

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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TERRELL ASKEW and YVONNE SANFORD,

Plaintiff-Appellants/Cross-  
Appellees,

v

MARY MARGARET HERNANDEZ,

Defendant-Appellee/Cross-  
Appellant.

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UNPUBLISHED

July 6, 2001

No. 215734

LC No. 96-604794-NI

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

PER CURIAM.

In this automobile negligence case, plaintiffs Terrell Askew and Yvonne Sanford appeal as of right from a December 10, 1997, jury verdict of no cause of action and the denial of their motion for a new trial against defendant, Mary Margaret Hernandez. We affirm.

I. Facts and Procedural History

This case arises out of an October 23, 1995, automobile accident. On that day, Mary Hernandez drove through a red light at the intersection of Schoolcraft Road and Middlebelt in the City of Livonia and struck a vehicle<sup>1</sup> driven by Yvonne Sanford and also occupied by her boyfriend, Terrell Askew. Hernandez admitted at trial that the accident was her fault. Police arrived at the scene of the accident, but Askew and Sanford denied needing an ambulance and the two drove their car home and Hernandez drove her car to work in Livonia. Approximately two hours after the accident, Sanford and Askew presented at Sinai Hospital, complaining of various physical problems that they maintain were caused by the car accident.

On February 7, 1996, plaintiffs filed their complaint, alleging Hernandez' negligence caused the accident and that they suffered serious impairment of body function. Specifically,

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<sup>1</sup> Hospital records indicate that the cars were traveling between twenty-five and thirty miles per hour when the accident occurred. Witnesses did not describe *how* the accident occurred; however, Hernandez admitted she was at fault. The logistics of the accident were not disputed at trial and are not at issue on appeal.

Sanford alleged she suffered permanent back and neck injuries and Askew asserted that he suffered cervical spine strain, lumbosacral strain, lumbar radiculopathy and a herniated disc at L5-S1.<sup>2</sup> On March 27, 1997, plaintiffs amended their pleadings to include a claim that Askew suffered a closed head injury.

Following an eight-day trial, the jury returned a verdict of no cause of action, specifically finding that, although both Sanford and Askew sustained injuries, that Hernandez' negligence was not the proximate cause of their injuries. The trial court entered a judgment of no cause of action on January 5, 1998. Thereafter, plaintiffs filed a motion for a new trial, which the trial court denied.

## II. Analysis

### A. Great Weight of the Evidence

Plaintiffs contend that the trial court should have granted them a new trial because the jury's verdict was against the great weight of the evidence. We disagree.<sup>3</sup>

Plaintiffs say that the jury's verdict, which specifically found a lack of proximate cause, was contrary to the evidence at trial which showed that plaintiffs sustained at least minor injuries as a result of the car accident. Our Supreme Court has defined proximate cause as "that which in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury, without which such injury would not have occurred." *McMillian v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985).

Under Michigan's no-fault act, neither plaintiff could recover in this case unless the jury found that Hernandez' negligence proximately caused serious impairment of body function, as plaintiffs alleged in their complaint. MCL 500.3135. Contrary to plaintiffs' argument on appeal, therefore, the issue is not only whether Hernandez' negligent driving proximately caused Sanford's back ache and Askew's bump on the head when they presented at Sinai Hospital after the accident, but whether their serious impairment injuries were a natural result of her negligence. Accordingly, plaintiffs could not recover if they merely showed the accident caused

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<sup>2</sup> Plaintiffs' counsel also attempted to assert a wage loss claim for Askew's inability to work after the accident and for the remainder of his life. The trial court granted Hernandez' motion for directed verdict on this issue. It appears that Askew was receiving worker's compensation payments for a hand injury he sustained in April 1995 and that he failed to present evidence of his work history to support a wage loss claim.

<sup>3</sup> This Court reviews the denial of a motion for a new trial for an abuse of discretion. *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 411; 516 NW2d 502 (1994). "A trial court may grant a motion for a new trial based on the great weight of the evidence only if the evidence preponderates heavily against the verdict so that a miscarriage of justice would result from allowing the verdict to stand." *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999). This Court gives substantial deference to the trial court's determination that the verdict was not against the great weight of the evidence. *Morinelli v Provident Life and Acc Ins Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000).

some minor strains and bruises after the accident; they had to show that the automobile accident caused the injuries amounting to serious impairment.

Here, the jury verdict form for each plaintiff asks (1) whether the plaintiff was injured and, if so, (2) whether defendant's negligence was a proximate cause of the injury and, if so, (3) whether the injury amounted to a serious impairment of body function. The jury answered "yes" to whether Sanford and Askew suffered an injury and "no" for both plaintiffs concerning whether Hernandez proximately caused those injuries. Because the jury answered "no" to the proximate cause question, the jury did not answer whether plaintiffs suffered a serious impairment.

We hold that the jury could reasonably conclude that both plaintiffs proved they sustained minor injuries as a result of the accident, and could also reasonably conclude that those injuries, asserted by plaintiffs as affecting their ability to lead a normal life, did not flow from the accident. See *May v Sommerfield*, 239 Mich App 197, 201; 607 NW2d 422 (1999).

Sanford testified that her back and neck hurt following the car accident. Sinai Hospital records indicate she complained of low back pain, neck pain and headache on the day of the accident. The emergency room physician stated that Sanford suffered acute multiple sprains and/or strains from the car accident that were expected to subside within twenty-four hours. Sanford testified that she worked the whole day after the car accident, but that she could not lift her arms or get up from her chair the next day and was unable to work for the next six months. Sanford's claimed injuries, therefore, were for a serious impairment of body function - injuries to her neck and back which affected her normal life and, according to her testimony, prevented her from working for those months and caused her ongoing pain and suffering.

Regardless whether the jury found that Sanford suffered a serious impairment of body function, the record reflects that she admitted that she suffered multiple, work-related injuries to her back in the years preceding the car accident.<sup>4</sup> Sanford's job required her to physically restrain patients and she admitted she was thrown by patients in the past. In fact, Sanford admitted that she took time off from work in 1987, 1989, 1990, 1991, 1992 and 1994, for lumbar sacral spine injuries which, at times, doctors described as totally disabling. Accordingly, the jury could reasonably conclude from the evidence that the injuries at issue, those that caused Sanford's pain, inability to work, and serious impairment, were not caused by the car accident, but resulted from her numerous prior work injuries.

The jury also concluded that Askew sustained an injury but that Hernandez' negligence did not proximately cause his injury. The record indicates that Askew presented at Sinai with a bump on the head two hours after the car accident, which Askew attributed to hitting his head on the dashboard of Sanford's car. However, Askew did not begin showing signs of emotional and

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<sup>4</sup> On appeal, plaintiffs did not submit the videotaped deposition of her diagnosing doctor, Dr. Schwartz or a transcript of his testimony regarding his diagnosis of Sanford's back problems. However, the record reflects that Sanford failed to notify Dr. Schwartz about her previous back injuries. The jury could reasonably conclude that Sanford's failure to give Dr. Schwartz information regarding her prior, disabling back problems would affect the validity of any conclusions Dr. Schwartz made regarding the cause of her injuries.

cognitive disability until almost 1-½ years after the accident. Plaintiffs' experts testified that Askew's mental problems were the result of a closed head injury he sustained in the car accident, while defendant's experts testified that Askew was not only feigning his injuries, but that a bump on the head he claimed to suffer in the car accident could not have caused the ongoing, disabling symptoms he displayed, especially because they appeared so long after the initial injury.

Because this Court recognizes that the jury is in a better position to judge the weight and credibility of witness testimony, this Court will "not substitute its judgment for that of the jury unless the record reveals a miscarriage of justice." *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999).<sup>5</sup> As with Sanford, it appears that the jury concluded Askew suffered an injury but that the injuries sustained in the car accident did not relate to any alleged serious impairment of body function. Although expert testimony conflicted regarding the cause of Askew's emotional, behavioral and cognitive problems, this Court will defer to the jury's apparent conclusion that defendant's experts were correct: if Askew suffered some mental impairment, those injuries were not a natural result of the car accident or the bump on the head he sustained several months before.

Plaintiffs essentially requests this Court to rule that, if a plaintiff sustains *any* objective, minor injury in a car accident caused by negligence, the jury is bound to find that any and all claimed injuries thereafter were proximately caused by the accident, regardless whether the plaintiff establishes a nexus between the original injury or accident and the serious impairment. Such a ruling would be inconsistent with the purpose of the threshold requirement of serious impairment which "is designed to eliminate suits based on clearly minor injuries and those that do not seriously affect the ability of the body to function." *May, supra*, 239 Mich App 200. It would also encourage the exaggeration or deliberate aggravation of injuries by plaintiffs who contemplate a lawsuit after leaving an accident with only minor injuries.

While our Supreme Court has held that recovery is warranted if the trauma from a car accident triggers or precipitates symptoms of another, more serious condition which is not immediately apparent, evidence must show a causal connection between the accident and the subsequent manifestation of the claimed injury. See *Wilkinson v Lee*, 463 Mich 388, 395-397; 617 NW2d 305 (2000). Here, the jury reasonably concluded that plaintiffs failed to show a causal connection between the accident and the injuries they assert constitute serious impairment.

A review of the record reveals that the evidence did not preponderate heavily against the jury's verdict and, indeed, ample evidence supported the jury's conclusion. Therefore, the trial court did not abuse its discretion in denying plaintiffs' motion for a new trial on this basis.

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<sup>5</sup> Moreover, as our Supreme Court observed in *Granger v Fruehauf Corp*, 429 Mich 1, 9; 412 NW2d 199 (1987):

[I]t is fundamental that every attempt must be made to harmonize a jury's verdicts. Only where verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside.

## B. Exclusion of Evidence

Plaintiffs also claim that they are entitled to a new trial because the trial court failed to timely admit hospital records concerning Askew's suicide attempt.

This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Powell v St John Hosp*, 241 Mich App 64, 72; 614 NW2d 666 (2000). "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected ...." MRE 103. "An error in the admission or exclusion of evidence is ground for granting a new trial if refusal to take this action appears inconsistent with substantial justice." *Merrow v Bofferding*, 458 Mich 617, 634; 581 NW2d 696 (1998), citing MCR 2.613(A).

The parties did not articulate for the record their arguments regarding whether and why some or all of the Oakwood records are admissible under the business records exception of MRE 803(6). Nonetheless, the trial court ultimately admitted the records and plaintiffs' claim appears to be that the delay in admission caused them prejudice. However, the record is clear that plaintiffs' counsel actually contributed to the delay in their admission by repeatedly misstating that the trial court admitted them without objection at some prior time. Plaintiffs have not pointed to anything in the record showing that the documents were offered by plaintiffs and admitted by the trial court as plaintiff maintained each time he raised the issue. Furthermore, plaintiffs' counsel repeatedly argued that he certified the records' authenticity, though defendant did not object to the records on that basis. Plaintiffs' counsel's misstatements and repetitive, inapplicable arguments certainly delayed the speedy admission of these records.

Further, plaintiffs' claim that they were prejudiced by the trial court's failure to admit the records during Dr. Bradley Sewick's testimony is without merit. While the trial court precluded plaintiffs' counsel from continuing to question Dr. Sewick about the documents, the record clearly shows that Dr. Sewick did not rely on them to render his diagnosis regarding Askew. Also, two witnesses already testified about Askew's suicide attempt and other doctors testified at length regarding his mental and emotional problems. Accordingly, these records would have been simply cumulative to other evidence and we hold that plaintiffs were not harmed by the delay in their admission.

Moreover, plaintiffs have not shown how they would have further utilized the records if they were admitted by the trial court earlier. Plaintiffs did not actually offer them for admission until their final medical expert testified and shortly before plaintiffs rested their case. Thereafter, defendants presented deposition testimony during which plaintiffs' counsel could not have raised the issue and plaintiffs' counsel did cross-examine defendant's live expert, Dr. Shatz, about Askew's suicide attempt.

Thus, plaintiffs have not shown how the trial court's failure to admit the records sooner affected a substantial right. Once Dr. Sewick left the stand, as the trial court noted, it was not imperative to admit the records immediately because plaintiffs had closed their proofs. Further, plaintiffs asserted no reason for the trial court to immediately decide the issue and no reason why they needed the records admitted earlier. In short, plaintiffs offered the records so that the jury

could inspect them, an objective accomplished when the trial court admitted the records and gave them to the jury to review during deliberations.

Accordingly, plaintiffs have failed to show either that the trial court abused its discretion by failing to admit the Oakwood Hospital records sooner or that they were prejudiced by the trial court's ruling.

### C. Cross Examination of Defense Experts

Plaintiffs next argue that the trial court erred by limiting plaintiffs' counsel's cross-examination of defendant's witnesses.

"The trial court has the discretion to control the questioning of witnesses, and [this Court] review[s] its determination of the scope of cross-examination for an abuse of discretion." *Persichini v William Beaumont Hosp*, 238 Mich App 626, 632; 607 NW2d 100 (1999). MRE 611 provides:

(a) The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. The judge may limit cross-examination with respect to matters not testified to on direct examination.

The record clearly shows that the trial court did not unfairly limit plaintiffs' counsel's cross-examination of Dr. Shatz regarding his opinion that Askew was faking and malingering during his medical examinations. During his direct examination, defense counsel established Dr. Shatz' skepticism about the delayed onset of Askew's mental impairment symptoms and Dr. Shatz' opinion that Askew's symptoms were not typical of a closed head injury. Also during direct, Dr. Shatz testified that Askew seemed to feign his speech impairment and that test scores indicated that Askew made an "incomplete effort" to perform well on examinations to evaluate his condition.

During cross-examination, plaintiffs' counsel questioned Dr. Shatz about his opinions regarding Askew's malingering and he also attempted to confront Dr. Shatz with excerpts of reports from plaintiffs' expert witnesses and a published report to contradict Dr. Shatz' findings. However, defense counsel and the trial court judge repeatedly interrupted plaintiffs' counsel when he attempted to read aloud long portions of the reports without asking the witness a question. Thereafter, plaintiffs' counsel again questioned Dr. Shatz about his finding that Askew was faking or malingering. The trial court cut off plaintiffs' counsel's questioning after reminding him that he had already addressed the issue at length. Plaintiffs' counsel agreed but continued to ask Dr. Shatz about faking and malingering, despite repeated warnings that the court would stop his cross-examination if he did not move on to another issue. Plaintiffs' counsel then agreed to move to a different topic and began reading an excerpt regarding Askew's malingering

from Dr. Shatz' report. The trial court then stopped plaintiffs' counsel's examination. The trial court then allowed redirect by defense counsel and, thereafter, the trial court allowed plaintiffs' counsel to recross-examine Dr. Shatz.

Plaintiff has failed to show that the trial court abused its discretion in controlling plaintiffs' counsel's examination of Dr. Shatz. The doctor testified at length regarding Askew's scores on the examinations and his opinion regarding Askew's lack of effort. Further, the court was already compelled to curtail plaintiffs' counsel's cross examination when he tried to read lengthy, contradictory reports into the record during his cross-examination. Despite the trial court's repeated warnings that the faking issue was already thoroughly covered, plaintiffs' counsel continued to ask question after question without raising any new points. Accordingly, the trial court properly stopped plaintiffs' counsel's examination after he repeatedly and wilfully ignored the court's directives. Accordingly, and because the trial court gave plaintiffs' counsel another opportunity to examine Dr. Shatz on recross, the court did not abuse its discretion in limiting his cross-examination.<sup>6</sup>

#### D. Judicial Comments

Plaintiff argues that the trial court's comments to plaintiffs' counsel denied plaintiffs a fair and impartial trial.

“While a trial court's criticism of counsel may be grounds for reversal, the appropriate test is whether the court's participation denied the defendant a fair and impartial trial by unduly influencing the jury.” *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 216; 457 NW2d 42 (1990).

The record clearly reflects that the trial court actually exercised appropriate judicial restraint in handling plaintiffs' counsel's outbursts and disrespectful behavior during trial. During plaintiffs' counsel's opening argument, he attempted to read into the record portions of

<sup>6</sup> Plaintiffs also argue that the trial court erred in limiting plaintiffs' counsel's cross-examination of Dr. Mercier. Dr. Mercier testified by way of deposition and plaintiffs did not attach a transcript on appeal. However, on the record, plaintiffs' counsel objected to the trial court striking one of his questions regarding Dr. Mercier's testimony in two other cases in which plaintiffs' counsel participated. Defense counsel objected because, he argued, plaintiffs in other cases were irrelevant and that he had no information regarding those other plaintiffs or their claims or injuries. The trial court struck the question and answer, indicating that plaintiffs' counsel failed to show a nexus between the other plaintiffs and those in this case and that there was no showing that Dr. Mercier even acknowledged performing examinations on the other plaintiffs.

Because plaintiffs have not provided the relevant portions of Dr. Mercier's deposition transcript on appeal, we decline to address this issue. From the record provided, we cannot determine the questions plaintiffs' counsel asked of Dr. Mercier on this issue, what comments the doctor made regarding his findings in the other cases, or whether the prior testimony is relevant in this case.

Dr. Feldstein's report regarding Askew's back problems. Defense counsel objected and argued that Dr. Feldstein, a neuropsychologist, was not competent to testify regarding Askew's back problems and, therefore, plaintiffs' counsel's assertions would not be supported by evidence at trial. The trial court sustained defense counsel's objection and reminded plaintiffs' counsel that he may not read evidence into the record that will not be supported by testimony at trial. Nonetheless, plaintiffs' counsel continued to read from the reports.

The trial court reminded plaintiffs' counsel that it sustained the objection and told him to move on to another point. Plaintiffs' counsel again disregarded the court's instruction and the trial court again reminded him that he could only explore issues about which the witness is qualified to testify. Following yet another attempt by plaintiffs' counsel to introduce such evidence, defense counsel objected and the trial court admonished plaintiffs' counsel for not only continuing his attempt to argue inadmissible evidence before the jury, but also for ignoring the trial court's directives, and for turning his back toward the trial judge and ignoring him while the judge made his rulings.

Plaintiffs also claim they suffered prejudice because the trial court threatened plaintiffs' counsel with contempt of court. The trial court first raised the prospect of holding plaintiffs' counsel in contempt after plaintiffs' counsel shook his head and made a gesture to the jury after the court ruled against him on an evidentiary issue. The trial judge explained that he did not permit that kind of behavior and said that plaintiffs' counsel was on warning. The issue arose again during plaintiffs' counsel's cross-examination of Dr. Shatz, when he (despite the trial court's numerous warnings) repeatedly said, "That's right" or, "That's right. You don't know," in response to the doctor's answers, apparently in an attempt to emphasize the doctor's lack of knowledge. After repeated warnings, the trial court ultimately fined plaintiffs' counsel \$200 for continually ignoring the court's orders to stop using the phrase during cross-examination.

Moreover, the record reflects that plaintiffs' counsel repeatedly ignored or ridiculed the trial court's rulings throughout this trial, repeatedly attempted to read evidence to the jury while questioning witnesses, made inappropriate hand gestures and, at one point, even began yelling and screaming in front of the jury. The trial court properly advised plaintiffs' counsel regarding his inappropriate and hostile behavior and nothing in the record suggests that the trial court showed a bias against plaintiffs' counsel or that it abused its discretion in admonishing him. In fact, the trial judge specifically instructed the jury that when he exercised control over the proceedings, the jury should not interpret his remarks to reflect a bias for one party or against another.

In sum, the trial court's comments in no way unduly influenced the jury or otherwise deprived plaintiffs of a fair trial. The record clearly shows that the trial court appropriately addressed plaintiffs' counsel's misconduct and, in light of plaintiffs' counsel's highly disruptive and contemptuous behavior, the trial court, in fact, exercised remarkable restraint in controlling the proceedings.

#### E. Defense Counsel's Conduct

Plaintiffs claim that defense counsel's comments also deprived them of a fair and impartial trial. It is well established that:

When reviewing claims of improper conduct by a party's lawyer, this Court must first determine whether the lawyer's action was error and, if so, whether the error requires reversal. A lawyer's comments will usually not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial or where counsel's remarks were such as to deflect the jury's attention from the issues involved and had a controlling influence on the verdict. [*Ellsworth, supra*, 236 Mich App 191-192 (citations omitted).]

Plaintiffs claim that they suffered prejudice when defense counsel questioned Sanford about whether she called her attorney before going to the hospital after the car accident. Sanford simply answered, "No," and defense counsel did not pursue the issue. Defense counsel did raise the issue during closing argument, however, and stated that Sanford denied calling her attorney, but argued that the jury might infer otherwise.

Plaintiffs' counsel failed to preserve this issue by objecting before the trial court. Accordingly, we review the comments to determine if it "may have caused the result or played too large a part and may have denied the party a fair trial." *Ellsworth, supra*, 236 Mich App 192.

Generally, "[i]n closing argument, counsel is permitted to draw reasonable inferences from the testimony." *Matter of Miller*, 182 Mich App 70, 77; 451 NW2d 576 (1990). Here, testimony did not establish that Sanford called plaintiffs' counsel before going to Sinai Hospital on the day of the accident. Rather, Sanford denied calling plaintiffs' counsel that day. Accordingly, defense counsel's comment during his closing argument was improper. However, defense counsel's comment was not so inflammatory that it caused the result in this case and it did not play such a large role that it denied plaintiff a fair trial.

Plaintiffs also claim they were prejudiced when defense counsel stated during closing argument: "Do you suppose Mr. Askew has got some help in feeling bad? His lawyer is real concerned for him telling him you're never going to get better, sir." Defense counsel made this point when referring to the Oakwood records which documented Askew's suicide attempt, apparently attempting to imply that Askew's depression may have been caused by his overzealous attorney. Plaintiffs' counsel objected and the trial court sustained the objection.

Defense counsel's comment constituted improper argument. No evidence showed that plaintiffs' counsel influenced Askew to believe his injuries were severe or permanent. Accordingly, the comment was not supported by evidence at trial. However, the comment did not rise to the level of a deliberate course of conduct aimed at preventing a fair and impartial trial and was not so prejudicial that it deflected the jury's attention from the issues.

Plaintiffs further contend that defense counsel improperly told the jury that Sanford settled a malpractice case. Plaintiffs' counsel objected to the questions on relevance grounds and the trial court sustained the objection. While we agree that the issue of Sanford's malpractice claim was not relevant to the issues at trial, any error was harmless. The trial court sustained plaintiffs' objection and defense counsel did not revisit the issue. Moreover, as defendant correctly notes in her brief on appeal, because the jury never reached the issue of damages, this comment would not have affected their determination of that issue. Plaintiffs' specific argument on appeal is that defense counsel made the reference "so that this jury would not feel the need to

give her money in this case.” Because the issue of awarding money to plaintiffs was never reached by the jury, they cannot demonstrate they suffered prejudice they allege.

#### F. Statute Regarding Physician Referrals

Plaintiff next avers that the trial court erred by permitting defense counsel to cross-examine Dr. Ram Gunabalan regarding his referral of Askew for a Single Positron Emission Computed Tomography (SPECT) scan and for instructing the jury<sup>7</sup> regarding Dr. Gunabalan’s financial interest in the SPECT scan referral pursuant to the Public Health Code, which provides that the Health Department may investigate and discipline doctors for unprofessional conduct, including referring a patient for testing at a facility in which the doctor has a financial interest. MCL 333.16221(e)(iv).

Defense counsel requested that the trial court take judicial notice of the statute prior to Dr. Gunabalan taking the stand. Plaintiffs’ counsel objected and argued that the evidence would be more prejudicial than probative. The trial court disagreed and ruled that, if defense counsel established that Dr. Gunabalan knew about the statute and made the referral in spite of that knowledge, that it would be relevant regarding his credibility and financial interest.

The record shows that plaintiffs’ counsel pursued the issue with Dr. Gunabalan in more depth than did defense counsel and that defense counsel merely raised the issue to impeach Dr. Gunabalan’s testimony. Because this issue was relevant to show bias, we find no error by the trial court in permitting cross-examination on the issue. Furthermore, plaintiffs have not demonstrated that the probative value of this relevant evidence, which defense counsel addressed only briefly, was substantially outweighed by the risk of unfair prejudice.

We also hold that the trial court did not err by instructing the jury regarding Dr. Gunabalan’s referral. Contrary to plaintiff’s argument, the trial court did not instruct the jury to interpret the statute, but merely read the instruction for the jury to make its own determination regarding Dr. Gunabalan’s credibility.

#### H. Motion to Amend

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<sup>7</sup> As noted above, “[t]he trial court has the discretion to control the questioning of witnesses, and [this Court] review[s] its determination of the scope of cross-examination for an abuse of discretion.” *Persichini, supra*, 238 Mich App 632; MRE 611.

This Court reviews claims of instructional error de novo by examining “the jury instructions as a whole to determine whether there is error requiring reversal.” *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). “Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury.” *Id.* This Court “will only reverse for instructional error where failure to do so would be inconsistent with substantial justice.” *Id.*, citing MCR 2.613(A).

Plaintiff also complains that the trial court erred by denying plaintiffs' motion to amend the complaint to conform to the proofs at trial.<sup>8</sup>

Plaintiffs' counsel moved to amend the pleadings to conform to the proofs at trial, arguing that, if the evidence failed to show that the accident *caused* Sanford's back injuries, evidence showed that the accident *aggravated* Sanford's prior back condition.<sup>9</sup>

The trial court correctly found that the proofs did not establish an aggravation of Sanford's prior injuries to support an amendment of the pleadings. While evidence showed that Sanford suffered prior back injuries, the proofs did not establish any nexus between her prior back problems and her injuries in this case. Plaintiffs' medical experts did not testify regarding the location and details of Sanford's prior back problems and they did not testify that those problems were exacerbated or that any former symptoms were triggered by her new injuries. In fact, Sanford did not even tell her examining doctor, Dr. Schwartz, that she suffered prior back injuries. Accordingly, the proofs did not establish any aggravation of her Sanford's old injuries to justify amending the complaint.

Moreover, an amendment in the middle of trial would have significantly prejudiced defendant. MCR 2.118(C)(2). Defendant would not have an opportunity to cross-examine plaintiffs' experts regarding the location and severity of Sanford's prior injuries and how the accident affected them. Further, defendant argued throughout trial that Sanford's complaints were due entirely to her prior work-related injuries. Obviously, defendant would have altered this strategy if she knew Sanford was claiming aggravation of those injuries. Accordingly, the trial court did not abuse its discretion in denying plaintiffs' motion to amend.

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<sup>8</sup> This Court has held:

Leave to amend a complaint should be freely given when justice so requires. MCR 2.118(A)(2). This Court will reverse a trial court's decision on a motion to amend a complaint only where the trial court abused its discretion. *Price v Long Realty, Inc*, 199 Mich App 461, 469; 502 NW2d 337 (1993). An amendment to conform to the proofs made during trial shall not be granted unless the party seeking to amend establishes that the amendment and the admission of the evidence would not prejudice the objecting party. MCR 2.118(C)(2). [*Froede v Holland Ladder & Mfg Co*, 207 Mich App 127, 136; 523 NW2d 849 (1994).]

<sup>9</sup> Plaintiff relies on MCR 2.118(A)(2) which provides:

Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires.

Affirmed.<sup>10</sup>

/s/ David H. Sawyer  
/s/ Henry William Saad

I concur in result only.

/s/ William B. Murphy

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<sup>10</sup> Because we affirm the jury's verdict and the trial court's denial of plaintiffs' motion for a new trial, we decline to address defendant's issues on cross appeal.