *Id.* at *2-3.

[95] *Id.* at *3.

[96] *Id.* at *4 (Dickinson, J., dissenting).

[97] *Id.* at *5.

[98] *Id.*

[99] *Id.* at *10 (emphasis added).

[100] *Id.*

question. Some are "permissive" or "inclusionary" in nature: by this type of motion, "a party seeks a ruling that evidence it plans to offer at trial is admissible, will be received, and can be referred to in opening statement."[101] Others are "prophylactic" or "preclusionary" motions: they seek "an order that the evidence cannot be mentioned at trial until the court decides, at a proper time during the trial, whether it is admissible."[102] Or, in Ohio's terminology, they seek a "precautionary instruction" to avoid error by prohibiting any reference to the contested evidence "until the trial court is better able to rule on its admissibility outside the presence of a jury once the trial has commenced."[103]

Then there is a third variety: the "definitive" or "exclusionary" motion *in limine*, referred to in this Article as the "one-step type," which seeks a "final pre-*trial* determination with respect to inadmissibility of a particular matter."[104] In the traditional terminology used by Ohio case law, a definitive motion *in limine* is *not* a "preliminary means of raising objections to *evidentiary issues*."[105] Rather, it is "the *functional equivalent* of a motion to suppress evidence that is either not competent or improper due to some unusual circumstance not rising to the level of a constitutional violation."[106] And, to Judge Dickinson, Echard's motion was of the definitive type:

> He did not ask the Court to prohibit the State from referring to his prior guilty plea until the trial court could consider, in context, whether evidence regarding it was admissible. He asked the Court to rule that his prior guilty plea could not be used for enhancement purposes, *regardless of what evidence the State might offer regarding it*.[107]

Judge Dickinson's dissenting opinion in *Echard* was important because it reframed the question about the appealability of liminal rulings in broader terms. In his view, if a motion *in limine* presented a question of law (albeit directed at evidence) and if that question could be (and was) definitively answered before trial, then the pretrial ruling would be appealable. And as subsequent developments would confirm, that reasoning applies to civil cases too.

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[101] *Id.* at *5 (citing Susan E. Loggans, *Motions in Limine*, *in* 2 LITIGATING TORT CASES § 19.3 (Roxanne Barton Conlin & Gregory S. Cusimano, eds. 2009); Laurence M. Rose, *Effective Motions in Limine*, TRIAL 50 (1999)). Another writer has referred to this variety as an "inclusionary" motion *in limine*, stating that "[i]f the trial judge sustains an inclusionary motion, then the evidence will be admitted, and counsel can likely mention the evidence during opening statements and witnesses might even be permitted to refer to the evidence before it has formally been proffered." Ryan A. Ray, *Motions* in Limine*: To File or Not to File*, 17 PROOF No. 4, 1, 11 (2009).

[102] *Echard*, 2009 WL 4830001, at *5 (Dickinson, J., dissenting).

[103] *Id.* at *5 (citing State v. Grubb, 503 N.E.2d 142 (Ohio 1986)).

[104] *Id.* at *6 (quoting Susan E. Loggans, *Motions in Limine*, *in* 2 LITIGATING TORT CASES § 19.3 (Roxanne Barton Conlin & Gregory S. Cusimano, eds. 2009)).

[105] State v. French, 650 N.E.2d 887, 891 (Ohio 1995).

[106] *Id.*; *see also Echard*, 2009 WL 4830001, at *6-8 (Dickinson, J., dissenting).

[107] *Echard*, 2009 WL 4830001, at *6-8 (Dickinson, J., dissenting) (emphasis added).

D. The Emerging Trend: A Definitive Pretrial Ruling on a Motion in Limine *Preserves the Issue for Appeal*

The dissenting analysis in *Echard* has proven to be persuasive, laying the basis for majority opinions in decisions by the Ninth, Second, and Twelfth District Court of Appeals.

In its 2010 decision *City of Akron v. Carter*, for example, the Ninth District held that an order denying Carter's motion *in limine* to exclude evidence of mediation settlement discussions preserved the issue for appeal because it was "a ruling on a definitive motion in limine, that is, a final pretrial determination with respect to inadmissibility of a particular matter."[108]

The *Carter* opinion noted that, ordinarily, a motion *in limine* must be renewed at trial to preserve the issue for appeal.[109] But, the court explained, that concept applied "only if the motion in limine is of a type that requests a preliminary ruling prior to the issue being presented in context during trial."[110] And the renew-at-trial concept did not apply to Carter because his statutory argument could be decided before trial: "Whether evidence is privileged . . . is not dependent on a foundation being laid at trial. Therefore, the ruling on this type of motion in limine is not precautionary. It is definitive."[111]

In February 2015, following *Carter*, the Second District held in *State v. Johnston* that the ruling granting a motion *in limine* to exclude a defense expert's opinion, on the ground that it was improper under a statute that bars voluntary intoxication as a defense, was definitive, and therefore appealable after Johnston's no contest plea.[112] As the *Johnston* court explained:

> This is not a situation where admissibility could have only been resolved in the context of other evidence. The trial court's decision would not have been affected by other evidence and is not dependent on a foundation being laid at trial. Like a suppression hearing, all the evidence and testimony necessary to make this decision was presented at the evidentiary hearing where Dr. Bromberg was fully questioned and cross-examined by the parties. As a result, the motion was assessed in its full evidentiary/testimonial context and a conclusive ruling was thereafter made.[113]

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[108] City of Akron v. Carter, 942 N.E.2d 409, 413 (Ohio Ct. App. 2009); *see also* Giannini-Baur v. Schwab Ret. Plan Servs., Inc., C.A. No. 25172, 2010 WL 5548784, at *8 (Ohio Ct. App. Dec. 29, 2010) (Dickinson, J., concurring); State v. Ibn-Ford, No. 26386, 2013 WL 2326985, at *17 (Ohio Ct. App. May 29, 2013) (Belfance, J., concurring) ("I write separately to note that this Court has stated that not all motions in limine are preliminary in nature.").

[109] *Carter*, 942 N.E.2d at 413.

[110] *Id.*

[111] *Id.*

[112] State v. Johnston, No. 26016, 2015 WL 502322, at *5 (Ohio Ct. App. Feb. 6, 2015).

[113] *Id.*

In *Johnston*, the Second District agreed with the Ninth District that "[s]ome evidence cannot ever become relevant and admissible."[114] Evidence of that type does not need to be considered in the context of a trial. It does not need to be the subject of a preliminary, precautionary ruling to keep it away from the jury until a controlling decision can be made. Rather, it can be ruled on, definitively, before trial. And once that has happened, no further action is needed to preserve the issue for appeal.

Most recently, in September 2015, the Twelfth District followed the Second District's ruling in *Johnson* and held that a defendant could appeal the decision on a motion *in limine* after his no contest plea.[115] As the Twelfth District reasoned, the defense's motion to exclude expert testimony was "the functional equivalent" of a motion to suppress that was capable of being resolved conclusively before trial.[116] The court went on to create a four-factor test to determine when a ruling on a motion *in limine* may be preserved by a no contest plea:

> Having examined the case law on this issue, we conclude that a trial court's ruling on a motion in limine may be preserved for review by a no contest plea if (1) the motion in limine is being used as the "functional equivalent" of a motion to suppress evidence that is either improper or not competent due to some circumstance not rising to the level of a constitutional violation, (2) there is a clear understanding between the trial court and the parties that the trial court's ruling on the evidentiary issue presented will be preserved for review, (3) the evidentiary issue has been contested and fully developed in the record, and (4) the evidentiary issue was conclusively determined without a trial and is ripe for appellate review.[117]

In Ohio, the principle of definitive or conclusive pretrial rulings has developed most fully in the context of criminal litigation. First, the concept of a suppression ruling (appealable after a no-contest plea) was broadened to include, as "functional equivalents," even non-constitutional claims, so long as they were "capable of determination without a trial on the general merits."[118] Later, Rule 12 was amended to recognize that if an evidentiary issue can be determined before trial, it should be, and that after a no-contest plea the pretrial ruling could be appealed.[119]

Despite some suggestions to the contrary,[120] the principle that some pretrial liminal rulings are definitive and controlling is not limited to the criminal-litigation

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[114] *Id.* at *3 (quoting City of Akron v. Carter, 942 N.E.2d 409, 413 (Ohio Ct. App. 2010)).

[115] State v. Shalash, No. CA2014-12-146, 2015 WL 5522176, at *6-8 (Ohio Ct. App. Sep. 21, 2015).

[116] *Id.* at *6 (citing State v. Johnston, No. 26016, 2015 WL 502322, at *5 (Ohio Ct. App. Feb. 6, 2015).

[117] *Id.* at *8.

[118] State v. Ulis, 600 N.E.2d 1040, 1041-42 (Ohio 1992) (citing State v. Hennessee, 469 N.E.2d 947, 950 (Ohio Ct. App. 1984)).

[119] *See* OHIO R. CRIM. P. 12(F); *see also* OHIO R. CRIM. P. 12(I).

[120] *Compare* Carmen v. Madden, No. L-89-285, 1990 WL 174321, *3 (Ohio Ct. App. Nov. 9, 1990) (rejecting argument that the ruling on a motion *in limine* as to subrogated medical

context. For, as we have seen, the Ohio Supreme Court has applied it in civil cases, too, when the admissibility determination was dependent on some source of law other than the Ohio Rules of Evidence.[121] And some recent appellate decisions have done the same.[122]

As we shall see in the next section, this development of Ohio law was preceded by a similar trend in the federal courts. Eventually, most federal circuit courts of appeals recognized that some motions *in limine* did present issues that could be finally decided in a pretrial hearing and held that, as to those issues; the pretrial ruling on the motion preserved the matter for appeal.[123] That trend culminated in a 2000 amendment to Rule 103 of the Federal Rules of Evidence that specifically preserves definitive pretrial rulings for appeal.

II. MOTIONS *IN LIMINE* IN THE FEDERAL COURTS

The idea that some liminal rulings are definitive (and appealable without any proffer or objection at trial) was recognized by many federal circuit courts long before the Tenth Circuit's 1993 decision in *United States v. Mejia-Alarcon*.[124] But no other decisions explored the concept as fully as *Mejia-Alarcon*, and so it is to *Mejia-Alarcon* that we will first turn.

The background of the decision was this: Lorenzo Jesus Mejia-Alarcon ("Mejia"), who was charged with various drug-related offenses, moved *in limine* to exclude evidence of a prior conviction for unauthorized use of food stamps.[125] The district court, apparently concluding that the food-stamp conviction involved a crime of dishonesty or false statement, denied the motion and ruled that the government could use the conviction to impeach Mejia if he testified.[126] At trial, Mejia did not object to the admission of his prior conviction; in fact, to lessen the evidence's impact, his attorney brought it out on direct examination.[127] Then, not surprisingly, when Mejia appealed the government contended that he waived his objection to that evidence.[128] But the Tenth Circuit disagreed.

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bills "was equivalent to the granting of a motion to suppress" because there is no provision in the civil rules for motions to suppress), *with* Riverside Methodist Hosp. Ass'n v. Guthrie, 444 N.E.2d 1358, 1361 (Ohio Ct. App. 1982) (noting, in the context of a civil case, that a motion *in limine* "can serve the same purpose as a motion to suppress evidence where the evidence either is not competent or is improper").

[121] *See, e.g.*, Hall v. Bunn, 464 N.E.2d 516, 519 (Ohio 1984); Huffman v. Hair Surgeon, Inc., 482 N.E.2d 1248, 1250 (Ohio 1985).

[122] *See, e.g.*, City of Akron v. Carter, 942 N.E.2d 409, 413-14 (Ohio Ct. App. 2010); Giannini-Baur v. Schwab Ret. Plan Servs., Inc., C.A. No. 25172, 2010 WL 5548784, at *8-9 (Dickinson, J., concurring).

[123] *See* L. Timothy Perrin, *Pricking Boils, Preserving Error: On the Horns of a Dilemma After* Ohler v. United States, 34 U.C. DAVIS L. REV. 615, 629-30 (2001).

[124] 995 F.2d 982 (10th Cir. 1993).

[125] *Id.* at 985.

[126] *Id.*

[127] *Id.*

[128] *Id.*

The Tenth Circuit acknowledged "[a] pretrial motion in limine to exclude evidence will not always preserve an objection for appellate review."[129] But in some circumstances it will: if the issue "(1) is fairly presented to the district court, (2) is the type of issue that can be finally decided in a pretrial hearing, and (3) is ruled upon without equivocation by the trial judge."[130]

Applying that three-part test, the Tenth Circuit determined that the first prong was satisfied: Mejia's attorney had adequately argued why the food-stamp conviction was not admissible as a crime of dishonesty or false statement under Rule 609(a)(2) of the Federal Rules of Evidence.[131]

Turning to the second prong, the Tenth Circuit explained that "some evidentiary issues are akin to questions of law" that can be finally decided in a pretrial hearing.[132] Others, by contrast, "are very fact-bound determinations dependent upon the character of the evidence introduced at trial."[133] Mejia's motion called for an interpretation of Federal Rule 609(a)(2), raising an issue that was akin to a question of law.[134] So Mejia was "entitled to rely on the district court's ruling that the conviction was admissible, as long as the ruling was definitive."[135]

Finally, the court found the third part of the test to be satisfied: "the district court unequivocally ruled that the prior food-stamp conviction was admissible."[136]

But why go to all that trouble? Why should courts not simply adopt a uniform rule making all liminal rulings tentative, and requiring a timely objection or proffer at trial to preserve the matter for appeal? The Tenth Circuit pointed to three reasons.

To begin with, modern procedural rules in criminal and civil cases have long since done away with the need to make a formal "exception" to preserve an issue for appeal.[137] And, while Rule 103(a)(1) of the Federal Rules of Evidence requires parties to make "timely" objections, that requirement had to be construed in light of the procedural rules making formal exceptions unnecessary.[138] So the Tenth Circuit reasoned that if the trial court had "issued a definitive ruling on a matter that can be fairly decided before trial," then requiring the party to renew the objection at trial "would be in the nature of a formal exception and therefore unnecessary."[139]

Furthermore, it would be unfair to litigants and upset their reasonable expectations. As the Tenth Circuit stated, "we believe that an absolute rule holding

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[129] *Id.* at 986.

[130] *Id.*

[131] *Id.* at 986-87.

[132] *Id.* at 987.

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Id.* at 986 (citing FED. R. CRIM. P. 51). The comparable civil rule, FED. R. CIV. P. 46, is "practically identical" to the criminal rule. *See Mejia-Alarcon*, 995 F.2d at 986.

[138] *Mejia-Alarcon*, 995 F.2d at 986 (citing Am. Home Assurance Co. v. Sunshine Supermarket, Inc., 753 F.2d 321, 324 (3d Cir. 1985)).

[139] *Id.*

that motions in limine may never preserve an objection is a trap for the unwary, who sensibly rely on a definitive, well-thought-out pretrial ruling on a subject that will not be affected by the evidence that comes in at trial."[140]

Finally, it would be a burden to the court and the jury. As the Tenth Circuit explained, "requiring the renewal of objections after a definitive ruling may be a needless provocation to the trial judge, not to mention a distracting interruption during the trial."[141]

Even so, the Tenth Circuit cautioned that prudent counsel should make proffers or renew objections at trial because many issues about evidence prove to be dependent on trial context, and a federal circuit court applying the three-part test might find that a party, by relying solely on the ruling on the motion *in limine*, waived the issue for appeal.[142]

Throughout the 1980s and 1990s most of the other federal circuit courts of appeals adopted similar tests, in criminal and civil cases alike.[143] The Fifth and Eleventh Circuits, however, continued to hold that the losing argument in a motion *in limine* must always be renewed at trial. Apparently, those courts saw so much indiscriminate use of liminal motions that they gave them little credence. As the Fifth Circuit explained:

> When a party files numerous motions in limine, the trial court may not pay close attention to each one, believing that many of them are purely hypothetical. Thus, a party whose motion in limine has been overruled must object when the error he sought to prevent with his motion is about to occur at trial. This will give the trial court an opportunity to reconsider the grounds of the motion in light of the actual—instead of hypothetical—circumstances at trial.[144]

The First Circuit adopted an intermediate position and held that a liminal objection to evidence (if overruled) must be renewed when the evidence is offered at trial, but that an offer of proof need not be made if the motion *in limine* resulted in a definitive determination that the evidence was not admissible.[145]

This lack of uniformity led to the 2000 amendment to Rule 103 of the Federal Rules of Evidence. That amendment, set forth in a new division (b) to Rule 103, expressly allows a definitive pretrial ruling on a motion *in limine* to be appealed: "Once the court rules definitively on the record—either before or at trial—a party

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[140] *Id.*

[141] *Id.*

[142] *Id.* at 988.

[143] *See, e.g.*, United States v. Brawner, 173 F.3d 966, 970 (6th Cir. 1999); Rosenfeld v. Basquiat, 78 F.3d 84, 90-91 (2d Cir. 1996); United States v. Williams, 81 F.3d 1321, 1325 (4th Cir. 1996); Thronson v. Meisels, 800 F.2d 136, 142 (7th Cir. 1986); Palmerin v. City of Riverside, 794 F.2d 1409, 1413 (9th Cir. 1986); Am. Home Assurance Co. v. Sunshine Supermarkets, Inc., 753 F.2d 321, 324 (3d Cir. 1985); Sprynczynatyk v. Gen. Motors Corp., 771 F.2d 1112, 1118 (8th Cir. 1985).

[144] Collins v. Wayne Corp., 621 F.2d 777, 784 (5th Cir. 1980); *see also* Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1504 (11th Cir. 1985).

[145] Fusco v. Gen. Motors Corp., 11 F.3d 259, 262-63 (1st Cir. 1993).

need not renew an objection or offer of proof to preserve a claim of error for appeal."[146]

Tracking the Tenth Circuit's reasoning in *Mejia* (and earlier decisions by the Third and Ninth Circuits), the Advisory Committee Notes to the 2000 amendment explain that the Federal Rules of Civil and Criminal Procedure made formal exceptions unnecessary.[147] So, if a ruling on a motion *in limine* is definitive, "a renewed objection or offer of proof at the time the evidence is to be offered is more a formalism than a necessity."[148]

The Committee Notes also explain that the 2000 amendment does not lock a trial court into its liminal ruling: the decision can still be revisited when the evidence is offered.[149] And if different facts or circumstances arise that might be sufficient to change the ruling, it is up to the losing party to bring them to the court's attention by a renewed and timely objection, proffer, or motion to strike.[150] Similarly, it is still up to trial counsel to lay a foundation for evidence allowed by the "advance ruling" (if a foundation is needed), or to object if the opposing party violates the ruling's terms.[151] Finally, as the Committee Notes cautioned, if the definitiveness of an *in limine* ruling is doubtful, counsel has a duty to clarify the point.[152]

Ingrained habits are hard to break, and so, even fifteen years after the amendment to Rule 103, some litigants continue to argue that objections (to evidence allowed by a liminal ruling) or proffers (of evidence excluded by a liminal ruling) are necessary at trial.[153] Fortunately, the rule is now clear, so federal circuit courts of appeals can dispose of those arguments in short order.[154] Predictably, too, disputes arise as to whether a ruling on a motion *in limine* truly is "definitive."[155] That is probably

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[146] FED. R. EVID. 103(b).

[147] FED. R. EVID. 103 advisory committee's notes.

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.*; *see also* Crowe v. Bolduc, 334 F.3d 124, 134 (1st Cir. 2003) ("The burden . . . was on Bolduc to clarify whether the in limine ruling was final or not, and he did not.").

[153] *See, e.g.*, United States v. Davis, 779 F.3d 1305, 1308 (11th Cir. 2015) ("The government says Mr. Davis waived the 'chaplain' objection by failing to assert the objection contemporaneously during the trial. That is plainly wrong."); United States v. Goodman, 633 F.3d 963, 966 (10th Cir. 2011) (Goodman's pretrial brief "fully proffered the essence of the proposed lay testimony prior to trial. The district court ruled unequivocally in a written order, and Goodman's counsel obviously was restricted in what testimony he could elicit from these witnesses at trial. We are therefore satisfied Goodman properly preserved his objections for appeal.").

[154] *See, e.g.*, Lawrey v. Good Samaritan Hosp., 751 F.3d 947, 951-52 (8th Cir. 2014) (straightening out intra-circuit dispute; holding that amended FED. R. EVID. 103 applies to proffers as well as objections; following several prior Eighth Circuit decisions that "held the error was preserved without requiring an offer of proof at trial, essentially recognizing that the motion in limine itself (or the opposition to the same) served as the required objection").

[155] *See, e.g.*, Tampa Bay Water v. HDR Eng'g, Inc., 731 F.3d 1171, 1178 n.5 (11th Cir. 2013) (the district court's ruling on a motion *in limine* stating that requested exclusion was

unavoidable. But at least the allocation of risk is certain: if it is not clear that a liminal ruling is definitive, the party who benefits by the order should either have it clarified or assume that it will not be sufficient to preserve the issue for appeal.

III. SIMILARITIES BETWEEN FEDERAL AND OHIO COMMON LAW ON MOTIONS *IN LIMINE*

There are many important parallels between the common-law federal test for preserving an issue for appeal by motion *in limine* and the standards that Ohio appellate courts are developing.

First, federal and state courts each acknowledge that, to be preserved, the issue must be fairly presented to the trial court. Typically, Ohio decisions have stressed the importance of a hearing on the motion, with testimony and cross-examination as needed to develop the record.[156] Notably, though, the 1995 amendment to Ohio Criminal Rule 12(F) does not make a hearing mandatory: it allows briefs, affidavits, the proffer of testimony and exhibits, "or other appropriate means" when adjudicating a pretrial motion.[157]

Second, courts in both jurisdictions recognize that the issue must be of a type that can be determined before trial. As *Mejia-Alarcon* explained, "some evidentiary issues are akin to questions of law" that can be decided in a pretrial setting.[158] In Ohio, motions raising those issues have been likened to the "equivalent of a motion to suppress evidence, which is either not competent or improper because of some unusual circumstance."[159] Or, more recently, they have been described as involving evidence that "is not dependent on a foundation being laid at trial" or that "cannot ever become relevant and admissible."[160]

Third, courts have required the ruling on the motion to be definitive and unequivocal. This requirement draws a clear line between rulings that are meant to be precautionary only and those intended to be determinative. To make that call, Ohio courts generally look at the timing of the order (right before trial or right before

"not going to happen" was "sufficiently definitive" to preserve the claim for appeal); United States v. Gajo, 290 F.3d 922, 927 (7th Cir. 2002) (holding that the district court's written order finding tape-recorded conversations to be admissible was not conditional because it "definitively settled the issue of admissibility").

[156] *See, e.g.*, State v. Ulis, 600 N.E.2d 1040, 1042 (Ohio 1992); *see also* Huffman v. Hair Surgeon, Inc., 482 N.E.2d 1248, 1251 n.5 (1985) (motion hearing held immediately before trial); State v. Johnston, No. 26016, 2015 WL 502322, at *1-2 (Ohio Ct. App. Feb. 6, 2015) (liminal ruling excluding expert testimony was made after a hearing at which the expert testified).

[157] OHIO R. CRIM. P. 12(F).

[158] United States v. Mejia-Alarcon, 995 F.2d 982, 987 (10th Cir. 1993).

[159] State v. Maurer, 473 N.E.2d 768, 788 n.14 (Ohio 1984) (quoting PALMER, OHIO RULES OF EVIDENCE RULES MANUAL 446 (1984)); *see also* State v. Vaughn, No. 683, 2003 WL 22999297, at *3 (Ohio Ct. App. Dec. 15, 2003) (describing the State's motion *in limine* to exclude defense evidence of battered child syndrome as "more akin to one to suppress, or preclude, evidence relating to an entire subject area as a 'matter of law'").

[160] City of Akron v. Carter, 942 N.E.2d 409, 413 (Ohio Ct. App. 2010).

a no-contest plea), whether the motion sought a "final" decision, as well as the terms of the ruling itself.[161]

Finally, the courts recognize that the requirements of Rule 103 of the Federal Rules of Evidence—for a "timely objection" to a ruling admitting evidence or an offer of proof when evidence that is excluded—must be harmonized with the modern civil and criminal procedural rules that eliminate the need for a formal "exception" to lay a foundation for review. In Ohio, Rule 46 of the Ohio Rules of Civil Procedure and Rule 51 of the Ohio Rules of Criminal Procedure each say that a sufficient foundation for review has been laid "whenever a matter has been called to the attention of the court by objection, motion, or otherwise, and the court has ruled thereon."[162] And, importantly, Rule 46 is the very reason the Ohio Supreme Court gave, in its 1984 decision *Hall v. Bunn*, to explain why it was unnecessary to proffer evidence of a theory of recovery that was excluded by ruling on a motion *in limine*.[163]

As this Article has shown, recent decisions by the Ninth, Second, and Twelfth District Courts of Appeals reveal that Ohio law continues to evolve, as federal law already did, toward allowing a definitive pretrial ruling on a motion *in limine* to preserve the issue for review. And that evolution has occurred despite the Ohio Supreme Court's decision in *Gable v. Village of Gates Mills*,[164] which, in the view of one commentator, appears to sanction a "one size fits all" rule to always require a timely objection at trial to preserve error.[165] But the commentator's view is unduly

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[161] *See, e.g.*, Huffman v. Hair Surgeon, Inc., 482 N.E.2d 1248, 1251 n.5 (Ohio 1985) (noting the motion *in limine* "expressly requested a final court order preventing introduction of the challenged evidence during the trial" and "the hearing on the motion was held immediately prior to trial, and that . . . motion was sustained"); State v. Johnston, No. 26016, 2015 WL 502322, at *3 (Ohio Ct. App. Feb. 6, 2015) ("[A] motion in limine can serve as the functional equivalent of a motion to suppress, which determines the admissibility of evidence with finality."); State v. Wilson, No. 22120, 2008 WL 3582812, at *2 (Ohio Ct. App. Aug. 15, 2008) (noting that the State conceded that liminal ruling excluding testimony was preserved for review after trial both "by the proffer . . . made during the hearing on the admissibility of that evidence . . . and by the nature of the State's motion in limine seeking to exclude the testimony of a party's witness, which is the equivalent of a motion to suppress"); Carlo v. Nayman, No. 84542, 2005 WL 1484031, at *3 (Ohio Ct. App. June 23, 2005) (no waiver because the motion *in limine* "expressly requested a final court order" and the motion was sustained at a hearing "immediately prior to trial"); Sixty Trust v. Bd. of Revision of Cuyahoga Cty., No. 54174, 1988 WL 87526, at *1 n.1 (Ohio Ct. App. Aug. 4, 1988) (failure to object at trial did not waive error because the motion *in limine* hearing was held right before trial and the court noted exceptions for the record).

Conversely, appellate courts applying the "one size fits all" rule to require a renewed objection or proffer at trial have struggled to justify their decision when the trial court's pretrial ruling excluding evidence seemed to be conclusive. *See, e.g.*, Elliott v. Springer, No. 88 CA 12, 1990 WL 34092, at *3 (Ohio Ct. App. Mar. 13, 1990) ("While there is some equivocal language tending to indicate a finality in the court's ruling, we must assume the court was familiar with the purpose of an *in limine* motion and intended its ruling to be preliminary only as requested in the motion.").

[162] OHIO R. CIV. P. 46; OHIO R. CRIM. P. 51.

[163] Hall v. Bunn, 464 N.E.2d 516, 521 (Ohio 1984).

[164] 816 N.E.2d 1049 (Ohio 2004).

[165] GLEN WEISSENBERGER, OHIO EVIDENCE TREATISE § 103.2, 25-26 (2014).

pessimistic. A careful reading of the *Gable* decision shows that (1) the court reviewed the *legal* decision about evidence on the merits and (2) it found the lack of objections at trial to be significant only as to the purely evidentiary issues.

The *Gable* case arose from a minor auto accident. David Gable claimed that his vehicle's airbag injured his spinal cord when it deployed.[166] He subsequently filed a products-liability suit against the vehicle's manufacturer and others.[167]

Gable was not wearing his seatbelt when the accident happened.[168] But an Ohio statute generally makes evidence of non-use of seatbelts inadmissible in a civil action.[169] Accordingly, Gable filed a pretrial motion *in limine* to preclude "any *argument*" implying that his failure to wear a seatbelt "somehow constitutes a defense."[170] Notably, he did not seek to exclude the evidence entirely. Rather, as his counsel conceded at the motion hearing, "the fact that David Gable is unbelted will come into this case. It's a function of what happened. It's the way the event will be explained. But its use and characterization as a defense is what's at issue in this motion."[171]

So, unlike a typical motion *in limine*, Gable's motion did not seek to completely preclude the seat-belt evidence. Rather, it sought (perhaps by means of a limiting instruction to the jury) to obtain a ruling *restricting* how that evidence could be characterized and used. The trial court denied the motion, stating the entry of the evidence of Gable's failure to use a seatbelt would be "permitted as to limited circumstances and for a limited purpose," but without specifying what those would be.[172]

The trial resulted in a defense verdict. But the Eighth District reversed, holding that it was prejudicial error to allow testimony about Gable's failure to wear a seatbelt.[173] The Ohio Supreme Court reversed and reinstated the trial court's verdict, explaining that Gable did not properly preserve for review "his contention that the trial court erred in the introduction of evidence and in allowing defense counsel to make improper statements throughout trial."[174]

Even so, the court then went on to consider the merits of Gable's *legal* argument about the evidence: that section 4513.263 of the Ohio Revised Code prohibited it.[175] After a lengthy analysis, the court concluded that the statute did not bar the evidence, because an exception within the statute allowed it to be used when the injured

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[166] *Gable*, 816 N.E.2d at 1051.

[167] *Id.*

[168] *Id.*

[169] OHIO REV. CODE ANN. § 4513.263 (West 2015).

[170] *Gable*, 816 N.E.2d at 1051 (emphasis added).

[171] *Id.* at 1051-52.

[172] *Id.* at 1052.

[173] *Id.*

[174] *Id.*

[175] *Id.* at 1052-53. The Eighth District found "that it was a violation of R.C. 4513.263(F)(2) to admit evidence concerning [Gable's] failure to wear his seat belt." Gable v. Village of Gates Mills, 784 N.E.2d 739, 747 (Ohio Ct. App. 2003), *rev'd*, 816 N.E.2d 1049 (Ohio 2004).

person's claim centered on the car's crashworthiness (and, in the court's view, Gable's claim did).[176]

The court then turned to Gable's *evidentiary* argument: that the seat belt evidence was irrelevant (under Evidence Rule 402) or it was unfairly prejudicial (under Evidence Rule 403).[177] Gable contended that the defense pervasively and improperly used testimony and statements on the seat belt "to destroy the jury's ability to rationally evaluate the evidence."[178] But whether the trial court committed reversible error as to those evidentiary issues, the *Gable* court explained, was "not . . . properly before this court, as Gable did not contemporaneously object to them at trial." [179]

The court in *Gable* noted that although the Federal Rules of Evidence were amended to make a definitive pretrial ruling admitting or excluding evidence sufficient to preserve the issue for appeal, Ohio's Rules of Evidence were not amended that way.[180] It concluded, however, that even under the Federal Rules of Evidence, "a contemporaneous objection would likely still have been required at trial for want of a definitive trial court ruling on Gable's motion in limine."[181]

As this analysis shows, *Gable* followed precedent. One branch of Gable's argument was a *legal* issue about evidence: whether the seat belt evidence was "not competent or improper" because of section 4513.263. And even though Gable's counsel apparently did not object at trial (or, at least, did not object enough)[182] the court did not hold that his legal argument on the evidence was waived. Rather, it considered the merits of that argument. Conversely, the other branch of Gable's argument was evidentiary only: whether proper application of Rules 402 and 403 of the Ohio Rules of Evidence precluded how the defense used the seat belt evidence at trial. And because that issue dealt with trial conduct, appellate review was dependent on proper and timely objections at trial.

To summarize: the concepts used by the federal circuit courts to create the federal test for preserving an objection by motion *in limine* are all present in Ohio law. So, too, is the rule-based rationale. Just as on the federal level, Ohio's modern rules of civil and criminal procedure make formal exceptions unnecessary. And like their federal counterparts, they allow a foundation for appellate review to be laid "whenever a matter has been called to the attention of the court by objection, motion, or otherwise" and the court has ruled on it.[183] Accordingly, as the Ohio Supreme Court has recognized, those procedural rules also make it unnecessary to renew at

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[176] *Gable*, 816 N.E.2d at 1053-54.

[177] *Id.* at 1055-56.

[178] *Id.* at 1055.

[179] *Id.* at 1056. Defense counsel also failed to ask the trial court for a limiting instruction to guide the jury as to the proper use of the seat belt evidence. *Id.*

[180] *Id.* The *Gable* court also noted that Uniform Rule of Evidence 103 had been amended in the same manner as the federal rule. *Id.*

[181] *Id.* at 1057.

[182] *Id.* at 1058. (Pfeifer, J., dissenting).

[183] OHIO R. CIV. P. 46; OHIO R. CRIM. P. 51.

trial the losing argument from a motion *in limine*, so long as the liminal ruling was not of the "precautionary" variety.[184]

Despite the similarities between Ohio and federal law, many Ohio appellate decisions continue to apply the "one size fits all" rule and refuse to consider issues decided by liminal ruling that were not later raised at trial and preserved by timely objection or proffer. The Ohio Supreme Court has not given any systematic, in-depth treatment to the matter, so the subject remains open to debate. Ohio could follow the federal model, but many of its district courts of appeals have not done so. And that raises the critical question: are they right?

IV. SHOULD OHIO FOLLOW THE FEDERAL RULE?

As we have seen, federal courts have abandoned any requirement that the losing party to the ruling on a motion *in limine* must always renew their argument at trial to preserve the issue for appeal. This development began with the common law: with individual federal trial courts (and then appellate circuits) recognizing that some liminal motions are of the "one-step type." And it culminated with a 2000 amendment to Rule 103 of the Federal Rules of Evidence, which explicitly made a "definitive" ruling on a motion *in limine* sufficient to preserve the issue for appeal.

In some appellate districts, Ohio common law is moving in the same direction. And the conceptual underpinnings for that movement are the same as they were at the federal level. But should Ohio follow the federal model? What are some potential objections to doing so? And if the federal model is followed, what difficulties may arise, and how can they be handled?

A. Arguments For and Against

It might be argued that a uniform rule to *always* make litigants preserve a losing liminal argument by a timely objection or proffer at trial is simpler and, relatedly, that if the rule is uniform parties will not make mistakes about it. But the fact remains that parties do make mistakes.[185] So do judges.[186] And the reason is

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[184] *See* Hall v. Bunn, 464 N.E.2d 516, 520 (1984).

[185] *See, e.g.*, Henderson v. Henderson 780 N.E.2d 1072, 1073-75 (Ohio Ct. App. 2002) (finding liminal decision was not appealable: there was no hearing so finality did not attach to the decision); Carlo v. Nayman, No. 84542, 2005 WL 1484031, at *4 (Ohio Ct. App. June 23, 2005) (finding no just reason for delay did not make pretrial ruling on motion *in limine* appealable; failure to contest the ruling at trial was not a waiver of the challenge because the movant expressly requested a final court order and the hearing was held right before trial; the failure to continue on to trial meant that there was no final ruling to review); Wright v. City of Columbus, No. 05AP-432, 2006 WL 391823, at *22 (Ohio Ct. App. Feb. 10, 2006) ("[A]lthough the motion [*in limine*] receives widespread use in Ohio courts, it is frequently misused and misunderstood"); Clemens v. Nelson Fin. Grp., Inc., No. 14AP-537, 2015 WL 1432604, at *4, *11 (Ohio Ct. App. Mar. 31, 2015) (stating that the judgment entry "summarized the court's earlier summary judgment rulings and reiterated the court's ruling on the motion in limine"; the trial court then granted plaintiff's motion to dismiss the remaining claims; the court of appeals held that the ruling on motion *in limine* was not appealable because the case never went to trial).

[186] *See, e.g.*, Riverside Methodist Hosp. Ass'n v. Guthrie, 444 N.E.2d 1358, 1361 (Ohio Ct. App. 1982) (trial court's liminal ruling that evidence "is inadmissible" was premature); *see also* Elliott v. Springer, No. 88 CA 12, 1990 WL 34092, at *3 (Ohio Ct. App. Mar. 13, 1990) ("While there is some equivocal language tending to indicate a finality in the court's ruling,

understandable. When a trial court has made an unequivocal pretrial ruling about evidence, and especially when the ruling is akin is to a decision on a question of law, it is natural to expect the ruling to be of the "one-step type" and controlling at trial.

But recognizing that some liminal rulings are conclusive does not mean that they all must be. In many instances a definitive pretrial ruling about evidence cannot be made. And if a pretrial evidentiary ruling should be tentative and precautionary—if there is reason to expect that it might change depending on what happens at trial—the court can easily make it that way just by saying so. The parties are then on notice that the issue has not been resolved and will not be until the evidence is presented in context at trial.

In any event, courts will be able to prevent many problems by clearly expressing the intended scope of their pretrial evidentiary rulings. And if the ruling is not clear on that point, the task of setting the record straight naturally falls to the party who bears the burden of doing something about it (whether proffering or objecting) at trial.[187]

One might also argue that if "one-step" pretrial rulings are given controlling status, some randomly filed motion *in limine* might lay an unexpected basis for reversal. That concern, as we have seen, is the reason the Fifth and Eleventh Circuits gave for sticking to the "one size fits all" rule. To be sure, parties sometimes let off volleys of motions *in limine* before trial. But how realistic is it to expect that a ruling on one of those scatter-shot motions will become the basis for an appeal about evidence that was never objected to (or offered) at trial?

We can expect that litigants will try to get definitive pretrial rulings on issues that cannot be fully determined until trial because litigants do that now.[188] But the danger that an issue deserving only of a precautionary ruling (or an overruling) will mistakenly get a definitive ruling seems unlikely, because the character of the ruling is always within the court's control.

Trial courts routinely sort through arguments to separate the stronger ones from the weaker ones. And only strong motion *in limine* arguments will qualify for the kind of in-depth treatment (full briefing, and possibly an evidentiary hearing and oral

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we must assume the court was familiar with the purpose of an *in limine* motion and intended its ruling to be preliminary only as requested in the motion"); Schultz v. Duffy, No. 93215, 2010 WL 1611111, at *3 (Ohio Ct. App. Apr. 22, 2010) (rejecting argument that liminal ruling by original judge was "the law of the case" but noting that "[a]s a matter of *practice* in this county, visiting judges assigned for the purpose of presiding over trial almost always decline to revisit pretrial evidentiary rulings" because "their lack of familiarity with the case would make any reconsideration of the original-assigned judge's pretrial rulings problematic"); Vespoli v. Encompass Ins. Co., No. 94305, 2010 WL 4351817, at *2 (Ohio Ct. App. Nov. 4, 2010) ("the trial court declined to admit the evidence with the belief that he was bound by the previous judge's ruling on the motion in limine").

[187] Conceivably, some judges might prefer to remain vague on that point, perhaps thinking that uncertainty about the definitiveness of the ruling might help motivate a settlement or plea. If that happens, it would be prudent for counsel to assume that a timely proffer or objection at trial will be required.

[188] *See, e.g.*, *Riverside Methodist*, 444 N.E.2d at 1361 (holding that the motion *in limine* improperly "sought an order that the evidence 'is inadmissible.'" Too often, "the motion is improperly applied to determine with finality the admissibility of evidence," and although a motion *in limine* "can serve the same purpose as a motion to suppress when evidence is either not competent or improper . . . [t]his should be a rare use of the motion *in limine*.").

argument) needed for a definitive one-step ruling. Middling arguments, or those that by their nature will support only a provisional two-step ruling, can be given that provisional ruling. The rest of the motions can be denied or, if the motion practice seems abusive, even ignored, because Ohio law deems as overruled a motion that hasn't been decided.[189] And, of course, a definitive liminal ruling does not mean the losing party *cannot* raise the issue again at trial. It merely means that they do not *have* to.

Another potentially troublesome subject centers on terminology—specifically, on the use of the word "finality" to describe the quality that makes some pretrial evidentiary rulings fall into the one-step category. But that word does not mean the ruling is a final appealable order or one that qualifies for an immediate interlocutory appeal.[190] In a civil case, a "final" pretrial ruling about evidence is not a judgment, and is not appealable, because it does not decide a "claim for relief."[191] It may make a claim easier to prove, harder to prove, or even impossible to prove, but it does not adjudicate the claim itself. Accordingly, an appeal before trial would be possible only if the ruling satisfies the "final order" test of section 2505.02 of the Ohio Revised Code.[192] In the criminal context, some pretrial rulings about evidence are immediately appealable by the prosecution, but the circumstances are spelled out by statute[193] and rule.[194] Further, as in a civil case, a defense appeal before final judgment in a criminal matter would be possible only if the requirements of section 2505.02 are satisfied.[195]

Tempering those concerns, though, is the stark fact that motion *in limine* practice is problematic right now. Urging Ohio to amend Rule 103 of the Ohio Rules of

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[189] *See, e.g.*, State *ex rel.* Cassels v. Dayton City Sch. Dist. Bd. of Educ., 631 N.E.2d 150, 155 (Ohio 1994) ("[W]hen a trial court fails to rule upon a pretrial motion, it may be presumed that the court overruled it.") (citing Newman v. Al Catrucci Ford Sales, 561 N.E.2d 1001 (1988)).

[190] It's worth noting that the 2000 amendment to Rule 103(b) of the Federal Rules of Evidence uses the term "definitive" to describe what makes a ruling conclusive enough to preserve for appeal the issue that was decided. FED. R. EVID. 103(b).

[191] *See* OHIO R. CIV. P. 54.

[192] *See, e.g.*, City of Akron v. Carter, 942 N.E.2d 409, 414 (Ohio Ct. App. 2010) (liminal ruling allowing use of mediation communications to prove existence of a settlement agreement in an appropriation proceeding was final and appealable "[b]ecause the order appealed was issued in a special proceeding and affected Carter's substantial rights").

In *Porter v. Sidor*, the Eighth District held that an order granting Sidor's motion *in limine* to exclude Porter's sole medical expert in a malpractice case was a final, appealable order. Porter v. Sidor, No. 84756, 2005 WL 433520, at *1 (Ohio Ct. App. Feb. 24, 2005). As the court explained, Porter needed expert testimony to sustain his burden of proof. *Id.* "The exclusion of Grischkan as a qualified expert immediately prior to the commencement of trial prevented Porter from proceeding with his case. The granting of the motion in limine thus created a final appealable order." *Id.*

[193] OHIO REV. CODE ANN. § 2945.67 (West 2015).

[194] OHIO R. CRIM. P. 12(K).

[195] *See, e.g.*, State v. Anderson, 6 N.E.3d 23, 32 (Ohio 2014) (holding that an order denying a motion to dismiss, which had been made on double-jeopardy grounds, was a final, appealable order under OHIO REV. CODE § 2505.02).

Evidence to conform to the federal model and "modern practice," Professor Glen Weissenberger bluntly wrote: "Continuing to adhere to the rigidity of the current rule seems to imply a preference for setting traps for unwary lawyers over justice for litigants."[196] And he saw no structural reason against making the change: "given the similarity in the overall structure and substance of the Federal Rules with the Ohio Rules of Evidence, there is little reason to deviate from federal developments in this regard."[197]

Finally, it is worth noting that many other jurisdictions—including each state that borders Ohio—have chosen to adopt an amended evidence rule based on the federal model.[198]

B. Distinguishing Definitive from Precautionary Rulings

So what are the hallmarks of a definitive (one-step) pretrial ruling admitting or excluding evidence? How can it be distinguished from the tentative, precautionary (two-step) variety? In federal practice, under the amended Rule 103, the party who wants to rely on the ruling can eliminate all doubt by asking (on the record) whether the ruling is definitive. But if that has not been done or cannot be done, there are other indicators to look for.

First, what reason for exclusion is the movant urging? Is it statutory or common law, or a procedural rule, or an argument from the rules of evidence? Second, what basis did the court give for its ruling? Is it akin to a legal decision? If any question of fact is involved, was it explored in a hearing with testimony and cross-examination? Third, is the on-the-record ruling expressed in terms that seem conclusive or tentative?

Sometimes a motion *in limine* can fit both categories: perhaps one ground for exclusion is statutory and another is evidentiary. The seat belt issue in *Gable* was both. Gable argued that section 4513.263 restricted how the evidence could be used and portrayed, and alternatively argued that the way the defense used that evidence made it irrelevant (under Evidence Rule 402) or unfairly prejudicial (under Evidence Rule 403).[199]

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[196] WEISSENBERGER, *supra* note 165, at § 103.2, 26.

[197] *Id.*

[198] *See, e.g.*, IND. R. EVID. 103(b) ("Once the court rules definitively on the record at trial a party need not renew an objection or offer of proof to preserve a claim of error for appeal."); KY. R. EVID. 103(d) ("A party may move the court for a ruling in advance of trial on the admission or exclusion of evidence. The court may rule on such a motion in advance of trial or may defer a decision on admissibility until the evidence is offered at trial. A motion in limine resolved by order of record is sufficient to preserve error for appellate review. Nothing in this rule precludes the court from reconsidering at trial any ruling made on a motion in limine."); MICH. R. EVID. 103(a) ("Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."); PA. R. EVID. 103(b) ("Once the court rules definitively on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error for appeal."); W.VA. R. EVID. 103(b) ("Once the court rules definitively on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error for appeal.").

[199] Gable v. Village of Gates Mills, 816 N.E.2d 1049, 1052-53, 1055-56 (Ohio 2004).

And so were the words of a doctor, which were at issue in the 2013 Ohio Supreme Court decision *Estate of Johnson v. Randall Smith, Inc.*[200] There, after a pretrial evidentiary hearing on a motion *in limine*, the trial court ruled that Ohio's "apology statute"[201] barred evidence that the defendant doctor told his patient (who was suffering from surgical complications) "I take full responsibility for this. Everything will be okay."[202] But even if the statute did not apply, the court still had to decide whether, under Evidence Rule 403(A), the probative value of the doctor's statement was substantially outweighed by the danger of unfair prejudice.[203]

How should these two-category motions be treated? As we have seen, even under current Ohio law, there is a supportable argument that a pretrial ruling applying the relevant *statute* to the evidence (whether resulting in its inclusion, in *Gable*, or its exclusion, as in *Estate of Johnson*) preserves the statutory issue for review. And that is so because the admissibility determination hinges on something outside the scope of the rules of evidence.

With regard to the purely evidentiary determination, under federal law that issue would be preserved for appeal as well, so long as the ruling on the motion *in limine* was definitive and on the record. And one concurring Ohio appellate opinion has suggested that a pretrial ruling on an evidence-rules subject can be sufficient to preserve the issue for appeal, provided that the ruling is definitive enough.[204] To date, though, no appellate panel majority in Ohio has gone that far.

C. Appeals in Cases That Don't Go to Trial

In most circumstances, a ruling on a motion *in limine* cannot be appealed until there has been a final judgment in the case. And the principal focus of this Article has been on what happens to a liminal ruling after a trial: the Article's thesis is that a definitive ruling on a liminal motion should qualify for one-step treatment and be appealable after final judgment even though the motion was not renewed during the trial.

But what of the cases that don't go to trial? Only a small percentage of cases are tried. In 2013, about 2.5% of the criminal cases filed in Ohio's common pleas courts

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[200] 989 N.E.2d 35 (Ohio 2013).

[201] OHIO REV. CODE ANN. § 2317.43 (West 2015).

[202] *Gable*, 989 N.E.2d at 37.

[203] *See id.* at 38.

[204] Giannini-Baur v. Schwab Ret. Plan Servs., No. 25172, 2010 WL 5548784, at *8 (Ohio Ct. App. Dec. 29, 2010) (Dickinson, J., concurring) (concluding that a ruling that excluded evidence of an employee's sexual orientation as inadmissible under the Evidence Rule 403 balancing test was definitive: the record shows that the trial court "became convinced that the evidence in question could not be introduced under any circumstances"); *see also* Scott v. Tibbels, No. 3:12-CV-146, 2013 WL 3579925, at *3-4 (S.D. Ohio July 11, 2013) (applying Ohio law in habeas case; Scott did not object at trial to the limits placed on his cross-examination of Westbrook, but the federal court concluded that the issue was preserved for appeal because "the matter of cross-examining Westbrook about her motivation for cooperating with police" was addressed in a pretrial hearing and the state court, at trial, had "stated its unwillingness to consider the issue further": in the federal court's view, "it would put form over substance to find that Scott failed to object to the trial court's ruling.").

were decided by a jury.[205] For civil cases, the figure was even lower: 1.2%.[206] Those numbers indicate that it is important to have adequate methods for narrowing down and disposing of legal issues before trial. And how a trial court's use of those methods may be appealed depends on whether the case is criminal or civil.

1. Criminal Cases

In criminal cases, the elemental unit of a prosecution is the "offense" charged (typically referred to as a "count").[207] And, in a pretrial motion, a defendant may seek to have charges dismissed as to one or more offenses.[208] But pretrial motion practice is not restricted to offenses: a defendant may also challenge the admissibility of discrete items or categories of evidence.

The traditional means for applying the law to evidence before trial was through a ruling on a motion to suppress. But under Rule 12(C)(3) the only reason to suppress evidence was "on the ground that it was illegally obtained."[209] As we have seen, though, courts broadened this concept to include a "functional equivalent" of a motion to suppress. By doing so, they were able to make pretrial rulings on motions that sought to preclude evidence for some other law-based (usually statutory) reason. Yet, deciding whether a given motion did or did not fit into the "functional equivalent" category could be problematic. And neither the original suppression concept nor the broader one could encompass a prosecutor's legal challenge to the admissibility of defense evidence.

Many of those problems were resolved by the 1995 amendments to Rule 12. The purpose of those amendments was to "encourage the state and the defendants to seek pretrial resolution of critical evidentiary . . . issues,"[210] to describe how those motions are to be adjudicated,[211] and to clarify how rulings on pretrial evidentiary motions could be appealed.[212] Seemingly, the amended Rule 12 now provides a clear path for a court to hear a pretrial motion *in limine* and apply the law to evidence, and for the parties to appeal the court's ruling, so long as subject of the ruling was "capable of determination without the trial of the general issue" and the case was

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[205] THE SUPREME COURT OF OHIO, 2013 OHIO COURTS STATISTICAL SUMMARY 29 (2014), http://www.supremecourt.ohio.gov/Publications/annrep/13OCS/summary/trend.pdf.

[206] *Id.*

[207] *See* OHIO R. CRIM. P. 3 ("The complaint is a written statement of the essential facts constituting the offense charged."); *see also* OHIO R. CRIM. P. 7(B) (an indictment or information shall "contain a statement that the defendant has committed a public offense specified" in the document).

[208] *See, e.g.*, State v. Marrero, No. 09CA009738, 2010 WL 3075625, at *3-4, *13-14 (Ohio Ct. App. Aug. 9, 2010) (ruling on a pretrial motion, the trial court dismissed all but one of the offenses charged in a supplemental indictment).

[209] OHIO R. CRIM. P. 12(C)(3).

[210] OHIO R. CRIM. P. 12 staff notes to 1995 amendment.

[211] OHIO R. CRIM. P. 12(F).

[212] OHIO R. CRIM. P. 12(I) (appeal by the defense after a no-contest plea); OHIO R. CRIM. P. 12(K) (pretrial appeal by the state if the ruling destroyed any reasonable possibility of an effective prosecution).

resolved by a no-contest plea.[213] And the prosecution may immediately appeal an order "suppressing or excluding evidence," provided that the requirements of Rule 12(K) and section 2945.67 of the Ohio Revised Code are met.

2. Civil Cases

In civil cases, the basic element is a "claim." And the Ohio Rules of Civil Procedure provide two methods of pretrial challenge to a claim. Under Rule 12(B)(6), a party may move to dismiss a claim on the grounds that the pleaded facts are insufficient "to state a claim upon which relief can be granted."[214] And under Rule 56(C), summary judgment may be granted if the filed evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[215] Like a motion to dismiss, a summary judgment motion operates at the level of a legal claim or part of a claim.[216] And a ruling granting either motion is interlocutory—although the ruling disposes of the claim at issue as a matter of law, it is (generally) not appealable until after a final judgment on all claims.[217]

Neither of those motions, however, is precise enough to reach a discrete item or category of evidence. Yet, as we have seen, sometimes the admissibility of a particular piece of evidence is adjudicated as a matter of substantive or procedural law. In those instances, there is a need for some kind of interlocutory order, analogous to a partial summary judgment, by which a trial court can apply the law to that evidence. And the pretrial ruling on a motion *in limine* has evolved to fill that role.

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[213] Application of the amended Rule 12 has been uneven. *See, e.g.*, State v. Brock, No. 5-06-27, 2006 WL 3702660, at *2 (Ohio Ct. App. Dec. 18, 2006) (citing pre-amendment case law) ("A party may not plead no-contest to preserve for appellate review the trial court's ruling on a motion in limine. In such an event there remains no evidentiary ruling upon which error may be predicated."). Two recent decisions illustrate this problem. *Compare* State v. Shalash, No. CA2014-12-146, 2015 WL 5522176, at *6-8 (Ohio Ct. App. Sep. 21, 2015) (liminal ruling to allow expert testimony was appealable after a no contest plea), *with* City of Columbus v. Zimmerman, Nos. 14AP-963, 14-AP-964, 2015 WL 5086367, at *1-2 (Ohio Ct. App. Aug. 27, 2015) (Zimmerman contended that under section 4511.192(A) of the Ohio Revised Code only the arresting officer could read BMV Form 2255 to the person being arrested; the trial court denied her motion *in limine* and she entered a no contest plea; the appeals court held that because the issues raised in the motion were not reached during trial, they could not be considered on appeal).

[214] OHIO R. CIV. P. 12(B)(6).

[215] OHIO R. CIV. P. 56(C).

[216] Rule 56(A) and Rule 56(B) each provide for summary judgment "as to all or any part of a claim, counterclaim, cross-claim, or declaratory judgment action." OHIO R. CIV. P. 56(A), (B).

[217] *See, e.g.*, Pattison v. W.W. Grainger, Inc., 897 N.E.2d 126, 126 (Ohio 2008) ("When a plaintiff has asserted multiple claims against one defendant, and some of those claims have been ruled upon but not converted into a final order through Rule 54(B), the plaintiff may not create a final order by voluntarily dismissing pursuant to Rule 41(A) the remaining claims against the same defendant."); Miklovic v. Shira, No. 04-CA-27, 2005 WL 1503628, at *1, *3-4 (Ohio Ct. App. June 20, 2005) (order granting summary judgment on five of the six pleaded claims was not final and appealable).

Turning to our question about appealing a liminal ruling in a civil case that does not go to trial, we begin by considering how the case was resolved. And there are two ways (short of trial) to resolve a civil case during or after the evidence-gathering stage: a settlement or summary judgment.[218]

If there has been a settlement, there will be no appeal of the decision on a motion *in limine*. The settlement will have resolved the entire controversy,[219] and presumably the parties assessed their chances of winning or losing an appeal of the liminal ruling as they decided what settlement terms to accept.

And what if there has been a summary judgment? Here, there are two questions to consider. First, does a ruling on a motion *in limine*—which by its nature regulates evidence at trial—even survive to be appealed if a case has been resolved by summary judgment? And second, can a liminal ruling excluding evidence be used as a *basis* to grant a summary judgment?

As to the first question, given the principle that interlocutory orders merge into (and become appealable with) a final judgment, courts agree that the interlocutory decision on a motion *in limine* is appealable after a case has been resolved by summary judgment.[220]

As to the second question, the answer is uncertain. In *Brown v. Mabe*, the First District Court of Appeals decided that a liminal order excluding medical expert evidence (that was needed to prove an element of a claim) *could not* be used as the basis for a summary judgment.[221] It reasoned that because "[a] motion in limine is a tentative ruling for trial purposes" and would not conclusively preclude the evidence until a trial happened, the ruling could not support a summary judgment before trial.[222] But in *Lillie v. Meachem*, the Third District Court of Appeals treated the ruling on a motion *in limine* excluding evidence of safety regulations as conclusive and considered it on the merits, using the abuse of discretion standard of review applicable to decisions to admit or exclude evidence.[223] And the Eleventh District Court of Appeals used similar reasoning to hold that a nurse's opinion, which had

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[218] Although it does not resolve the case, dismissal without prejudice is a third alternative to a trial. At the federal level, it's possible to dismiss a civil case while reserving the right to appeal a liminal decision that excluded expert testimony. *See, e.g.*, Lee v. Smith & Wesson Corp., 760 F.3d 523, 524-26 (6th Cir. 2014). It seems unlikely that an Ohio court would allow that practice. But if expert evidence is necessary to prove a claim, a liminal order excluding that evidence prevents a judgment; thus, it is final and appealable before trial. *See* Porter v. Sidor, No. 84756, 2005 WL 433520, at *1 (Ohio Ct. App. Feb. 24, 2005).

[219] *See, e.g.,* Clermont Cty. Transp. Improvement Dist. v. Smolinski, No. CA2014-10-071, 2015 WL 4716550, at *4 (Ohio Ct. App. Aug. 10, 2015) (settlement agreement resolved all disputes, including the defense's challenge to the trial court's decision granting plaintiff's motion *in limine*).

[220] *See, e.g.*, Brown v. Mabe, 865 N.E.2d 934, 936 (Ohio Ct. App. 2007); Lillie v. Meachem, No. 1-09-09, 2009 WL 2987182, at *3 (Ohio Ct. App. Sept. 21, 2009). *But see* Brannon v. Austinburg Rehab. & Nursing Ctr., 943 N.E.2d 1062, 1072 (Ohio Ct. App. 2010) (Grendell, J., dissenting) ("The granting of summary judgment in this case ended the matter, and no trial occurred; therefore, this court has no error to review as to the motion in limine.").

[221] *Brown*, 865 N.E.2d at 936-37.

[222] *Id.* at 937.

[223] *Lillie*, 2009 WL 2987182, at *3-6.

been excluded by a liminal ruling made on statutory grounds, was legally sufficient to support a claim of ordinary negligence and so defeat a summary judgment.[224]

CONCLUSION

As we have seen, Ohio appellate courts are divided as to whether a ruling on a motion *in limine* that knocks out evidence needed to prove an element of a claim can be used as a basis for summary judgment. Those decisions, and the conflicts in results and reasoning they display, are a microcosm of the larger problem this Article is meant to address.

Some motions *in limine*, and the rulings they entail, depend on issues that are purely evidentiary in nature. As to those issues, the prevailing idea about liminal rulings being tentative and precautionary in nature makes sense, because it's usually not possible for a court to make a definitive decision without seeing the evidence in context at trial.

But other motions *in limine* may raise issues far outside the scope of the rules of evidence. In those instances, even though the ruling operates on evidence (by admitting it or excluding it), the *reason* for the court's decision is not evidentiary: it lies elsewhere—in a statute, in a procedural rule, in the common law. As to those issues, the prevailing idea makes no sense, because a definitive decision can be made regardless of what the other evidence at trial might be.

There also is a middle category of issues that do come within the scope of the rules of evidence (such as the qualification of an expert to testify), but are decided by the court on a stand-alone basis, typically in a hearing under Rule 104 of the Ohio Rules of Evidence. And there, again, the "tentative and precautionary" concept does not apply: if a witness did not qualify as an expert under Ohio Evidence Rule 702, nothing that happens at trial is going to change the outcome of the liminal decision.

So why do Ohio district courts of appeals tend to lump all these issues together and require an objection or proffer at trial, no matter what the basis for the liminal motion and ruling? Perhaps part of the reason is a labeling problem: judges have been conditioned to think that *all* liminal rulings must be tentative and precautionary, and if a motion to exclude evidence (as a matter of substantive or procedural law) is labeled as a motion *in limine*, the appeals court will act as if the issue presented by the motion was purely evidentiary. And that labeling problem leads to a second consequence. Appellate courts normally try to decide an appeal on the narrowest possible grounds, so if the court can supportably dispose of an issue by finding that it was waived (for failure to timely object or proffer), it will not be inclined to reach the issue's merits. Finally, there is an advocacy problem: if appellate lawyers are unable to present cogent arguments to explain why a liminal ruling was definitive and therefore sufficient to preserve an issue for appeal, the courts can't be expected to depart from the well-trodden path.

One of the goals of this Article is to lay some groundwork for better arguments on that point: to show why the "one size fits all" rule requiring an objection or proffer at trial is misplaced when applied to a motion *in limine* that is predicated on substantive or procedural law. By recognizing that some liminal motions raise issues

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[224] *Brannon*, 943 N.E.2d at 1066-69. A dissenting judge believed the ruling on the motion *in limine* was not itself reviewable. *Id.* at 1072 (Grendell, J., dissenting). Paradoxically, though, the same judge saw no problem with using the *result* of the liminal ruling, which excluded the nurse's testimony, as a basis for granting summary judgment to the defense. *Id.*

that warrant (and obtain) a definitive, conclusive pretrial ruling, the Ninth, Second, and Twelfth Appellate Districts have gotten their analytic method onto the right track.[225] It is to be hoped that other Ohio courts of appeals will follow their lead (and the common-law model of the federal courts, as exemplified by the Tenth Circuit Court of Appeals' opinion in *Mejia-Alarcon*) when the circumstances justify it.

Finally, it is no accident that the federal courts and many states, including each of Ohio's neighbors, have all amended their evidence rules to specify that a definitive pretrial ruling on a motion *in limine* will preserve for appeal the issue that was decided. Our state, too, should give that idea full and careful consideration.

[225] The Third District may be on that path as well. That court treated a ruling on a motion *in limine* as conclusive when reviewing it, on the merits, to see if it was sufficient to support a summary judgment. *Lillie*, 2009 WL 2987182, at *3-6. If a liminal ruling can be deemed conclusive for summary-judgment purposes, it should be treated the same in a post-trial appeal.