STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY PELLEGRINO, Individually and as Personal Representative of the Estate of SHIRLEY ANN PELLEGRINO,

Plaintiffs-Appellees,

v

AMPCO SYSTEMS PARKING,

Defendant-Appellant.

UNPUBLISHED
May 27, 2008

No. 274743
Wayne Circuit Court
LC No. 03-325462-NI

Before: O'Connell, P.J., and Borrello and Gleicher, JJ.

O'CONNELL, P.J. (*concurring in part and dissenting in part*).

I concur with the majority opinion that the trial court committed multiple errors during the course of this jury trial. I disagree with the majority opinion that these errors were harmless. Many of these errors standing alone are grounds for reversal. The cumulative effect of these errors dictates that the parties are entitled to a new trial before a different trial court judge. A foundation of the American jury system is that both plaintiffs and defendants are entitled to a fair trial before a fair and impartial jury. Based upon the numerous errors committed by the trial court, defendant received neither a fair trial nor a fair and impartial jury. I would reverse the decision of the trial court and remand for a new trial before a new judge.

Four Categories of Errors

There are four broad groupings of errors committed by the trial court: (1) error in jury selection, including improper denials of challenges for cause and peremptory challenges; (2) refusing to exclude the reading of a poem to the jury that had as its sole purpose evoking sympathy from the jury, having knowledge from a prior reversal that the reading of the same poem had been previously determined to be reversible error both by this Court and our Supreme Court; (3) errors in expert testimony, including permitting medical experts to testify when they were not qualified to testify in the field that they gave expert medical opinions (this error is extremely egregious because a panel of this Court had previous ruled that Ph.D. Sewick was unqualified to testify pursuant to MCL 500.3135(2)(a)(ii)), and a complete failure of the trial court's role as a gatekeeper under MRE 702 and MCL 600.2955(1); and (4) intentionally revising the standard jury instructions to allow plaintiffs to recover for injuries and damages that

merely "related to" but were not necessarily "caused by" defendant's negligence. Based upon these errors, either individually or cumulatively, defendant is entitled to a new trial.

Fair and Impartial Jury

Defendant first argues that it did not receive a fair and impartial jury based on errors committed by the trial court during jury selection. I agree. In my opinion, the trial court erred multiple times throughout jury selection, the most egregious of which were its failure to strike juror Church for cause, its flawed *Batson*[1] analysis, and its failure to excuse juror Greene peremptorily.

When the parties began exercising their challenges, defendant attempted to challenge juror Church for cause. Juror Church was a Caucasian female who cried during voir dire and sympathized with the decedent's family because her own grandmother had recently died. After defendant challenged her, the trial court ordered further questioning. Juror Church indicated that she would try her best not to be influenced by her loss and that she could be fair.

"It is grounds for a challenge for cause that the person . . . is biased for or against a party or attorney" or "shows a state of mind that will prevent the person from rendering a just verdict." MCR 2.511(D)(2) and (3). Although the decision to grant a challenge for cause is within the trial court's discretion, the trial court must not act arbitrarily. *Poet v Traverse City Osteopathic*, 433 Mich 228, 236-237; 445 NW2d 115 (1989). It must balance its discretionary power "with a litigant's right to a fair trial" and should err on the side of the requesting party where the concern is reasonable. *Id.* at 238. "There are simply too many unbiased and otherwise qualified individuals eligible to sit on any given jury to quibble over persons who have voluntarily articulated a grave potential for bias." *Id.* at 238-239.

> Where there is a sufficient reason to believe that at the beginning of the trial the prospective juror is not indifferent but favors one of the litigants over the other *or* may be unconsciously influenced by considerations in addition to the evidence presented at trial and the instructions of law, the juror must be dismissed for cause. [*Id.* at 239 (citation omitted, emphasis in *Poet*).]

That juror Church cried during voir dire and could not affirmatively state that she would not be influenced by the death of her grandmother was a more than sufficient reason to dismiss her for cause. Her simple statement that she could be fair could not overcome the evidence to the contrary.[2] See *People v Roupe*, 150 Mich App 469, 474-475; 389 NW2d 449 (1986). Because the indicia of the juror's impartiality did not outweigh her equivocated and qualified answers and her evident bias, the trial court abused its discretion. *Id.*

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[1] *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).

[2] Indeed, it is the rare person who admits before a judge, counsel, and a jury panel that they would not be fair.

Such an improper denial of a challenge for cause was error and can be grounds for automatic reversal. *Id.* at 240-241. In order to qualify for reversal, our Supreme Court laid out several requirements:

> (1) the court improperly denied a challenge for cause, (2) the aggrieved party exhausted all peremptory challenges, (3) the party demonstrated the desire to excuse another subsequently summoned juror, and (4) the juror whom the party wished to later excuse was objectionable. [*Id.* at 241.]

However, given the bizarre nature of the additional errors that occurred during jury selection, these factors are not easily applied. In the present case, defendant attempted to strike juror Church for cause. Having been denied the challenge, defendant used a peremptory strike, leaving him only two others. Defendant did demonstrate a desire to excuse another juror—juror Greene—but she was not one subsequently called, but rather one from the original panel. Additionally, it was not defendant's running out of peremptory challenges that kept him from removing the objectionable juror, but because the trial court denied defendant's peremptory challenge against her.

The record clearly evidences that juror Greene was objectionable. Juror Greene indicated that plaintiffs' counsel's mentioning of a jury award of $10 million, "it clicked into my mind [something] about my mom and how I appreciated [the money she left me]." She was grieving her recently deceased mother. One of her two deceased husbands had died in an automobile accident. She was personally involved in a terrifying automobile accident as a child and had witnessed other horrific automobile accidents. It is difficult to imagine a more biased juror to decide a personal injury and wrongful death action involving a vehicle accident. Plaintiffs' counsel argued that if juror Greene were really so biased, defendant should have stricken her for cause. However, the record reveals that any attempt by defendant to strike juror Greene for cause would have been futile. Given the trial court's response to defendant's attempt to strike juror Church for cause, it was clear that the trial court would not grant it as to juror Greene either.

Under the circumstances, I believe that the trial court's actions in denying defendant's challenge for cause against juror Church resulted in the exact type of prejudice found in *Poet* to require reversal even though the factors are not, strictly speaking, exactly the same.

When defendant's counsel attempted to use a peremptory challenge to excuse juror Greene, plaintiffs' counsel objected, asserting a *Batson* challenge. Plaintiffs' counsel alleged that defendant's counsel was only excusing African-American jurors. *Batson* established a three-step analysis for use by trial courts to determine whether a peremptory challenge was based on race. *Snyder v Louisiana*, 128 S Ct 1203, 1207; 107 L Ed 2d 175 (2008).

> (1) the complaining litigant must make a prima facie showing of discrimination, (2) the burden then shifts to the party exercising the peremptory challenge to articulate a race-neutral rationale for striking the juror at issue, then (3) the court must determine whether the complaining litigant carried the burden of proving

> "purposeful discrimination." [*Harville v State Plumbing & Heating, Inc*, 218 Mich App 302, 319; 553 NW2d 377 (1996)].

Plaintiffs' counsel made the *Batson* challenge, stating, "No articularable [sic] basis." After excusing the jury, the following exchange took place:

> *The Court*: The motion is to exclude juror number one and there's an objection based on, that the challenge is based solely on race.
>
> *Plaintiff's counsel*: That's correct and—
>
> *The Court*: Well, let me find out why he wants to excuse her. You have to articulate why.

The trial court has already committed error at this point, as it "did not require plaintiff to make a prima facie showing of discrimination, a required first step." *Clarke v Kmart Corp*, 220 Mich App 381, 383; 559 NW2d 377 (1996).

> [T]he race of a challenged juror is not enough to make out a prima facie case of discrimination. The mere fact that a party uses one or more peremptory challenges in an attempt to excuse minority members from the jury venire, is not enough to establish a prima facie showing of discrimination.
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> Furthermore, even assuming that plaintiff[s] could have [their] burden of establishing a prima facie showing of discrimination, [I] believe that the trial court abused its discretion in determining that defendant's reasons for seeking dismissal of the challenged jurors were not race-neutral. The party providing the race-neutral reason is not required to justify the exercise of the peremptory challenge to the same degree one must justify a challenge for cause. Rather, the party must articulate a neutral explanation related to the particular case to be tried. The United States Supreme Court has stated that unless a discriminatory intent is inherent in the reason offered, which does not have to be persuasive or even plausible, the reason will be deemed race-neutral. [*Id.* at 383-384 (citations omitted).]

As was true in *Clarke*, defendant provided a race-neutral reason:

> The basis for this, we have Mrs. Greene, all of her testimony—
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> * * *
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> I asked her followup [sic] questions. And I asked her about the first husband and the second husband [who had both died, one in an automobile accident], she described at the intensity of the loss, of her passion for loss wasn't as great as it was for the loss of her mom who was five years ago. This lady told me in response to the question that she grieves still today, her grief is at the same level that it was the day of her mom's death, okay. It is on that basis, I might say

> to the Court that I excluded juror number two [Amy Church, a Caucasian female], based on her mom recently passing away and the intensity of her feelings. It is the exact same reason as to juror number one [Greene]. [Tr I, 134]

Review of the voir dire transcript reveals this to be the case. As noted above, after being denied a challenge for cause, defendant exercised its first peremptory challenge to excuse Amy Church, a Caucasian female who cried during voir dire and sympathized with the decedent's family because her own grandmother had recently died. His second peremptory challenge was used to excuse Tara Chapas, an African-American female who suggested that she was sympathetic to plaintiffs' family and had recently found out that her own father had died. This is a more than sufficient, race-neutral reason under *Purkett v Elem*, 514 US 765, 769; 115 S Ct 1769; 131 L Ed 2d 834 (1995). Moreover, the basis for defense counsel's peremptory challenge of juror Greene was consistent with his explanations for challenging the other two jurors, one black and one white, who he sought to exclude peremptorily. Namely, he was removing individuals who had recently lost family members and who might still be grieving or sympathetic to plaintiffs based on their own personal experiences with the death of loved ones.

Having erred in failing to require plaintiffs' counsel to make a prima facie showing, and having failed to recognize that under the United States Supreme Court precedent the reason stated by defendant's counsel was race-neutral, the trial court then erred by utterly failing to make any determination on the record that plaintiffs' counsel had met his burden of proving "purposeful discrimination." The trial court's complete and utter failure to follow *Batson* was also contrary to the rulings of our own Supreme Court, which mandated the trial courts to "meticulously follow *Batson*'s three-step test" and "*strongly* urge[d] our courts to *clearly* articulate their findings and conclusions on the record." *People v Knight*, 473 Mich 324, 339; 701 NW2d 715 (2005) (emphasis in original).

Perhaps most disconcerting, however, was the trial court's continuous and adamant refusal, both at trial and during post-trial motion hearings, to make a finding of discrimination as required by *Batson* and *Knight*: "Well, I'm not going to do that. So if that's the requirement then I guess I'll have to be told that. If that's the requirement, I'm saying *Batson* is stood on its head. I'm not going to make findings that a lawyer like [defense counsel] is a racist. I'm just not going to do it. I guess, what do that have to do, remove me from office[?]" Then later, the trial court stated: "I guess I'm in sufficient hot water with the appellate courts to say I'm not going to do that. . . . Now, if the Supreme Court rules that way, I suspect they would not but if they do, then I'll have to decide whether I can function as a judge any longer."

The trial court's refusal to follow the law was not confined to *Batson*. During jury selection, defendant's counsel also brought to the trial court's attention a Michigan Supreme Court order regarding what ultimately became MCR 2.511(F). Our Supreme Court had already stated in *Knight*, *supra*, that "the right to a fair and impartial jury does not entail ensuring any

particular racial composition of the jury."[3] *Id.* at 349. The footnote to the statement specifically notes that a "proposed court rule would expressly prohibit the use of peremptory challenges to achieve a racially proportionate jury" and cites the exact language now found in MCR 2.511(F). *Id*. at 349, n 17. The trial judge not only admitted that he told counsel before jury selection that he "was interested and it would be a goal of [his] to have a jury that represented the racial composition of this county," but also stated that he would refuse to adhere to MCR 2.511 unless ordered to do so:

> I am until either removed from the bench by the disciplinary committee or ordered to have a new trial, I am going to seek to have this proportional representation on the juries that hear cases in this court. I can't be clearer. I'm going to do it until I'm ordered not to do it and then when I'm ordered not to do it, then I'll have to decide what's next for me.

For a trial judge to state on the record that he refuses to follow the law and will continue to do so unless removed from office does more than imply prejudice in the proceedings, it admits them. I can think of no ground for reversal more clear than that.

Having erred in its *Batson* analysis, the trial court then committed additional error by not permitting defendant to exercise a peremptory challenge against juror Greene. As noted above, the *Batson* analysis revealed a race-neutral for defendant's peremptory challenge, and the trial court refused to make a finding of purposeful discrimination. Where a *Batson* analysis reveals that the juror is not being excluded on the basis of race, there is no reason for the trial court not to grant the peremptory challenge. To deny a peremptory challenge against a juror who is clearly biased where there is no improper discrimination under *Batson* falls outside the range of principled outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). Even assuming that the trial court believed that defense counsel was exercising his challenges based on race but that it was refusing to make such a statement on the record, the trial court still clearly abused its discretion. There was insufficient evidence in the record to support a *Batson* violation, making any such decision outside the range of principled outcomes. *Id.*

In determining whether the trial court's error in denying defendant's peremptory challenge is reversible error, I do not contest the majority's conclusion that under *People v Bell*, 473 Mich 275, 293; 702 NW2d 128, amended 474 Mich 201 (2005), this case does not involve a *Batson* error giving rise to automatic reversal, but is reviewed under a harmless error standard.[4] I disagree with the majority that any of the above errors is harmless.

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[3] This statement is consistent with the United States Supreme Court's ruling that "[r]ace cannot be a proxy for determining juror bias or competence." *Powers v Ohio*, 499 US 400, 410; 111 S Ct 1364; 113 L Ed 2d 411 (1991). Decisions about jurors may not be made based on race, good intentions notwithstanding.

[4] I agree the case does not implicate *Batson*, but do not concede that *Bell* is applicable. The *Bell* Court admitted that it did not need to address whether a denial of a peremptory challenge was (continued…)

Leaving such a clearly biased juror on the panel is not harmless. Our legal system is crafted around the power of a single juror. In criminal trials, our system imbues a single juror with the authority to stand fast and create a hung jury such that another trial is required. Additionally, our culture is filled with examples exhorting the power of a single juror. In *Twelve Angry Men*, a single juror continually voting not guilty in a room of 11 other contentious jurors who are certain the defendant is guilty continues to discuss the evidence with the other 11 jurors until they all have reasonable doubt and render a not guilty verdict. In *Runaway Jury*, a single biased juror with an agenda to make the defendant pay manages to sway the jury into rendering an excessively high verdict for a plaintiff in a wrongful death claim. Indeed, the power of a single juror is the very premise behind *Poet*:

> Despite the fact that the jury's verdict in this case was [unanimous], there is, of course no way for this Court or the lower courts to know how [the questionable juror's] general presence, personal knowledge, or expertise in the area explored at this trial, affected the other jurors during their deliberations. [*Poet, supra* at 252.]

In the present case, instead of excusing juror Greene, the trial court forced defendant to try a wrongful case before a juror who had expressed strong emotions over the death of three close loved ones and who was still in the grieving stage and who had both personally experienced and witnessed terrifying and emotionally trying accidents. "[T]he risk of influence was unacceptably high, if not imminent." *Id.* Because such an obviously biased juror was left on the panel, the error cannot be considered harmless. The verdict must be reversed and a new trial granted.

The Death "Organ Donation" Poem

Defendant's second argument on appeal is that plaintiffs' counsel read an irrelevant poem to the jury during closing arguments and that the poem's sole purpose was to appeal to the sympathies of the jury. I agree.

During closing argument, counsel for plaintiffs read an "organ donation" death poem. In *Porter v Northeast Guidance Ctr, Inc*, unpublished per curiam opinion of the Court of Appeals, issued October 5, 2001 (Docket Nos. 213190, 217974, 223647, 223648) (*Porter I*), plaintiff's counsel read the very same poem, and the Court of Appeals reversed and remanded for a new trial on damages.

The *Porter I* panel ruled that reading of this poem injected reversible, prejudicial error into the proceedings:

(…continued)

subject to automatic reversal for the resolution of the case. *Id.* at 293. Such an admission might make the analysis simply dicta. However, in light of my conclusion that the denial of the peremptory challenge in this case was not harmless error, rather than belabor the point, I will accept the majority's standard of review.

> The issue of organ donation was an emotional one. It was not relevant to any measure of damages. It was utilized to invoke the sympathies of the jury. Therefore, the error in its admission was not harmless. [*Id.* at 6.]

Our Supreme Court modified the ruling to require a new trial not just on damages, but also on liability and comparative negligence, leaving intact the ruling that plaintiff's reading of the organ donation poem was so inflammatory that a new trial for damages was warranted. *Porter v Northeast Guidance Ctr, Inc*, 467 Mich 901; 653 NW2d 183 (2002) (*Porter II*). The *Porter* cases were decided in 2002, approximately four years before this case was tried. Both *Porter I* and *Porter II* stand for the proposition that it is reversible error to attempt to invoke the sympathies of the jury by reading this poem. The trial court should have been aware of the edict in *Porter*, i.e. that the subject of the poem, organ donation, does not shed any light on plaintiffs' damages, particularly when Shirley Pellegrino's organs were not donated.[5]

The majority attempts to distinguish *Porter* by saying that this Court ruled, not that reading the poem itself was improper, but that testimony regarding the victim's organ donation was inadmissible. This very narrow reading misses the forest for the trees. Even though the victim in *Porter* donated her organs, this Court held that the testimony related to organ donation was irrelevant to the issues involved, and its singular purpose was for use in conjunction with the poem to inflame the jury. Therefore, it held that none of it—the testimony or the poem—should have been admitted. The majority attempts to say that because Shirley Pellegrino did not donate her organs, the poem was somehow less inflammatory, thereby rendering its admission harmless. Given that organ donation is even less relevant in the present case than in *Porter*, I find it makes the poem more inflammatory, not less. Without any connection at all to the case, the sole purpose of the poem is clearly to make the jurors feel bad for plaintiff and award higher damages. This is the modus operandi of plaintiffs' counsel—to use irrelevant, inflammatory tactics to get juries to render verdicts based on passion and not the law. See e.g. *Gilbert*, *supra*; *Porter II*, *supra*; *Porter I*, *supra*; *Powell v St John Hospital*, 241 Mich App 64; 614 NW2d 666 (2000); *Badalamenti v Beaumont Hosp-Troy*, 237 Mich App 278; 602 NW2d 854 (1999). In light of this Court's and our Supreme Court's edicts in the *Porter* opinions, it is clearly reversible error to read this poem to evoke the sympathies from the jury.

Expert Medical Testimony

Defendant next argues that the trial court erred in permitting Bradley Sewick, Ph.D., and Dr. Gerald Shiener to testify regarding their interpretation of MRI and CT scans of plaintiff's[6]

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[5] Importantly, it was the very same trial judge in the present case that was reversed in *Porter I* for allowing the same trial attorney to read the same poem to the jury. I am reminded of the old maxim, "Fool me once, shame on you, fool me twice, shame on me."

[6] References to plaintiff are to Anthony Pellegrino in his individual capacity. Shirley Pellegrino is referred to either by name or as plaintiff's decedent.

brain. According to defendant, Dr. Shiener and Ph.D. Sewick's testimony was improper under MCL 500.3135(2)(a)(ii). Again, I agree.

> MCL 500.3135(2) provides, in relevant part:
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> (a) The issues of whether an injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:
>
> * * *
>
> (ii) [F]or a closed head injury, a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury.

This is a very specific requirement. A simple diagnosis of a closed-head injury is insufficient. *Churchman v Rickerson*, 240 Mich App 223, 229; 611 NW2d 333 (2000).

At trial, the court permitted Ph.D. Sewick and Dr. Shiener to testify as expert witnesses regarding whether plaintiff suffered a closed head injury based on their interpretations of a magnetic resonance image (MRI) of plaintiff's brain. Unfortunately for plaintiff, Ph.D. Sewick does not qualify as an expert in a case involving a closed head injury under MCL 500.3135(2)(a)(ii) because he was not an allopathic or osteopathic physician. Thus, Ph.D. Sewick's testimony would not automatically establish an issue of fact under MCL 500.3135(2)(a)(ii) regarding the existence of a closed-head injury in plaintiff, and his testimony on this issue should have been disallowed.

Recognizing that the standard of review for a trial court's decision to admit evidence is abuse of discretion, *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004), I might have been more forgiving of this error were it not for the fact that this Court has previously and explicitly ruled that Ph.D. Sewick is not qualified under MCL 500.3135(2)(a)(ii) because he is not an allopathic or osteopathic physician. *Reed v Yackell (On Remand)*, unpublished opinion per curiam of the Court of Appeals, decided June 8, 2004 (Docket No. 236588), rev'd on other grounds 473 Mich 520 (2005). Though unpublished, that case was before the same trial judge in the present matter. Because the trial court had notice that Ph.D. Sewick was not qualified to testify regarding closed-head injury matters, I find the trial court's blatant disregard of that holding disturbing and would hold that its decision to permit the testimony falls outside of the range of principled outcomes. *Woodard*, *supra*, at 557. Under the circumstances, the trial court committed reversible error when it allowed Ph.D. Sewick to testify as to the existence of a closed-head injury.

I find similar error in the trial court's allowing Dr. Shiener to testify regarding the existence of a closed-head injury. Although Dr. Shiener is a medical doctor who is board certified by the American Board of Psychiatry and Neurology and, therefore, qualifies as an allopathic physician, he was unable to testify that he regularly diagnoses or treats closed-head injuries. Under the plain language of MCL 500.3135(2)(a)(ii), Dr. Shiener does not meet the

criteria to testify as to the existence of a closed-head injury. Even assuming the trial court's permitting Dr. Shiener to testify was not error by itself, when coupled with the admission of Ph.D. Sewick's testimony, the jury was exposed to large amounts of inadmissible evidence such that I cannot, in good conscience, find that the errors were harmless. Having been summarily reversed by our Supreme Court when we attempted to permit a cumulative amount of evidence to create a factual dispute regarding a closed-head injury, *Minter v Grand Rapids*, 275 Mich App 220; 739 NW2d 108 (2007), rev'd ___ Mich ___ (2008) (Docket No. 133988, April 25, 2008), I cannot subscribe to any position that attempts to cumulate the other evidence in this case to render the error harmless.[7] The trial court allowed two witnesses to testify as to the existence of a closed head injury when neither witness met the threshold requirements of MCL 500.3135(2)(a)(ii). This was reversible error.

Defendant also argues that with respect to both Dr. Shiener and Ph.D. Sewick, the trial court failed to properly execute its role as gatekeeper under MRE 702 and MCL 600.2955(1). I agree.

> The trial court has an obligation under MRE 702 "to ensure that any expert testimony is reliable." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004). While the exercise of the gatekeeper function is within a court's discretion, the court may neither abandon this obligation nor perform the function inadequately. *Id.* [*People v Dobek*, 274 Mich App 58, 94; 732 NW2d 546 (2007)].

As stated above, neither Dr. Shiener nor Ph.D. Sewick was qualified, pursuant to MCL 500.3135(2)(a)(ii), to interpret CTs and MRIs. Under MRE 702, expert testimony is admissible "[i]f the court determines that [the testimony] will assist the trier of fact to understand the evidence or to determine a fact in issue." MCL 600.2955 contains similar language, providing that "a scientific opinion by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact." Given that neither Dr. Shiener nor Ph.D. Sewick were qualified to testify regarding a closed-head injury under MCL 500.3135(2)(a)(ii), their testimony could not assist the jury to determine that fact which was in issue. Instead, any arguable probative value the evidence may have had was substantially outweighed by the danger of misleading the jury to consider the evidence when the witnesses were not qualified to give it. *Dobek*, *supra* at 95. "A trial court necessarily abuses its discretion when the court permits the introduction of evidence that is inadmissible as a matter of law." *Id.* at 93. By permitting the jury to hear testimony that is contrary to the requirements of MRE 702 and MCL 600.2955(1), the trial court neglected to properly apply the applicable court rules and statutes, failed to properly act as a gatekeeper, and abused its discretion. *Id.* Reversal is

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[7] I note that at trial all of the plaintiff's treating physicians testified that he did not suffer a closed head injury as a result of the accident. Furthermore, they testified that he responded favorably to a memory-improving drug, Aricept, which does not improve memory impaired as a result of a closed head injury but which does improve impairment as a result of age-related dementia.

warranted because the jury was allowed to consider inadmissible testimony regarding a closed-head injury, which clearly prejudiced defendant's rights. *Id*.

Jury Instructions

Defendant next argues that the trial court erred in refusing its request to give the standard jury instruction on proximate cause found in M Civ JI 15.01 and when it substituted the words "relate to" for "caused by" in M Civ JI 17.01. Defendant claims these modifications of the jury instructions allowed the jury to award damages for injuries that were merely "related to" the accident. Defendant argues that the proper standard for damages is "caused by," as set forth in the standard jury instruction. As before, I agree.

MCR 2.516(D) mandates the use of the standard jury instructions. *Johnson v Corbet*, 423 Mich 304, 325; 377 NW2d 713 (1985). "When a party so requests, a court must give a standard jury instruction if it is applicable and accurately states the law." *Chastain v GMC* (*On Remand*), 254 Mich App 576, 590; 657 NW2d 804 (2002). Appellate courts "should not hesitate to reverse for a violation of Rule 2.516 . . . [where] it concludes that noncompliance with the rule resulted in such unfair prejudice . . . that the failure to vacate the jury verdict would be 'inconsistent with substantial justice.'" *Johnson*, *supra* at 327.

Even though defendant admitted liability and the only issue at trial was damages, the trial court still should have instructed the jury regarding proximate cause because there must be a proximate cause connection before there can be an award of damages. I am not aware of any case law that does not require the proximate cause of the damages to be defendant's negligence. Were that the only error, I might have been able to agree that the trial court's refusal to give M Civ JI 15.01 by itself was not enough to constitute unfair prejudice. However, jury instructions are reviewed in their entirety to determine whether they accurately and fairly presented the applicable law, *Meyer v Center Line*, 242 Mich App 560, 566; 619 NW2d 182 (2000). When the denial of M Civ JI 15.01 is coupled with the trial court's improper restatement of M Civ JI 17.01, the instructions as a whole required the jury to award damages irrespective of causation. Plaintiffs' counsel represented to the trial court that 15.01 was unnecessary because the proximate cause instruction was contained in 17.01. However, the altered 17.01 did not contain the word "cause." I fail to understand how a jury can be considered properly instructed on proximate cause when the word "cause" is never used.

The majority asks me to conclude that never informing a jury to limit itself to only those damages caused by defendant is harmless error. Such nonsense flies in the face of negligence jurisprudence dating back to the doctrine's inception. To establish a prima facie case of negligence, a plaintiff must prove: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004). The breach of duty has to proximately cause the damages. *Moll v Abbott Laboratories*, 444 Mich 1, 16; 506 NW2d 816 (1993). Indeed, jury instructions given by Michigan courts as far back as 1918 recognized this basic principal: "'Now, gentlemen of the jury, the defendant carrier is not an insurer of the safety of its passengers, and *it can only be held liable for injuries caused by its negligence*.'" *Rathbone v Detroit United R*, 203 Mich 695, 697-698; 169 NW 884 (1918) (emphasis added).

The majority's finding of harmless error also would require equating "relate to" with "cause." This is beyond plausible and borders on ludicrous. The requested jury instruction was:

> The defendant has admitted that [it] is liable to the plaintiff for any injury which [it] caused. You are to decide only what injuries/damages were caused by defendant and the amount to be awarded to the plaintiff for such injury/damages. [M Civ JI 17.01.]

Instead, the trial court instructed the jury: "Defendant . . . has admitted that it is liable to [plaintiffs] for injuries and damages that relate to Shirley Pellegrino's death and Anthony Pellegrino's injuries." By modifying the instructions, the trial court set a new and interesting standard for damages in jury trials. Admitted liability has never meant liability for all injures and damages *related* to the negligence. For damages to relate to an injury, there need only be some connection. Causation is much more strict. Imagine a person negligently drives his car and hits a family's dog, which dies. The family then purchases a new dog that mauls their child. The driver's negligence did not cause the injury to the child, even though the two events are related. Having omitted the instruction defining proximate cause and removed any reference to causation from the admitted liability instruction, the trial court single-handedly made liability for admitted negligence broader than that for contested liability, destroying years of jurisprudence and encroaching into legislative territory. On that basis alone, the trial court committed reversible error.

Even assuming I was willing to ignore the entire legal foundation of negligence and say that "relate to" is close enough to "cause," the instruction fails to provide any useful standard to the jury because it is circular and nonsensical. Boiled down, it says that defendant admitted it was liable for injuries related to injuries, omitting any reference to defendant's conduct. The jury was essentially instructed to award damages for any injury sustained by plaintiffs without regard not only to causation, but even defendant's conduct. Giving such a worthless instruction that not only fails to follow the law, but also fails to provide any limitation whatsoever, is so egregious that it clearly constitutes unfair prejudice. Because of the error in the jury instructions, the damages award for both plaintiff and plaintiff's decedent must be reversed.

Cumulative Error

Lastly, even assuming none of the issues above constituted reversible error, together they produced an overall effect on the trial that amounted to cumulative error such that reversal is required. A verdict should be affirmed only when it rests upon the foundation of a fair and impartial trial. "When a verdict is procured through improper methods of advocacy, misleading argument, or other factors that confound the jury's quantification of a party's injuries, that amount is inherently unreliable and unlikely to be a fair estimate of the injured party's losses." *Gilbert*, *supra* at 765. There were countless errors in this trial: 1) errors in jury selection; 2) errors in permitting expert testimony and in permitting irrelevant, inflammatory closing remarks, both in disregard of prior opinions by this Court and the Michigan Supreme Court in other cases before the same trial judge; 3) a complete failure by the trial court to exercise its gatekeeping function; 4) errors in revising standard civil jury instructions to omit a required element of a claim; and 5) errors of law by the trial judge in misapplying United States Supreme Court and

Michigan Supreme Court precedent and expressing a blatant refusal to conform his conduct to the Michigan Court Rules. When a trial court fails to properly administer justice, justice is not accomplished. Affirming this verdict will only erode the general public's faith that our system of justice is fair.

I would reverse the decision of the trial court and remand for a new trial. On remand, I would direct the case to be assigned to a different judge.

/s/ Peter D. O'Connell