STATE OF MICHIGAN
IN THE COURT OF APPEALS

JOSEPH WIER,

Plaintiff-Appellee and Plaintiff-Appellant,

Court of Appeals Nos. **334773**
335167

-vs-

ALLSTATE INSURANCE COMPANY, a Foreign Corporation,

Lower court no. 14-3584-NF

Defendant-Appellant and Defendant-Appellee.

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PLAINTIFF-APPELLEE'S BRIEF ON APPEAL, DOCKET NO. 334773

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

Contents

TABLE OF CONTENTS ii

INDEX OF AUTHORITIES iv

STATEMENT REGARDING (1) PROCEDURAL POSTURE, (2) ORDER APPEALED FROM, (3) JURISDICTION, (4) RELIEF SOUGHT, and (5) ORAL ARGUMENT v

Procedural Posture v

Order Appealed From and Relief Sought v

Jurisdiction v

Oral Argument v

STATEMENT OF THE ISSUES vi

STANDARD OF REVIEW viii

STATEMENT OF FACTS AND PROCEEDINGS 1

LAW AND ARGUMENT 15

ISSUE I 15

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR SUMMARY DISPOSITION, BECAUSE THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH PLAINTIFF'S CASE-IN-CHIEF. 15

ISSUE II 22

THE TRIAL COURT PROPERLY PERMITTED PLAINTIFF'S PHYSICIANS' TESTIMONY LINKING PLAINTIFF'S CONDITION TO THE 1996 ACCIDENT. 22

Introduction 22

Facts Specific to Issue II 22

Law pertaining to Issue II 27

ISSUE III 32

THE TRIAL COURT ACTED WITHIN ITS DISCRETION WHEN IT STRUCK DEFENDANT'S BODILY INJURY CLAIM FILE AND SUBSEQUENT PIP CLAIM FILES, WHERE THE PROPOSED EVIDENCE WAS MORE PREJUDICIAL THAN PROBATIVE. 32

ISSUE IV 36

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S REQUEST FOR DIRECTED VERDICT ON ATTENDANT CARE 36

Standard of Review 36

Substantive Argument 37

ISSUE V 45

THE TRIAL COURT SUBMITTED A PROPER VERDICT FORM TO THE JURY. EVEN IF (ARGUENDO) THE FORM WAS TECHNICALLY DEFICIENT, THIS COURT SHOULD AFFIRM THE JUDGMENT, WHERE THE VERDICT FORM WAS NOT INCONSISTENT WITH SUBSTANTIAL JUSTICE. 45

Standard of Review 45

Substantive Argument 47

RELIEF REQUESTED 49

INDEX OF AUTHORITIES

Cases

Bartlett v. Sinai Hosp of Detroit, 149 Mich.App. 412, 385 N.W.2d 801 (1986)............................37

Brisboy v. Fibreboard Corp., 429 Mich. 540, 418 N.W.2d 650 (1988)..46

Chapin v A & L Parts Inc., 274 Mich.App. 122, 732 N.W.2d 578 (2007).........................30, 31, 32

Daubert v Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2768, 125 L.Ed.2d (1993) 20, 29, 30, 31

Douglas v Allstate Ins. Co., 492 Mich. 241, 821 N.W.2d 472 (2012).....................................38, 39

Gilbert v DaimlerChrysler Corp, 470 Mich 749, 685 NW2d 391 (2004).....................................28

Kumho Tire Co, Ltd v Carmichael, 526 U.S. 137, 119 S Ct 1167, 143 L Ed 2d 238 (1999).........29

Lenawee Co v Wagley, 301 Mich.App. 134, 836 N.W.2d 193 (2013)...30

McDonald v. Stroh Brewery Co., 191 Mich.App. 601, 478 N.W.2d 669 (1991) 37

Meagher v. Wayne State University, 222 Mich.App. 700, 565 N.W.2d 401 (1997) 37, 46

People v Unger, 278 Mich.App. 210, 749 N.W.2d 272 (2008) 29, 31

Smith v. Khouri, 481 Mich. 519, 751 N.W.2d 472 (2008) ix

Surman v Surman, 277 Mich.App. 287, 745 N.W.2d 802 (2007) 30

Statutes

MCL 600.2955 ....29, 30

MCL 600.2955(1)..29, 31

Rules

MRE 403 37

MRE 702 .... *passim*

MRE 704 28

STATEMENT REGARDING (1) PROCEDURAL POSTURE, (2) ORDER APPEALED FROM, (3) JURISDICTION, (4) RELIEF SOUGHT, and (5) ORAL ARGUMENT

Procedural Posture

This is an action for first-party, no-fault benefits, brought by Plaintiff-Appellee (Plaintiff) Weir. Defendant-Appellant (Defendant) first paid and then denied no-fault coverage. After a jury trial, the lower court entered a judgment in Plaintiff's favor. This appeal (Docket No. 33473) pertains to the judgment.

Order Appealed From and Relief Sought

Defendant appeals from the judgment. Plaintiff requests this Court affirm the judgment.

Jurisdiction

Plaintiff acknowledges this Court's jurisdiction over Defendant's appeal.

Oral Argument

Two appeals are before this Court: Defendant's appeal from the judgment and Plaintiff's appeal from the order denying attorney fees. The appellate litigation is fact specific, and the trial was lengthy and complicated. Oral argument would assist this Court in its deliberations.

STATEMENT OF THE ISSUES

ISSUE I[1]

DID THE TRIAL COURT PROPERLY DENY DEFENDANT'S MOTION FOR SUMMARY DISPOSITION, WHERE THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH PLAINTIFF'S CASE-IN-CHIEF?

Plaintiff-Appellee says "Yes."

Defendant-Appellant says "No."

The trial court said "Yes."

ISSUE II[2]

DID THE TRIAL COURT PROPERLY PERMIT PLAINTIFF'S PHYSICIANS' TESTIMONY LINKING PLAINTIFF'S CONDITION TO THE 1996 ACCIDENT?

Plaintiff-Appellee says "Yes."

Defendant-Appellant says "No."

The trial court said "Yes."

ISSUE III[3]

DID THE TRIAL COURT ACT WITHIN ITS DISCRETION WHEN IT STRUCK DEFENDANT'S BODILY INJURY CLAIM FILE AND SUBSEQUENT PIP CLAIM FILES, WHERE THE PROPOSED EVIDENCE WAS MORE PREJUDICIAL THAN PROBATIVE?

Plaintiff-Appellee says "Yes."

Defendant-Appellant says "No."

The trial court said "Yes."

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[1] Defendant's statement of the issue, p. vi, does not conform to its statement of the issue in the text. Plaintiff responds to the issue posed within the text.
[2] Defendant's statement of the issue, p. vi, does not conform to its statement of the issue in the text. Plaintiff responds to the issue posed within the text.
[3] Defendant's statement of the issue, p. vi, does not conform to its statement in the text. Plaintiff responds to the issue posed within the text.

ISSUE IV

DID THE TRIAL COURT PROPERLY DENY DEFENDANT'S REQUEST FOR DIRECTED VERDICT ON ATTENDANT CARE, WHERE PLAINTIFF PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH A JURY SUBMISSIBLE CASE?

Plaintiff-Appellee says "Yes."

Defendant-Appellant says "No."

The trial court said "Yes."

ISSUE V

THE TRIAL COURT SUBMITTED A PROPER VERDICT FORM TO THE JURY. EVEN IF (ARGUENDO) THE FORM WAS TECHNICALLY DEFICIENT, SHOULD THIS COURT AFFIRM THE JUDGMENT, WHERE THE VERDICT FORM WAS NOT INCONSISTENT WITH SUBSTANTIAL JUSTICE?

Plaintiff-Appellee says "Yes."

Defendant-Appellant says "No."

The trial court said "Yes."

STANDARD OF REVIEW

Most issues presented by Defendant are reviewed under the abuse of discretion standard of review. See *Smith v. Khouri,* 481 Mich. 519, 526, 751 N.W.2d 472 (2008). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." The motions for summary disposition and directed verdict are reviewed *de novo*.

STATEMENT OF FACTS AND PROCEEDINGS

In this first-party, no-fault action, on June 9, 1996, Plaintiff Joseph Wier, age 14, was delivering newspapers with his dad. (Video Deposition of Dr. Todd T. Best, 7/7/2016, p. 10)[1] He fell from the back of a truck and hit his head on concrete. (Best, 11) Ms. Bradford, Defendant's adjuster summarized the PIP claim file notes from 1996 through 2000: Joseph declined during that period. (Bradford, 7/15/2013, 236)

Dr. Michael D. McMillan, Ph.D., a specialist in neuropsychology testified by video deposition.[2] (McMillan Dep., p. 7) He treats persons with traumatic brain injury, TBI. *Id.* In 1996, he worked at St. John Hospital. *Id.* As a staff psychologist, his duties included "psychological disturbance or – you know, like a head injury or a brain tumor, things of that sort." *Id.*, p. 8. As part of his specialty, he would review imaging study reports. *Id.*, p. 9.

Dr. McMillan's first note is dated September 12, 1996. *Id.* Joseph suffered anterograde amnesia after the accident. *Id.*, p. 16. Reading the September 10, 1996, CT report, Dr. McMillan saw multiple areas of hemorrhage; Joseph bled in his brain in multiple areas. *Id.*, p. 19. There was a "contrecoup parenchymal hemorrhagic contusion" meaning injury to the frontal lobe. *Id.*, p. 20. The bleeding got worse. *Id.*, p. 22-23 (reviewing an image dated 9/11/1996). Other reports followed – describing the injury (but not requiring recitation for this appeal). *Id.*, p. 24-30.

Dr. McMillan examined Joseph on September 19, 1996. Joseph did "fairly well" on his cognitive ability, but this was not necessarily indicative of his ability to "put the information together appropriately." *Id.*, pp. 32-33. Joseph had suffered a frontal lobe injury. *Id.*, p. 34. The

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[1] Presented at trial 7/15/2016, 7/19/2016.
[2] Video Deposition of Michael David McMillan, Ph.D., 7/8/2016, presented at trial 7/14/2016.

frontal lobe involves executive functioning – the part of the brain that helps organize thoughts, *e.g.*, planning, organizing. *Id.*, p. 11. This injury can affect impulse control – make a person "disinhibited." This manifests as: (i) the person's tolerance may become much diminished; (ii) he/she is argumentative; (iii) he/she is irritable and hard to live with. *Id.*, p. 35. Anger may be an issue, arising from the inability to deal with frustration. *Id.*, pp. 35-36. By contrast, an ordinary person may be frustrated and yet not go into a rage if cut off while driving. *Id.*

Unfortunately, "neural tissue doesn't get replaced." *Id.*, p. 36. "[I]t's fairly permanent." *Id.* "[I]t doesn't get better." *Id.* Asked about possible neuropsychological testing showing that Joseph did better over years, Dr. McMillan responded, "No. I don't think he did better." *Id.*, p. 37.

Dr. McMillan treated Joseph again in 1999, writing his June 14 report. *Id.*, p. 38.[6] By then, Joseph was having trouble with people and school. *Id.*, p. 40. He was losing his temper and had been kicked out of school. *Id.*, p. 40. Many friends were now unavailable to him. *Id.* This was all "pretty consistent with a frontal lobe injury." *Id.*, p. 40. If Joseph was teased, he would misinterpret and get angry. He would overreact. *Id.* Dr. McMillan's report showed Joseph saying things suggesting paranoia, poor judgment, and cynicism. *Id.*, 41. Dr. McMillan's conclusion was: "Severe head injuries typically result in performance levels that remain significantly reduced, as in Joe's case." *Id.*, p. 48. He determined that Joseph's head injury – suffered in 1996 – was a severe closed head injury. *Id.*, p. 49. He saw no evidence of malingering (Joseph would now be seventeen), and the findings were not surprising based on the frontal lobe injury. *Id.*, p. 50. The findings were typical. *Id.* Today (at the trial deposition), his opinion is unchanged. *Id.*, p. 51.

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[6] Dr. McMillan sent a copy of the report to an insurance adjuster, but this was a "clinical report" and not an IME report. *Id.*, p. 39.

The doctor's 1999 conclusion was:

> A. Because of Joe's significant psychological problems, his moodiness and his emotional lability in particular, he needs to be referred to a physician for the possible use of psychotropic medication. His emotionality and his anger not only present him with difficulty, but could cause him serious problems with other people as well.

Dr. McMillan did not thereafter treat Joseph, but he reviewed the reports of treatment by Drs. Best, Rubin, and Kamoo. *Id.*, pp. 52-53. He was unsurprised by the course of Joseph's life. *Id.*, pp. 53, 55. He testified, 1999, Joseph's "temper was getting him in trouble, [] he was having problems with people, starting to abuse substances." This was consistent with Dr. Hanks' complete history.

Dr. McMillan opined: (i) Dr. Kamoo's report was "pretty consistent" with McMillian's analysis, and Dr. Hanks did a good job of taking the family history and documenting what Joseph had done, but her [Hanks] conclusion differed from his. *Id.*, p. 56. Dr. McMillan was struck by Hanks initial analysis – consistent with his own, and anticipated Dr. Hanks would reach a similar conclusion. But she instead opined Joseph had an antisocial personality; Dr. McMillan said, "It's not consistent with anything in the literature."[7] *Id.*, p. 57. (Among all doctors including Defendant's other IME witness, only Dr. Hanks concluded this.)

Dr. McMillan could hardly contain himself.

> [Wier] has had some issues with regard to irritability and temper problems early in his high school career; however, that appeared to change into more of a psychiatric condition involving paranoid ideation, suspiciousness, antisocial personality traits. * * *
>
> [Hanks report stated] [t]his is not thought to be related to brain injury, but is likely separate from that event, and is very common that some of these behaviors, especially the psychiatric conditions, occur frequently in young adulthood.
>
> And that's -- I mean, that's insane to say. I mean, that's not based on anything

[7] Dr. McMillan testified, "And it's, like, where -- I mean, if I can be perfectly frank, where the hell did you get that? It's not consistent with anything in literature." *Id.*, p. 57.

in the literature. All right? And -- and -- that's not even an arguable point.

> * * * Just not arguable. * * * I'd give you all 50 bucks for any article you can produce in the – in the literature that says frontal lobe injuries really don't affect personality. I mean, just it -- it's not a point of contention in the medical or psychiatric or world of neurology. Frontal lobe injuries cause all sorts of personality disorders, and it's just -- it's just an acceptable finding. [*Id.*, pp. 58-59]

Antisocial personality disorder was, statistically, a low occurrence (between 0.2% and 3.3%). *Id.*, p. 60. Dr. McMillan summed up, referring to Joseph's adult, personality problems, "Well, there is a much greater probability mathematically that it occurred because of his frontal lobe injuries than the fact that he just hit adulthood." Further, Joseph's treatment and diagnosed brain injuries related back to the 1996 injury. *Id.*, pp. 62-63.

Dr. Todd Best first saw Joseph on December 3, 2012, and saw him fourteen times through September 6, 2015. (Video Deposition of Dr. Todd T. Best, 7/7/2016, 10)[8] He reviewed Joseph's medical and personal life after the accident. (Best, *passim*) After the accident, Joseph was taken to a pediatric intensive care unit, where he stayed for some time between one and two weeks, with almost a week in a coma. (Best, p. 11) Reasonably soon after release from the hospital, Joseph unsuccessfully attempted to return to school, but he could not return to school for some time

Going back to school was a disaster. Joseph was a changed child. *Id.*, p. 12. He turned from a happy child to one obsessed with death. *Id.*, p. 12. The years that followed reveal a profoundly unsuccessful life.

For example, Joseph tried trade school, but this failed. *Id.*, p. 13. He tried various entry level jobs – one after the other was unsuccessful. *Id.*, p. 12. In one job, he put his boss into a headlock and was fired. *Id.*, p. 12. One ray of sunshine was Joseph's completion of adult education high school, earning a degree. *Id.*, p. 12. But a multitude of failed jobs characterized his life. *Id.*,

[8] Presented at trial, Proceedings, 7/15/2016, p. 238.

p. 12. Joseph wound up in jail three to four times. *Id.*, p. 13.

His medical condition was consistently poor. He had blurry vision; back pain (10 out of 10); couldn't bend, lift or twist; and weakness in his legs. *Id.*, pp. 13-14. Before seeing Dr. Best, Joseph used alcohol and drugs. *Id.*, p. 14. There were multiple symptoms of traumatic brain injury (TBI). *Id.*, p. 15. Joseph's mood was "labile." *Id.*

Dr. Todd Best reviewed numerous symptoms that characterize TBI – symptoms presented by Joseph.

> Q. * * * your note * * * about his energy level and chronic insomnia?
>
> A. [T]hese are – the top five manifestations of a traumatic brain injury, insomnia is always in there, it's always in the top five. Energy is -- fatigue, energy, that's always a very common symptom, and he had problems with that.
>
> Q. What about coordination issues or balance issues?
>
> A. Again in your top five symptoms of traumatic brain injury balance is usually in there. He was having problems with balance and coordination. Also vertigo where he feels like the room is actually spinning around him.
>
> Q. What about psychological assessment on that date?
>
> * * *
>
> A. He was having flashbacks for years after the accident. The flashbacks had improved. He did admit that his mood was very labile, meaning the slightest thing could set him off and he can't control his anger. [*Id.*, p. 15]

Dr. Best reviewed early records from other doctors. A neuropsychological report by Dr. McMillan, June 6, 1999, "described [Joseph] as being suspicious of other people, distrustful of other people, angry, critical of other people." (Best, 16) Asked for his December 3, 2012, diagnosis, Dr. Best testified the primary diagnosis was TBI: "Number one, traumatic brain injury; * * *.") *Id.*, p. 16. Dr. Best's assessment was "traumatic brain injury due to motor vehicle accident 9-9-96." *Id.*, p. 19.

Dr. Best's treatment plan involved multiple prongs: (i) "psychiatric consultation emotional disorder due to traumatic brain injury;" (ii) treatment with psychiatrist, Dr. Rubin; (iii) vocational

rehabilitation (or pre-vocational counseling); and (iv) recreational therapy. *Id.*, pp. 18-21.

The program worked remarkably well. Dr. Best described the visit on November 26, 2013. "Life was going good." Joseph "was really enjoying the pre vocational activities at therapy, and "working at Gallery U." (This is a center in downtown Royal Oak where people with traumatic brain injury create and display and sell, they actually sell their art pieces.) (Best, 25.)

Dr. Rubin was counseling Joseph, and there was both vocational rehab and recreational rehab. (Best 26) The assessment still the same – traumatic brain injury. *Id.*, p. 26. But Joseph thrived in vocational rehab. *Id.*, p. 26. Dr. Best continued to prescribe medication "and it wasn't a lot." *Id.*, p. 27. On January 14, 2014, Joseph was continuing with counseling, rec therapy, and vocational therapy. *Id.*, p. 27. Dr. Best hoped that Joseph would eventually move from his parents' home to a semi-independent facility. *Id.*, p. 28-29.

By July 22, 2014, Dr. Best characterized Joseph:

> Absolutely. He was really thriving, really happy, really thriving, making progress. * * *
>
> Q. And the working diagnosis remained the same on July 22 of '14, correct?
>
> A. Yes.
>
> Q. [Y]ou did actually note that he was making excellent progress * * *?
>
> A. Yes. [Best, *supra*, pp. 31-32]

Attendant care was among other claims submitted to Defendant. Mrs. Wier (helped by other family members) had attended and supervised Joseph. See *infra*.

On September 23, 2014, Dr. Best learned that Defendant would not pay for Joseph's treatment. Joseph, having lost his insurance benefits, has dramatically decreased his care, and his health has correspondingly decreased. Dr. Best's diagnosis and recommendations remained the same, although Joseph could not follow these recommendations. *Id.*, pp. 38, 39-40.

Dr. Best rejected the alternative diagnosis that Joseph is bipolar. "He's stressful, he's

paranoid, he's -- overreacts to the slightest of slight. This is not a genetic problem; this is a loss of inhibition, loss of control type of problem. It's got nothing to do with bipolar." (*Id.*, p. 46.) Last, Dr. Best rejected the proposition that Joseph had recovered from TBI, characterizing the suggestion as "a horribly irresponsible thing to say." *Id.*, p. 46.

Ms. Allison Fikany, Joseph's case manager, testified. (Fikany, 7/19/2016, p. 6) She coordinated various medical and therapeutic services for Joseph. She arranged for Allstate to re-open Joseph's claim file and also arranged Joseph's meeting with Dr. Best. (Fikany, 7/19/2016, pp. 16, 23-24) Ms. Fikany read her case management report that was transmitted to Defendant. She read a report that reviewed Dr. Michael McMillan's medical review.

> "On a neuro psychological evaluation * * * he states that Mr. Wier's cognitive difficulties are largely attributable to the injuries sustained in the automobile accident. * * * Mr. Wier sustained contusions to the left frontal lobe, a hemorrhage in the right occipital lobe, and also within the parietal cortex. * * * [D]ue to financial restraints the family was unable to accommodate all therapies recommended for Joseph." [*Id.*, p. 26.]

Ms. Fikany's opinion – transmitted to Defendant in the report – emphasized the need for continuing treatment.

> Despite traditional views, children often do not necessarily recover well from brain injury. Residual functional impairments are commonly documented and physical, cognitive, educational, and social domain means and result in a significant on-going social and economic burden for the child's family and for the broader community.
>
> * * *
>
> More recent acknowledgement of the serious and often permanent consequences of acquired brain injury in childhood has been documented. [*Id.*, pp. 27-28; internal quotation marks omitted.]

Ms. Fikany further testified that three doctors recommended semi-independent living. "Doctor Best, Doctor Rubin and Doctor Kamoo all recommended semi-independent living" and she was not surprised that Dr. McMillan would also agree. *Id.*, pp. 32-33.

Besides Joseph, two family members testified: Joseph's sister and his mother.

Julia Reinhart, Joseph's sister, presented testimony. (Reinhart, 7/19/16, pp. 126-156; 7/20/2016, pp. 15-72) Joseph was in the hospital for about two weeks, spending maybe four days in a coma. (Reinhart, 7/19/16, p. 137) After the accident, Joseph's personality changed from doing well at school and home.

> When he was little -- well, before the accident, he had a personality that was very sweet, very alert. He was intelligent. After the accident, he was quick to get angry, aggressive, he lashed out, he said horrible inappropriate things when there shouldn't have been any reason for him to say things like that.
>
> * * *
>
> A. He called me Meals on Wheels in front of people. He would say things like I was a hooker, which was nothing that would have ever come out of his mouth ever before this. And it wasn't he even – terrible things. Called my mom names. * * *
>
> A. [He said such things to] everyone. [*Id.*, p. 141.]

Joseph's personality changed; he didn't relate to the family anymore. He said very inappropriate things about his father. (Reinhart, 7/19/16, p. 142) He threatened his sister – even to the point of threatening to kill her. (Reinhart, 7/19/16, pp. 146-147) And he assaulted Julia, putting her into the hospital, requiring a surgical procedure. *Id.*, pp. 21-22.

Ms. Brenda Wier, Joseph's mother, testified. (Brenda Wier, 7/21/2016, p. 107) Her testimony largely conformed to that of Ms. Reinhart. Joseph's post-accident history is marked by a multitude of failed jobs,[9] employment marred by stupid disputes with his superiors, jail time, and drug use, all marked by overall impulsiveness. Ms. Wier compared this to Joseph's younger self when he "was an altar server at church. Just a very loving young man." *Id.*, p. 138.

Plaintiff Joseph Wier also testified. (Joseph Wier, 7/22/2017, 16) He confirmed the

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[9] ABC Warehouse, Panera Bread, Jets Pizza, Little Caesars Pizza, and McDonalds, to name some.

testimony presented by his mother and sister. After the accident, he was more aggressive,[10] used inappropriate speech,[11] was more confrontational,[12] alienated friends,[13] lost jobs,[14] and landed in jail.[15] *Id.*, p. 27-28. As an example of his poor impulse control, on his way to an N.A.[16] meeting, he instead bought drugs and then decided that he wanted more drugs. Using a paper bag with eyeholes cut, he robbed a 7-11 about three blocks from his house. Joseph described the proprietor as trying not to laugh. The police arrested him. *Id.*, pp. 45-46. He did the same thing in the same manner on another occasion at the same location. *Id.*, p. 47. Joseph explained these impulses were the same. "Yeah, they were all the exact same thing. I was supposed to be going to N.A. at the time and instead I decided to go do something else stupid." "What I would do is, afterwards I would realize what I did, how stupid it was. And I was too embarrassed to go to my family and tell them what I'd done * * *." *Id.*, p. 47.

There was substantial testimony from medical and psychological experts.

Dr. Eugene Rubin, a psychiatrist with a focus on psychopharmacology testified. (Rubin Video Deposition, 7/8/2016, p. 6)[17] Dr. Rubin testified regarding Joseph's history and diagnosis.

> [H]e had a history of traumatic brain injury suffered in a motor vehicle accident at age 14. That injury resulted in a loss of consciousness, hospitalization, brain bleed, cerebral edema; and that subsequent to the head injury he had problems on several fronts, involving his mood and behavior, primarily.
>
> He had a history of mood swings, altercations, poor judgment, significant history of substance abuse,[18] time in jail. He described periods of depression as well as brief periods of feeling elated. A major concern was aggression. He also described being disorganized, having trouble completing tasks, being easily distracted, losing jobs because of mistakes and inefficiencies or -- or due to

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[10] Joseph Wier, 7/22/2017, 28.
[11] Id.
[12] Id.
[13] Id.
[14] *Id.*, p. 30.
[15] *Id.*, p. 44.
[16] Narcotics anonymous.
[17] Presented at trial, 7/20/2016, p. 81.
[18] Substance abuse is common for someone with a severe TBI. (Rubin, p. 103.)

inappropriate behavior.

> My conclusion was that he did, in fact, have a traumatic brain injury, and a mood disorder secondary to the traumatic brain injury, in addition to a cognitive disorder related to the brain injury. [Rubin, pp. 11-12]

Dr. Rubin agreed that Joseph be "in a more structured, supervised setting, where professionals are working with him and monitoring him and -- as opposed to his family." *Id.*, p. 16. A semi-independent living arrangement. *Id.*, pp. 16-17.

Upon reviewing records of the original injury from St. John Hospital, Dr. Rubin concluded that the TBI was worse than he initially believed. Previously, Dr. Rubin characterized the TBI as "at a minimum * * * a mild complicated TBI." After review of further records, he testified:

> In his case, he had bleeding or multiple areas of hemorrhage, involvement of his frontal lobe, occipital lobe, temporal lobe, he had a skull fracture. It was noted that he had frontal edema. He was admitted to the hospital September 9. His CT report of September 16, frontal edema was noted has increased, and other findings, other pathological findings, had decreased. Frontal edema had increased.
>
> And then it was noted on a discharge summary from pediatrics unit, to which he had been transferred -- let's see if I can find this.
>
> Patient was transferred late on September 13, '96, to the pediatric floor from pediatric intensive care unit. Although he still had some emesis after the transfer, he had very good oral intake and remained in rather a somewhat drowsy state. They go on to say on the floor he complained for a few days of severe frontal headaches, especially behind the eyes.
>
> So days after they're describing him as still having episodes of vomiting, which can be a sign of increased intracranial pressure, and they describe him as drowsy, which could be a sign that he's continuing to have, or going in and out of, an altered level of consciousness several days after the accident. [*Id.*, pp. 20-21]

The St. John records did not change the recommended treatment modes, but they helped Dr. Rubin realize the TBI was more severe than he had understood. *Id.*, p. 23.

Dr. Ray Kamoo, Ph.D., neuropsychology, also testified. He performed a neuropsychological workup on Joseph. (Kamoo, 7/21/16, p. 8) He reviewed the imaging study report from St. John's in 1997. *Id.* Joseph suffered a skull fracture, leading Dr. Kamoo to opine

Joseph suffered a skull fracture and multiple brain bleeds, causing moderate to severe injury. *Id.*, p. 16. Dr. Kamoo rejected Dr. Hanks' conclusion that Joseph's psychological issues were not attributable to the accident. *Id.*, pp. 17-18. Dr. Kamoo found that Dr. Hanks wrote a coherent report to a point and then leaped to the conclusion that the injury was independent of the accident. *Id.*, p. 18. In contrast, Dr. Kamoo agreed with Dr. McMillan's findings in 1999. *Id.*, p. 19.

Defendant called Dr. Robin Hanks, Ph.D., a psychologist. (Hanks, 7/22/2016, p. 113) Dr. Hanks agreed Joseph suffered a TBI, specifically, a "mild complicated traumatic brain injury." *Id.*, p. 127. She concluded Joseph is not impulsive; rather, he had the forethought to wear a paper bag at the 7-11 a few blocks from his home. *Id.*, p. 135. She asserted brain injuries get better over time and concluded Joseph recovered from the TBI relatively soon after the accident. *Id.*, p. 149. She found Joseph required no medical or psychological services in relation to the 1996 car accident. *Id.*, p. 147.[19]

Plaintiff cross-examined Dr. Hanks. Directed to Dr. Hanks' credibility, Plaintiff asked why an insurance carrier demanded an IME. Although she was paid between $10,000 and $12,000, she denied understanding the reason for an IME or the consequences of her testimony – not acknowledging Defendant will save considerable money by denying a claim. *Id.*, pp. 155-156.

Dr. Hanks called the TBI a mild complicated brain injury and later morphed this, striking ~~mild~~ and inserting moderate.

> Q. And so since you're saying this is a more recent thing, that's really what he had, was a moderate brain injury; correct?
>
> A. Yes. [*Id.*, p. 160]

Dr. Hanks agreed that her assessment of cognitive findings followed other doctors.

> Q. But overall, you would agree, and I think your report indicates, that your

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[19] Dr. Hanks asserted that Joseph required psychotherapy for reasons *unrelated* to the accident.

neuropsychological test results were very similar, to not only Dr. Kamoo's, but also Dr. McMillan; is that fair?

A. With regard to overall intellectual functioning, yes.

* * *

Q. So pretty much you and Dr. Kamoo and Dr. McMillan are all on the same page with regard to the results of your cognitive findings on the neuropsych test; correct?

A. Yes. [*Id.*, pp. 163-164]

But Dr. Hanks repudiated literature by her and her co-authors. In a paper from 1999, she and her co-authors wrote:

Q. It says, I'm looking at this part, it says: A variety of emotional sequela and adjustment difficulties have been reported after a traumatic brain injury. The TBI literature documents a high incidence of both active emotional disturbance, including anxiety, agitation, irritability, anger, paranoia, impulsivity and emotional lability, as well as passive emotional disturbance, such as depression, apathy and anergia.

It says: Such disturbances have been shown to have persistent and pervasive effects on rehab, return to work, and social community integration. [*Id.*, pp. 165-166]

Dr. Hanks, now Defendant's IME witness, repudiated what Dr. Hanks, lead author of the learned article, had written. *Id.*, 166.

Testifying for Defendant, Dr. Hanks espoused that Joseph had recovered from the TBI, and his symptoms were entirely independent from his accident. *Id.*, passim.

Dr. Hanks also rejected her own authority in another matter.[20] She wrote:

Q. Emotional and behavioral adjustment are complex and ambiguous constructs that are difficult to measure even in individuals without neurologic insult. In individuals with TBI, however, challenge is even greater due to the nature and etiology of their emotional behavioral disturbance. This problem is further exacerbated by decreased awareness that can occur after more severe brain injuries.

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[20] On direct examination, Defendant had relied on Dr. Hanks' authored literature, asking, "And with regard to the literature that you published yourself, can you tell the jury * * *?" (Hanks, 7/22/2016, p. 128)

Q. Do you agree with that statement?

A. No. [*Id.*, p. 168]

Moving on, Dr. Hanks disagreed with (or equivocated with) yet more that was laid out in her co-authored literature. She rejected her own authored writing that: (i) TBIs lead to anxiety, depression, confusion and social withdrawal six months after TBI, and (ii) patients at one to four years after injury exhibited greater belligerence, verbal expansiveness, negativity, helplessness, suspiciousness, social withdrawal, confusion and hyperactivity than exhibited by subjects in the normal community. She blamed her co-author and could not remember whether she had agreed with the passage from her authored literature. *Id.*, pp. 169-170.

Beyond disagreeing with her own authored literature, Dr. Hanks contested records from the Eastwood Clinic (Dr. Daniel Stettner, psychologist, and Dr. Gary Faulstich, psychiatrist), demonstrating both doctors were "working to stabilize Joe's inconsistent and problematic behavior disorder that both doctors related to his traumatic brain injury," characterizing the records as merely the doctors' "perception of what they were working on." *Id.*, p. 161.

Last, Dr. Hanks' acknowledged the limitations of her work. She performs neuropsychological testing generally. (Hanks, 7/22/2016, p. 120) Dr. Hanks "performed a number of neuropsychological tests on Joe." (Hanks, 7/22/2016, p. 143) But she acknowledged, "[U]nfortunately those validity[21] indices that I mentioned before were invalid, there was some inconsistent responding, so I couldn't actually use those scores." The unfortunate invalidity was discussed. In brief, (i) Dr. Hanks' tested to determine emotional functioning and personality; (ii) the test could not be used, because it was invalid; and, therefore, (iii) Dr. Hanks had no objective

[21] Simplistically, "A test is valid if it measures what it is supposed to measure." Nuances of the concept are not germane to this appeal.

test results regarding Joseph's emotional makeup and personality. She could not employ her expertise; her conclusion had no basis in her testing. She wrote the substance scores were deemed invalid and his reported emotional and personality scores on the measure could not be interpreted. *Id.*, pp. 170-171.

Dr. Hanks' impressions of Joseph's temperament and personality, therefore, were predicated upon her interview with Joseph – no doubt relying on Joseph's history as he related it. Put another way, although Defendant critiqued Joseph's treating physicians for relying on Joseph's history (related by him and his family), Dr. Hanks did exactly that. *Id.*, p. 177. In sum, Dr. Hanks, largely, relied on her conversation with Joseph (his self-assessment contradicted by his testimony at trial), notwithstanding his status – the victim of TBI, diagnosed with multiple psychiatric issues by his doctors. Asked her thoughts or opinions about Joseph's impulse control problems, she "didn't see any." (Hanks, 7/22/2016, p. 146.)

On the other hand, Dr. Hanks was content to rely on reports on Joseph's behavior over decades to reach the diagnosis: "paranoid ideation, suspiciousness, and antisocial personality traits" that depended on Joseph's history. This diagnosis, according to Dr. Hanks, did not relate to test results from the MMPI[22] but was instead based on the same history available to all other doctors (and even available to the jury). (*Id.*, p. 175)

Defendant purportedly relied on a report by Dr. Jeffrey Kezlarian. Dr. Kezlarian performed an IME on July 2, 2015 (Fikany, 7/19/2016, p. 40), and his video deposition[23] was played to the jury. (Transcript, 7/26, 2016, p. 115) Dr. Kezlarian asserted everything on Defendant's wish list, testifying that Joseph suffered from a bipolar personality with no connection to the accident.[24]

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[22] Minnesota Multiphasic Personality Inventory.
[23] Video Deposition of Jeffrey Kezlarian, M.D., 7/11/2016.
[24] Kezlarian Video Deposition, *supra*, pp. 9, 35-37.

Critically, Defendant first denied no-fault benefits and its counsel, after suit commenced, hired Dr. Kezlarian to perform an IME.

In his video deposition,[25] Dr. Todd Best, referred to his note of November 25, 2015, and testified that "they [insurance carrier] were not going to pay for the recreation therapy, work skills slash vocational rehab." (Best Deposition, p. 38) Defendant's senior claim service consultant working in the special investigation unit, Mr. Remski, testified that benefits were terminated by January 13, 2015. "In the course of the litigation," the Kezlarian deposition followed; denial of benefits preceded the deposition. He testified, "[W]e determined that there were a number of benefits that were being claimed that were not related to the motor vehicle accident and we sent a [January 13, 2015] letter to Mr. Wier's attorney at that time advising." The denied services were "for attendant care, residential care, recreational therapy and vocational rehabilitation." After that, they "arranged for a psychiatrist [Dr. Kezlarian] to evaluate Mr. Wier." (Remski, Transcript, 7/26/2016, pp. 25-26.)

The jury found Joseph was entitled to no-fault benefits relating to attendant care, medical bills, and rehabilitation, and awarded penalty interest. (Proceedings, 7/28/2016, pp. 5-6).

LAW AND ARGUMENT

ISSUE I[26]

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR SUMMARY DISPOSITION, BECAUSE THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH PLAINTIFF'S CASE-IN-CHIEF.

As a threshold issue, this Court should deny appellate review of the summary disposition

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[25] The video deposition, taken July 7, 2016, was played to the jury on July 15, 2016. (Transcript, 7/15/2016, p. 238)

[26] Defendant's statement of the issue, p. vi, does not conform to its statement of the issue in the text. Plaintiff responds to the issue posed within the text.

motion, because a trial followed. In the federal system, the appellate court will not review a motion for summary judgment, denied by the trial court, following a trial. *Ortiz v. Jordan*, 562 U.S. 180, 183-184, 131 S.Ct. 884, 178 L.Ed.2d 703 (2011), held:

> May a party, as the Sixth Circuit believed, appeal an order denying summary judgment after a full trial on the merits? Our answer is no. The order retains its interlocutory character as simply a step along the route to final judgment. Once the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary-judgment motion.

Ms. Ortiz sued prison officers, alleging sexual assault. The principal defendants moved for summary judgment based on qualified immunity, but the trial court found there were material facts in dispute and denied the motion. The culminated in a verdict for Ms. Ortiz; the defendants did not raise a postjudgment motion for judgment as a matter of law. On appeal, the defendants asserted the trial court erred by denying summary judgment.

Because the motion was based on facts that arose at trial, the Court explained, "[T]he full record developed in court supersedes the record existing at the time of the summary-judgment motion." *Id.*, at 899. So "the defense must be evaluated in light of the character and quality of the evidence received in court." *Id.*

Applying *Ortiz*, Defendant could challenge the sufficiency of the evidence (and its underlying foundation) at each stage of the trial: (i) when each witness was called – before and after the testimony, (ii) at the close of Plaintiff's proofs, and (iii) after verdict by a motion for judgment n.o.v. or for new trial. Appellate review of the motion for summary disposition, ignoring the complete record available from the trial, is unwarranted. *Glaros v H.H. Robertson Co.*, 797 F.2d 1564 (Fed.Cir. 1986), explained. If the trial court grants summary judgment on one or more counts, there is no trial on that issue, and the losing party is entitled to appeal the issue. *Id.*, at 1573. But an order denying (partial) summary judgment is neither dispositive nor appealable. *Id.*

There is obvious logic. Even if the trial court (*arguendo*) erred in finding sufficient evidence (at the motion stage), the plaintiff must then proceed to trial and present a *prima facie* case that may be tested by motion for directed verdict and motion for judgment n.o.v. If the plaintiff successfully establishes the case on a full trial, there is no equity in resurrecting the argument on summary judgment – predicated on evidence less than that available at trial. The rule embraces a species of harmless error: the trial court may have erred, but ultimately (at trial), the plaintiff presented a proper case to the jury. No justice is achieved by retroactively granting the motion for summary judgment.

In *Watson v. Amedco Steel, Inc.*, 429 F.3d 274 (7th Cir. 1994), the court "faced today" the "curious circumstance" where the appellant appealed an unfavorable jury verdict. He "does not contest that verdict," but his "lone challenge" was "to the district court's denial of his motion for summary judgment." *Id.*, 276. The appellate court refused to reverse on the basis of error in resolving the motion for summary disposition. (*Id.*, 277.) "As a general rule, the denial of a motion for summary judgment is not subject to review once the district court has conducted a full trial on the merits of a claim." *Id.* The trial court's denial of the motion for summary disposition merely determines that the matter should proceed to trial. "And after trial, whether or not summary judgment should have been granted generally becomes moot." *Id.* The earlier decision "does not settle or even tentatively decide anything about the merits of the claim." *Id.* (Internal quotation marks and citation omitted.) "Summary judgment was not intended to be a bomb planted within the litigation at its early stages and exploded on appeal." (Internal quotation marks and citation omitted.) Once "the district court has conducted a full trial on the merits of a claim * * * the merits should be judged in relation to the fully-developed record emerging from that trial." *Id.*, at 279. Plaintiff respectfully submits this Court should follow the federal system rule. After trial, the appellate court should not review a denied motion for summary disposition. This cause of action

demonstrates the wisdom of the rule. Nevertheless, Plaintiff responds to the substance of Defendant's issue.

At the motion for summary disposition, Defendant maintained that testimony by various physicians should be barred and summary disposition granted. Defendant asserted the testimony should be barred, because the physicians had not reviewed certain records from St. John Medical Center. [Defendant's Motion for Summary Judgment, Defendant's Attachment 4 to its brief on appeal.]

Astoundingly, by the time of trial, it was revealed the putative St. John Hospital records did not exist.

Plaintiff subpoenaed the purported records (Appellate App. 1). Counsel for the hospital wrote there are no such records, (Appellate App. 2), attaching Michael Kendrick's affidavit: "[A] a thorough search of the files of St. John Hospital and Medical Center, carried out under my direction and control, revealed no medical records on the patient named in the attached copy of the subpoena duces tecum." (Appellate App. 1)

Plaintiff's counsel expressed his outrage at trial! (Transcript, 7/12/2016, pp. 14-23; Appellate App. 3.) Defendant had repeatedly maintained that Plaintiff's experts' must review various medical records that did not exist. But there were no such records. Defendant conceded that she had no full set of records. (Transcript, *id.*, p. 19; Appellate App. 3). Indeed, Defendant's experts relied on the same records as Plaintiff. Learning that Defendant had challenged Plaintiff's experts on the basis of nonexistent records and proposed to do this yet again, the trial court held that Defendant could not cross-examine on the basis of non-existent records. (Transcript, *id.*, pp. 20-21; Appellate App. 3.)

At trial, Defendant could no longer insist there were medical records that Plaintiff's experts had not reviewed; there were no such records. Thus, the full trial record presents the full records

of evidence upon which Plaintiff relied.

In any event, the trial court properly denied Defendant's motion for summary disposition.

Defendant's motion was multi-pronged. (Proceedings, 12/14/2015) First, it asserted that Joseph Wier was involved in other accidents and gave testimony he did not suffer from physical impairments or disability. *Id.*, pp. 3-4. Mr. Wier stated that he had previously suffered a closed-head injury[27] and received care for that injury, but he now had no problems. *Id.*, p. 4. Defendant asserted Mr. Wier's testimony negated the possibility of causation.

The trial court disagreed. It denied the motion, because "we have two doctors who indicate and relate his current condition to the auto accident." *Id.* The trial court determined that the issue – relating Mr. Wier's present condition to the subject accident – was an issue for the jury. It opined, "But isn't that really the subject matter for cross examination and weight of testimony in that they (treating doctors) have specifically determined that this is related, the current condition is related to the auto accident?" *Id.*, pp. 4-5.

Defendant turned to another argument; it asserted the physicians had an insufficient basis for their opinion. *Id.*, p. 5. The trial court suggested that Defendant propose a Daubert hearing. *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2768, 125 L.Ed.2d (1993). It explained: (1) the doctor's testimony precluded summary disposition, but Defendant could move for a Daubert hearing. *Id.*, pp. 5-6. Defendant acknowledged the trial court's point and stated it would bring a *Daubert* motion. *Id.*, p. 5.

The trial court properly denied Defendant's motion for numerous reasons.

Plaintiff addressed the charge that Joseph Wier had conceded recovery from the subject accident (in May, 2000). Plaintiff explained that Mr. Wier (not clairvoyant and suffering from

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[27] Referring to the subject accident on September 9, 1996.

traumatic brain injury) thought he had recovered, but six months later, "Plaintiff began treating with Dr. Daniel C. Stettner, Ph.D., for psychological claims and Dr. Haranath Policherla for mental/physical claims relating to the 1996 closed head injury (Exhibit 2). **DEFENDANT PAID FOR THE TREATMENT AS IT WAS REASONABLE, NECESSARY AND RELATED TO THE ACCIDENT (EXHIBIT 1)**" (Emphasis in original.) In his brief, Plaintiff explained that Defendant submitted no decisional authority for its argument. Although on May 4, 2000, Mr. Wier believed there were no residual effects from his 1996 traumatic brain injury; he was wrong. Defendant confirmed Plaintiff's continuing infirmity by paying benefits "RELATED TO THE SUBJECT ACCIDENT! (Exhibit 11) [Plaintiff's Brief in Support (of Plaintiff's answer to motion for summary disposition), p. 19, emphasis in trial brief.]

Plaintiff also responded that his expert witnesses had sufficient bases for finding that his present condition was caused by the subject accident. The doctors knew of Mr. Wier's medical history. "Dr. Best, Dr. Rubin and Dr. Kamoo all testified that they reviewed Dr. McMillan's 1999 neuropsychological report prior to treating Plaintiff. (Please see attached selections from the deposition transcripts of Dr. Todd Best, Exhibit 3, Page 8, lines 11-15, Page 14, lines 22-25, Page 15 lines 1-5, Dr. Ray Kamoo, Exhibit 4, lines 21-24, and Dr. Eugene Rubin, Exhibit 5, page 16, lines 12-18)" And, "Please see the selected portions of the deposition transcripts of Dr. Best, Dr. Kamoo, and Dr. Rubin, whom all indicate that Plaintiff sustained a traumatic brain injury in the subject accident, that they have provided treatment for the same, and that he requires around the clock attendant care as a result of the same."[28] Plaintiff also responded that, on December 20,

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[28] Please see attached selections from the deposition transcripts of Dr. Todd Best, Exhibit 3, Page 35, lines 13-25, Page 45, lines 12-17, Page 73 lines 7-25, Page 7 4, lines 1-6, Dr. Ray Kamoo, Exhibit 4, page 27, lines 21-24, page 47, lines 15-24, page 63, lines 1-3, and Dr. Eugene Rubin, Exhibit 5, page 16, lines 12-18, page 24, lines 11-17, page 30, lines 13-24, page 55, line 16-25, page 56, lines 1-5, page 61, lines 20-22, page 62, lines 3-21, page 67, lines 20-22, page 101, lines 5-9.

2013, Dr. Nick Boneff, Ph.D. and Julia A. Czarnecki, MA, LLP, conducted an independent medical examination on behalf of the Social Security Administration (**SSD benefits were awarded**) and diagnosed Plaintiff as continuing to suffer from mood disorder secondary to the closed head injury of 1996, that the prognosis was guarded, that he could not work, and could not manage his own funds. (Exhibit **7.**)" [Emphasis in original]

In his brief,[29] Plaintiff reviewed the background of this action that need not be repeated here; the response to the trial court is within the record. Dr. McMillan testified regarding Joseph Wier's condition and the connection to the 1996 injury. *Id.* Dr. McMillan's prognosis (re-counted to the trial court in Plaintiff's response to the motion for summary disposition) was prophetic. The doctor referred to significant psychological problems, moodiness and emotional lability. Joseph's emotionality and his anger not only present him difficulty, but could cause him serious problems with other people.

This Court will perform a *de novo* review of the trial court's decision, but this Court is mindful that the trial court must deny the motion for summary disposition, unless there is no genuine issue on any material fact. MCR 2.116(C)(10). The reviewing court should consider the substantively admissible evidence offered in opposition to the motion. *Maiden v Rozwood*, 461 Mich. 109, 121, 597 N.W.2d 817 (1999). But the opponent is entitled to the benefit of any doubt and in the light most favorable to the party opposing the motion. Reviewing the facts in the light most advantageous to Plaintiff, the nonmovant, there can be no doubt. The trial court properly concluded there was sufficient evidence for a jury to determine the 1996 accident caused or contributed to the injuries suffered by Joseph Wier. The trial court properly denied Defendant's motion for summary disposition, and the jury also found sufficient evidence.

[29] Brief in Support (of response to motion for summary disposition), 12/7/2015.

ISSUE II[30]

THE TRIAL COURT PROPERLY PERMITTED PLAINTIFF'S PHYSICIANS' TESTIMONY LINKING PLAINTIFF'S CONDITION TO THE 1996 ACCIDENT.

Introduction

Defendant argues a novel proposition. A physician who takes a patient's history, including a prior, specific event and treats the patient must testify only to the treatment and not link the patient's diagnosis to the past event. The doctors treating Humpty Dumpty may testify that he is now scrambled eggs but must not testify his condition was caused by a great fall from a wall. The testimony of Dr. Todd Best, Dr. Eugene Rubin and Dr. Ray Kamoo assisted the trier of fact in determining that Mr. Wier's medical condition and neurological symptoms are causally related to the violent and traumatic fractured skull, brain bleed, and induced coma he sustained in a 1996 motor vehicle accident. Defendant complained regarding the material upon which Drs. Best, Rubin and Kamoo relied to reach their conclusions. But these complaints properly bear on the weight of the evidence, not its admissibility. Each was qualified as an expert in his specialty, and no *Daubert* hearing was necessary. Plaintiff was not required to show that the testimony and conclusions were absolutely true or uncontested; the weight of the testimony is reserved for jury determination. The trial court properly denied Defendant's motion, without abusing its discretion.

Facts Specific to Issue II

In 1996, Joseph Wier suffered a traumatic brain injury, altering his life. He received No-Fault benefits for approximately three years, until Defendant stopped benefits. Plaintiff sought additional treatment from various medical providers beginning in approximately 2012. Dr. Best, Dr. Rubin and Dr. Kamoo testified that Plaintiff's condition relates to the traumatic brain injury

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[30] Plaintiff responds to the statement of the issue stated within Defendant's text.

he sustained in the 1996 motor vehicle accident. Each is a specialist in his field and qualified to provide opinion testimony that Plaintiff's treatment is causally related to his traumatic brain injury. (Dr. McMillan's evidence is reviewed at length in the factual statement *supra*, and Defendant refers only to the treating doctors in this issue.)

A. Dr. Todd Best

Plaintiff treated with Dr. Todd Best, who received specialized training in closed-head injuries and traumatic brain injuries during his residency in physical medicine and rehabilitation at William Beaumont Hospital. (Best Dep., 8/21/2015, p. 5, Ex. 1 to Plaintiff's Response in Opposition to Defendant's Motion to Limit Testimony of Treating Physicians, 6/1/2016) Dr. Best routinely diagnoses traumatic brain injuries. *Id.*, 6. Over 24 years, he has seen 10 to 15 patients per week with traumatic brain injuries. *Id.*, p. 9. Dr. Best is uniquely qualified to offer expert opinions on traumatic brain injuries. (Dr. Best's CV was attached as Exhibit 2 to Plaintiff's Response.)

During his deposition, Dr. Best, drawing upon his 24 years of diagnosing traumatic brain injuries, described how injuries are diagnosed.

> A. It's actually history, physical and diagnostic testing….we can use CAT scans, MRIs, EEGs, neuropsychological testing. * * *
>
> A. There's many different symptoms. I mean, you have psychological problems to begin with. People suffer from anxiety, depression, irritability, change in personality, mood irregularity. You have cognitive problems, attention fatigue, mental fatigue, that is, memory, mathematical skills, you know, the entire gamut of cognitive functioning can be affected. You have behavioral problems, impulsivity. For example, impulsivity, energy, motivation problems. You can have somatic symptoms, for example, headaches, dizziness, balance problems. You can have sleep problems, can't get to sleep. Those are just a sampling of many symptoms. [Best Dep., *id.*, pp. 7-8.]

Dr. Best saw Plaintiff numerous times for treatment. Dr. Best related the complaints: "multiple areas of pain; his neck, his back, his tailbone, headaches, multiple joint pains, * * *

irritability, with violent outbursts, difficulty controlling himself, difficulty interacting with other people, very upset with the fact that he was not able to maintain employment." * * * You know, memory problems, cognitive problems." *Id.*, p. 23.

Defendant's counsel pressed Dr. Best about materials he reviewed before seeing Mr. Wier, to which Dr. Best responded that review of volumes of historical records was unnecessary, since the existence of Mr. Wier's closed-head injury was not even a close call. "The history was clear. There was no need to." *Id.*, p. 24.

Asked about prison medical records, Dr. Best again explained that Plaintiff's condition was obvious and such review was completely unnecessary. "Well, I think it's obvious. I don't need -- that he was suffering from a traumatic brain injury with terrible problems with mood instability and impulsivity and no ability to control his violent outbursts." *Id.*, p. 28.

Relating the obvious nature of Plaintiff's condition to the accident, Dr. Best testified about the cause of Wier's condition based on Best's examination. He related the diagnosis. "Traumatic brain injury, rule out migraines due to the traumatic brain injury, adjustment disorder with anxious and depressed mood, chronic low back pain due to the accident." *Id.*, p. 35. All treatment by Dr. Best was causally related to the 1996 motor vehicle accident. He agreed that "[e]very single time you [Dr. Best] saw him [Wier] since you began treating him, you treated him for his traumatic brain injury." *Id.*, p. 73.

Dr. Best's discovery deposition testimony provided a clear foundation for the admissibility of expert testimony. Dr. Best unequivocally testified Plaintiff suffered a traumatic brain injury during the 1996 motor vehicle accident and that all of his treatment for Plaintiff's traumatic brain injury symptoms were causally related to the 1996 motor vehicle accident. Defendant's objections to Dr. Best merely bear on the weight of the evidence, not the admissibility.

B. Dr. Eugene Rubin

Plaintiff obtained psychiatric treatment from Dr. Eugene Rubin, who earned his undergraduate and medical degrees from the University of Michigan. He was later board certified in psychiatry. (Rubin Dep., 11/6/2015, p. 6, Ex. 3 to Plaintiff's Response in Opposition to Defendant's Motion to Limit Testimony of Treating Physicians, 6/1/2016) He completed an academic psychiatry fellowship at New York University, where he also became an instructor. *Id.*, pp. 6-7. (Dr. Rubin's CV was attached.)

Dr. Rubin diagnosed Mr. Wier with a traumatic brain injury at their first meeting. *Id.*, p. 24. The diagnosis corresponded with the traumatic brain injury diagnosis given by Drs. McMillan, Kamoo and Hanks. *Id*. Due to Wier's 1996 accident, he suffered injuries to several parts of his brain, including the frontal lobe, occipital lobe and parietal lobe. *Id.* Wier's brain injury resulted from a closed-head skull fracture; he was put into an induced coma in the hospital after the accident *Id.*, p. 25; and he also suffered a brain bleed *Id.*, p. 27.

Dr. Rubin disagreed with psychiatrists who diagnosed Mr. Wier with bipolar disorder. As Dr. Rubin testified, "My diagnosis of Joe is that he has a mood disorder due to a traumatic brain injury."

> A. * * * The onset of the behavior change after a significant brain injury at the age of 14 is the start of his symptomatology. That included mood swings and impulsivity, violent behavior, um, and as I said, that started after the head injury and has essentially continued since. He has a great – a history of affective lability, reactivity, poor impulse control, and violent behavior. Not all of these behaviors have occurred in the context of mood episodes such as agitated depressions or manic episodes. There is an ongoing problem he has with impulse control and paranoia, altercations that are not exclusive to mood episodes. He does have mood episodes. If you take the whole picture together, it is more consistent with, um, a brain injury and disinhibition and mood symptoms, more consistent with that than bipolar disorder. He's quite different from the patients I treat with bipolar disorder in terms of longitudinal course, in terms of degree of symptoms and age of onset. [*Id.*, pp. 30-31]

All of Wier's treatment related to the traumatic brain injury he sustained in 1996. *Id.*, p. 101. Similar to the approach taken with Dr. Best, Allstate's counsel then pressed Dr. Rubin about whether he had ordered and reviewed volumes of medical records from many years prior. Dr. Rubin explained that it was unnecessary, since he based his diagnosis on more recent records and his examination of Mr. Wier:

> Q. Did you have the records from his psychiatric admission in late 2012?
>
> A. No. * * *
>
> A. Because taking his history and having [more recent] records was enough.
>
> Q. Even though there's a 13-year gap, you thought that was enough?
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> A. There isn't a 13-year gap. It's, it's not routine psychiatric practice to obtain records of everything that's happened to somebody. For the purpose of diagnosis and treatment you may get some records, you would take a history, an evaluation, see a person over time as well, which may affect diagnosis, but that is how, how we do it. [*Id.*, p. 46]

Dr. Rubin's deposition testimony provides a clear foundation for his expert testimony. Unequivocally, Plaintiff suffered a traumatic brain injury during the 1996 motor vehicle accident *Id.*, pp. 30-31, and all of Plaintiff's treatment for traumatic brain injury symptoms were causally related to the 1996 motor vehicle accident. *Id.*, p. 101. Here again, Defendant's complaints about Dr. Rubin are germane only to the weight of the evidence.

C. Dr. Ray Kamoo

Plaintiff obtained a neuropsychological evaluation from neuropsychologist Ray Kamoo, Ph. D., a neuropsychologist for over 23 years. He provides direct clinical services and consults with brain injury patients. Dr. Kamoo conducted a complete neuropsychological test protocol on Mr. Wier to determine his memory, general IQ, personality functioning and hand motor coordination. (Kamoo Dep., 11/11/2015, p. 5, Ex. 5 to Plaintiff's Response in Opposition to Defendant's Motion to Limit Testimony of Treating Physicians, 6/1/2016.) (Dr. Kamoo's CV was attached, as was Dr. Kamoo's neuropsychological evaluation) Tests were run to determine Mr.

Wier's current cognitive status and functioning. *Id.*, pp. 23-24.

Mr. Wier's traumatic brain injury symptoms did not manifest after a lapse of time from the accident; rather, the symptoms had been manifesting all along. *Id.*, p. 63. The symptoms that Wier was experiencing were not being adequately addressed. *Id.*, p. 63. Dr. Kamoo reviewed reports of two IME physicians, Dr. Kezlarian and Dr. Hanks. *Id.*, p. 79. However, Dr. Kamoo was not given access to purported records that Allstate had allegedly provided to its IME physicians. *Id.*, p. 80. He testified that if Allstate would share these records, he would be happy to review them (which Defendant could not do, because the records did not exist). *Id.* Dr. Kamoo disputed Dr. Kezlarian's diagnosis of bipolar disorder. *Id.* He also disagreed with Dr. Hanks' methodology in finding Mr. Wier's myriad issues had nothing to do with the accident. *Id.*, p. 81. Yet again, Defendant's argument regarding Dr. Kamoo are germane only to the weight of his testimony.

Law pertaining to Issue II

A. MRE 702

Expert testimony in an opinion is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact. MRE 704. The Michigan rule provides for opinions helpful to the trier of fact (See Advisory Notes to MRE 704). The admissibility of expert opinions is governed by MRE 702, which provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

MRE 702 requires the court "to ensure that each aspect of an expert witness's proffered

testimony – including the data underlying the expert's theories and the methodology by which the expert draws conclusions from that date – is reliable." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779–783, 685 NW2d 391 (2004). A court may admit evidence only after it confirms that the expert testimony meets the standard of reliability. *Gilbert*, *id.*, at 782.

The issue is whether Dr. Best, Dr. Rubin and Dr. Kamoo's testimony "is based upon sufficient facts or data" under MRE 702. "The standard focuses on the scientific validity of the expert's methods rather than on the correctness or soundness of the expert's particular proposed testimony." *People v Unger*, 278 Mich.App. 210, 217-218, 749 N.W.2d 272 (2008). The United States Supreme Court emphasized in *Daubert*:

> The inquiry envisioned by Rule 702 is . . . a flexible one. Its overarching subject is the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed sub-mission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate. [*Daubert*, 509 U.S. at 594-595.]

In *Kumho Tire Co, Ltd v Carmichael*, 526 U.S. 137, 119 S Ct 1167, 143 L Ed 2d 238 (1999), the Supreme Court revisited *Daubert*; the inquiry under Rule 702 is "a flexible one" in which the factors cited "do not constitute a 'definitive checklist or test.'" *Id.,* at 150. The *Daubert* factors "may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of the testimony." *Id.* The applicability of the *Daubert* factors necessarily varies case by case, expert by expert: "[t]oo much depends upon the particular circumstances of the particular case at issue" to impose hard and fast rules. *Id.* Thus, when screening scientific evidence under MRE 702, a court must determine which factors reasonably measure reliability within a case-specific factual context.

B. MCL 600.2955(1)

A trial court must also consider factors in MCL 600.2955(1). *Clerc v Chippewa Co War*

Mem Hosp, 477 Mich. 1067, 1067, 729 N.W.2d 221 (2007). MCL 600.2955 provides seven factors: (i) subjected to scientific testing and replication; (ii) subjected to peer review publication; (iii) consistency with generally accepted standards; (iv) error rate of the opinion and its basis; (v) acceptance within the relevant expert community; (vi) reliability of the opinion basis and reliance by experts in the field; and (vii) reliance of opinion/methodology by experts in other contexts.

Four factors identified in MCL 600.2955 (subparts [a]-[d]) derive directly from *Daubert*, and overlap with MRE 702. Not each statutory factor need favor the proposed expert's opinion. *Chapin v A & L Parts Inc.*, 274 Mich.App. 122, 137, 732 N.W.2d 578 (2007). It suffices that "the opinion is rationally derived from a sound foundation." *Id.*, at 139.

C. Drs. Best, Rubin, and Kamoo Properly Testified on Causation.

The diagnosis of traumatic brain injury is the overwhelming diagnosis by Drs. Rubin, McMillan, Kamoo and Hanks (Defendant's IME doctor). Defendant asked the trial court to scrutinize Dr. Best, Dr. Rubin and Dr. Kamoo's discovery only deposition testimony as if it were trial testimony, before trial testimony could be offered. The argument was based on Defendant's proposal of what these specialists should review and analyze to reach a diagnosis. Defendant's conclusory argument was improper, especially at the summary disposition level, since disagreements pertaining to an expert witness's interpretation of the facts relate to the weight of that testimony and not its admissibility. *Lenawee Co v Wagley*, 301 Mich.App. 134, 166, 836 N.W.2d 193 (2013). Drs. Best, Rubin and Kamoo were unquestionably qualified to testify as experts in their specialties. Plaintiff needn't show the experts' were absolutely true or uncontested. "[A] trial court's doubts pertaining to credibility, or an opposing party's disagreement with an expert's opinion or interpretation of facts, present issues regarding the weight to be given the testimony, and not its admissibility" and "[g]aps or weaknesses in the witness' expertise are a fit subject for cross-examination, and go to the weight of his testimony, not its admissibility." *Surman*

v Surman, 277 Mich.App. 287, 309, 745 N.W.2d 802 (2007).

The trial court properly rejected Defendant's sermon on the experts' putative shortcomings. "The standard focuses on the scientific validity of the expert's methods rather than on the correctness or soundness of the expert's particular proposed testimony." *People v Unger*, 278 Mich.App. 210, 217-218, 749 N.W.2d 272 (2008). The proposed testimony (later given at trial) was rationally derived from a sound foundation and designed to (and did) assist the jury in determining the causal connection between the Plaintiff's brain injury and his 1996 motor vehicle accident. *Chapin v A & L Parts, Inc*, 274 Mich App 122, 126-27, 732 N.W.2d 578, 580 (2007); MRE 702. The testimony available when Defendant brought its motion for summary disposition was substantially the same as that given at trial. The experts confirmed that the 1996 accident – the traumatic brain injury – is the basis for Plaintiff's claim for no-fault benefits. This testimony is neither novel nor surprising. The trial court properly denied Defendant's motion for summary disposition.

D. A *Daubert* Hearing was Entirely Unnecessary.

In *Chapin v A & L Parts, Inc*, 274 Mich.App. 122, 126-27, 732 N.W.2d 578, 580 (2007), this Court cautioned trial courts not to conduct "mini-trials" when deciding whether an expert can testify at trial under MRE 702 and MCL 600.2955(1). Here, Defendant disagreed with the diagnostic approach taken by Drs. Best, Rubin and Kamoo and asked the court to weigh their opinions based on that disagreement. This is not allowed, and these doctors were properly permitted to offer their expert opinions. A *Daubert* hearing is not required, where there is no debate about scientific reliability. For example, in *Chapin*, plaintiff was diagnosed with mesothelioma, after having spent 45 years working as an automobile brake mechanic. At issue is whether the plaintiffs' expert presented scientifically reliable (admissible) evidence drawing a causal connection between mesothelioma and inhalation of brake-lining dust. Writing for the

majority, Judge Davis noted:

> [T]he trial court's role as gatekeeper does not require it to search for absolute truth, to admit only uncontested evidence, or to resolve genuine scientific disputes. The fact that an opinion held by a properly qualified expert is not shared by all others in the field or that there exists some conflicting evidence supporting and opposing the opinion do[es] not necessarily render the opinion 'unreliable.' A trial court does not abuse its discretion by nevertheless admitting the expert opinion, as long as the opinion is rationally derived from a sound foundation. [*Chapin*, *id.*, at 127]

This Court concluded, regardless of contrary evidence, the trial court correctly permitted the plaintiff's expert to testify. "Although clearly not universally accepted, and although unsupported by epidemiological studies that may or may not be flawed, [the plaintiff's expert's] opinion is certainly objective, rational, and based on sound and trustworthy scientific literature." *Chapin*, *id.*, at 140.

Dr. Best, Rubin and Kamoo's testimony (Defendant's motion did not concern Dr. McMillan) was based upon sufficient facts or data under MRE 702. It was rationally derived from a sound foundation and designed to assist the jury in weighing the causal connection between Plaintiff's brain injury and his 1996 motor vehicle accident. The testimony is therefore admissible without a *Daubert* hearing. *Chapin*, *id.*, at 126-27; MRE 702. The trial court properly denied the Motion to Limit Testimony of Treating Physicians and Medical Personnel and/or for a *Daubert* Hearing.

ISSUE III[31]

THE TRIAL COURT ACTED WITHIN ITS DISCRETION WHEN IT STRUCK DEFENDANT'S BODILY INJURY CLAIM FILE AND SUBSEQUENT PIP CLAIM FILES, WHERE THE PROPOSED EVIDENCE WAS MORE PREJUDICIAL THAN PROBATIVE.

Defendant maintains the trial court erred in two respects: (i) limiting evidence regarding "Defendant's B.I. claim file," and (ii) limiting evidence from claim files from AAA and Progressive Insurance Co. (Defendant's Brief, pp. 22-23). Plaintiff responds to each assertion.

Defendant's B.I. claim file

Defendant asserts the trial court abused its discretion by precluding Defendant from utilizing its B.I.[32] claim file. There is no agreement on the underlying facts, making this a difficult issue. Defendant generates files regarding: (i) no-fault benefits, the PIP file, and (ii) third-party claims, the B.I. claim file. In a first-party, no-fault action, the PIP file is commonly grist for the mill, but the B.I. claim file is not.

Defendant maintained the B.I. file was admitted into evidence during Ms. Bradford's testimony. Transcript, 7/21/2016, p. 208. Plaintiff's counsel responded that Defendant had produced "one claim file" regarding PIP claims. Transcript, 7/21/2016, p. 210. He hadn't seen "any probate stuff in there or any B.I. stuff in there." *Id.*, p. 208. Later, there were more conflicting assertions. *Id.*, pp. 212-216.

The trial court stepped away from the differing contentions of what had been admitted and by whom and turned to consideration of relevance.

Defendant does not assert that it objected to Ms. Bradford's testimony. Plaintiff's use of the activity log notes relied on by Ms. Bradford while adjusting the PIP claim is distinct. Ms.

[31] Plaintiff responds to the issue stated within Defendant's text.
[32] Bodily injury claim file.

Bradford (PIP insurance adjuster), explained Defendant's denial of no-fault benefits; Plaintiff examined her at length. (Transcript, 7/15/2016, pp. 17-183, 219-237) What did Defendant know, what did it think it knew, and why did it deny benefits? Ms. Bradford testified that she reviewed the entire claim file. (Transcript, 7/15/2017, p. 28) Since she was the "point" person justifying Defendant's decision and since her understanding came from her review of the claim file, Plaintiff examined her, often referencing the file. (Plaintiff's counsel understood the file was the PIP file.)

Defendant raised no objection to Plaintiff's examination of Ms. Bradford, using the files to refresh Ms. Bradford's memory. The elicited testimony was unequivocally germane to Plaintiff's case on breach of contract and to Plaintiff's later motion for no-fault attorney fees.

Defendant limited its examination of Ms. Bradford (and the PIP file). Later, Defendant interrogated Mrs. Wier (Joseph Wier's mother), at which time Defendant planned to use the B.I. claim file. (Defendant's Brief, pp. 22-23, referring to Transcript, 7/21/2016, pp. 205-207.) Defense counsel "explain[ed] where [she] was going with this." *Id.*, p. 208. Within the "third party file," *id.*, p. 208, there was putative evidence on the guardian ad litem's appearance at the third-party settlement, *id.*¸ p. 207-208, which Defendant sought to elicit. *Id.*, pp. 206-218.

The trial court questioned the relevance of reviewing the third-party case. *Id.*, 206. Defendant responded, "[W]hen they put everything on the record they would have been asked if he has recovered from his injury, and that's what I would like to ask her." *Id.*, p. 206. Understanding that Defendant wished to discuss the third-party claim, the court stated, "[B]ut as far as treatment goes, you both know that injuries sustained in a third party case do not necessarily reflect continued coverage in the first party case." Defendant's counsel responded, "Correct." *Id.*, at 207. The court then noted that a guardian ad litem would have been appointed (and presumably made certain representations in the third-party case), *id.*, p. 207, to which Defendant responded, "Correct." Defendant maintained the bodily injury claims file (regarding the third-party claim)

would reveal the guardian ad litem did not refer to Joseph Wier's ongoing problems at the time of the settlement. *Id.*, 209.

The trial court concluded the third-party claim had no relevance (because claims for medical, no-fault benefits were not part of the third-party claim). *Id.*, p. 212. The court concluded, "It has no relevancy, and quite frankly, can be misleading to the jury. I do not understand how we could even consider the third party case in conjunction with this." *Id.*, p. 214. The court repeated its ruling: "[T]he third party claim is totally irrelevant to the first party claim that we're here for." *Id.*, p. 217. (The court again agreed medical records within the files were permissible. *Id.*)

The trial court's decision on statements by a guardian ad litem while settling a third-party action is reviewed by an abuse of discretion standard;[33] there was no abuse. The jury was presented with substantial testimony. Reviewing a statement made by a guardian ad litem in a third-party case (with distinct damages) risked confusing and distracting the jury. The trial court properly excluded such testimony, because "its probative value [was] substantially outweighed by the danger of unfair prejudice, confusion of the issues." MRE 403. "Relevant evidence may be excluded from trial if its probative value is substantially outweighed by the risk of unfair prejudice * * *." *McDonald v. Stroh Brewery Co.*, 191 Mich.App. 601, 605, 478 N.W.2d 669 (1991).

The remarks of the guardian ad litem at the settlement of a third-party action (or failing to make certain remarks) are hardly significant; the parameters of a third-party case and a first-party case are different. Upon the guardian ad litem determining that settlement is appropriate, the settlement is largely mechanical and formulaic. The guardian ad litem will not consider the different matter of a first-party, no-fault claim. Since Defendant sought to introduce extraneous,

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[33] "We review a trial court's decision to admit or deny evidence for an abuse of discretion." *People v. Ullah*, 216 Mich.App. 669, 673, 550 N.W.2d 568 (1996).

confusing and prejudicial evidence, the court committed no error and no abuse of discretion.

Claim files of AAA and Progressive Insurance Co.

Defendant proposed to introduce testimony about records from AAA and Progressive Insurance Co. Plaintiff objected for lack of relevance, explaining the records concerned a back injury, and the only issue in this case is whether he had a head injury from the '96 accident. [Transcript, 7/19/2016, p. 90]

Defendant responded with two arguments. First, Joseph hit his head in the accident. Second, Joseph filed a claim arising out of the accident, although Plaintiff (in this litigation) asserted Joseph was unsophisticated in filing a claim. *Id.*, p. 90.

The trial court agreed with Defendant that evidence of a later head injury (or head trauma) was relevant. *Id.*, pp. 93-95. Defendant mistakenly asserts, "The court ruled that the claim files were not to be submitted as evidence." (Defendant's Brief, p. 23] But the court did allow the use of the records.

The court rejected Defendant's proposal to use the records to demonstrate that Plaintiff filed a claim, some years after the 1996 injury. The trial court found no relevance: "What happened subsequent and whether or not he had assistance or didn't have assistance really isn't relevant to these proceedings. There is no issue raised by the plaintiff as to his cognitive deficiencies. His ability to read perhaps is not the best. His grades were not the best. But his ability to file a claim is not an issue here. It's totally irrelevant whether he filed another PIP claim." *Id.*, pp. 91-92.

The trial court properly resolved this issue, and its decision was no abuse of discretion is irrelevant or tangential. The trial court perceived that delving into that subject risked confusing and distracting the jury. The "probative value [was] substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. This Court

held, *McDonald v. Stroh Brewery Co.*, 191 Mich.App. 601, 605, 478 N.W.2d 669 (1991), "Relevant evidence may be excluded from trial if its probative value is substantially outweighed by the risk of unfair prejudice, confusion of the issues, waste of time, or misleading the jury." (Citing *Bartlett v. Sinai Hosp of Detroit,* 149 Mich.App. 412, 417, 385 N.W.2d 801 [1986].) Defendant sought to introduce evidence that was extraneous, confusing and prejudicial. The trial court committed no error; there was no abuse of discretion.

ISSUE IV

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S REQUEST FOR DIRECTED VERDICT ON ATTENDANT CARE

Standard of Review

Generally, this Court reviews the trial court's denial of a motion for directed verdict *de novo*. *Meagher v. Wayne State University*, 222 Mich.App. 700, 708, 565 N.W.2d 401 (1997). But both the trial court and the appellate court perform a limited review.

> [A] court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in favor of the nonmoving party. Directed verdicts are appropriate only when no factual question exists upon which reasonable minds may differ. [Citations omitted.]

Here, the trial court denied Defendant's motion for directed verdict on substantive grounds and because Defendant failed to timely raise the issue. See *infra*. The trial court's denial for lack of timeliness is reviewed for an abuse of discretion. See *People v. Grove*, 455 Mich. 439, 444, 566 N.W.2d 547 (1997) (Trial court refused to entertain plea arising from a plea agreement after the trial court's "plea cutoff" date."); *Phillips v. Dass*, unpublished (Mi.Ct.App. No. 267992, 9/19/2006) (The court had discretion to accept or reject a late filing. "Indeed, our courts have long recognized that a trial court has the inherent power to control the movement of cases on its docket. *Banta v. Serban,* 370 Mich. 367, 368, 121 N.W.2d 854 (1963); MCL 600.611," Opinion, at 1).

Substantive Argument

Douglas v Allstate Ins. Co., 492 Mich. 241, 821 N.W.2d 472 (2012), provides guidance on claims for attendant care. The Court outlined the salient factors.

> [A] fact-finder must examine whether attendant care services are "necessitated by the injury sustained in the motor vehicle accident" before compensating an injured person for them. * * * [A]n injured person who seeks reimbursement for any attendant care services must prove by a preponderance of the evidence not only the amount and nature of the services rendered, but also the caregiver's expectation of compensation or reimbursement for providing the attendant care. * * *
>
> If the fact-finder concludes that a plaintiff incurred allowable expenses in receiving care from a family member, the factfinder must also determine to what extent any claimed expense is a "reasonable charge[]." [*Id.*, at 247-248. Footnotes omitted.]

In *Douglas*, the insured suffered a closed head injury. *Id.*, at 249. After three years of payments, the defendant halted benefits; it asserted Douglas "did not seek additional PIP benefits after 1999 until he filed the instant lawsuit in 2005." *Id.*, at 250.

Katherine Douglas, the care provider, testified "her entire time was spent 'babysitting' and 'watching James,' even while she was performing other household chores." *Id.*, at 252. She provided "forms," all "dated June 25, 2007, covering each month between November 2004 and June 2007." The forms totaled hours during which she provided services and outlined the tasks she performed, "including organizing her family's day-to-day life, cooking meals, undertaking daily chores, maintaining the family's house and yard, ordering and monitoring plaintiff's medications, communicating with health care providers and Social Security Administration officials, calling plaintiff from work to ensure plaintiff's safety, monitoring plaintiff's safety, and cueing or prompting various tasks for plaintiff to undertake." Ms. Douglas "admitted that the forms were all completed in June 2007, that she did not contemporaneously itemize." "[S]he went through household bills to reconstruct what had occurred in her life during the relevant period."

[*Id.*, at 252]

The circuit court (in a bench trial) awarded attendant care benefits. *Id.*, at 253-254. This Court reversed. The Supreme Court explained that Mrs. Douglas provided some services that were "replacement services,"[34] but this did not preclude compensation for attendant care. *Id.*, at 263. Further, Ms. Douglas' attendant care as she described it[35] constituted permissible attendant care. *Id.*, at 265. Third, attendant care provided prior to the doctor's prescription was compensable. *Id.* Fourth, the caregiver must have an expectation of payment for the charge to be "incurred." *Id.*, at 267-268. And there is no distinction between a family member and a commercial health giver; in either case, there must be an expectation of payment. *Id.*, at 268-269.

The Supreme Court opined that the superior method for demonstrating entitlement for no-fault benefits is contemporaneous records of services performed. *Id.*, at 269-270. However, the statute prescribes no single method of proof. *Id.*, at 270. Mrs. Douglas' records were not the gold standard. *Id.*, at 270-273. But the records <u>are</u> permissible.

> While no statutory provision *requires* that this method be used to establish entitlement to allowable expenses—a caregiver's testimony can allow a fact-finder to conclude that expenses have been incurred— a claimant's failure to request reimbursement for allowable expenses in a timely fashion runs the risk that the one-year back rule will limit the claimant's entitlement to benefits, as occurred here when plaintiff commenced a lawsuit to recover allowable expenses that were alleged to have been incurred more than one year earlier. Moreover, once a claimant seeks payment from the insurer for providing ongoing services, the insurer can request regular statements logging the nature and amount of those services to ensure that the claimed services are compensable.

Therefore: (i) summary records are permissible, (ii) failure to keep contemporaneous records makes it more likely the claimant will run afoul of the one year back rule; (iii) the claimant

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[34] Benefits for replacement care are limited to $20 per day.

[35] Her entire time was spent 'babysitting' and 'watching James,' even while she was performing other household chores.

risks the finder of fact being unpersuaded by summary records,[36] and (iv) after a claimant seeks payments, the insurance carrier is entitled to request regular (contemporaneous) statements of work performed. *Id.*, at 270.

Here, Defendant asserts it paid attendant care for Joseph Wier following the accident. (Transcript, 7/15/2016, pp. 200, 225.) Defendant's witness (Ms. Bradford) stated there was "a submission from Brenda Wier that indicated how they calculated the amount of attendant care," but Ms. Bradford did not elaborate on this point. *Id.*, at 200. Nothing within Ms. Bradford's testimony demonstrates that Defendant explained to Brenda Wier the methodology for evidencing attendant care. That is, the testimony did not show Defendant request[ing] regular statements logging the nature and amount of those services to ensure that the claimed services are compensable" as suggested in *Douglas*.

Defendant did not explain to Ms. Weir the superior manner for claiming attendant care, because Defendant was reimbursing [Ms. Weir] twenty-four hour care at home at thirty dollars a day." *Id.*, at 225-226. Defendant was content with how Ms. Wier requested compensation for attendant care. (Later testimony disclosed a note that Defendant would compensate Ms. Wier at $30 per day for ten days straight attendant care [or $20 per half day]. *Id.*, pp. 228-230.[37])

One again, there is no evidence that Defendant requested from Ms. Wier "regular statements logging the nature and amount of those services to ensure that the claimed services are compensable," as contemplated by *Douglas*.

Dr. Best (by video deposition) testified that Joseph's mother "provided at least 16 hours a

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[36] If the summary records are unacceptable to the trier of fact, the claimant may never be able to recover for past services.
[37] Mr. Remski, Defendant's senior claim consultant, asserted he recalled a rate of $8 per hour. (Transcript, 7/26/2016, p. 28.)

day of attendant care for the last 18 years." (Best Deposition, 7/7/2016, p. 32.)

In cross examination, Brenda Wier testified that when the claim was re-opened, Mrs. Wier asked about attendant care benefits, but Toni Bradford (Defendant's adjuster) told her "I would receive mileage only." (Transcript, 7/22/2016, pp. 6-7)

Now Defendant contends, contrary to Ms. Wier's testimonial evidence, it stood ready to pay attendant care benefits only if regular records were kept. This assertion is patently undermined by (i) Defendant's prior payments of $30 per day and (ii) Defendant unwillingness to pay anything for Ms. Wier's attendant care services to Joseph upon the claim being re-opened. Ms. Wier acknowledged she did not keep track of time, although she expended over sixteen hours per day giving attendant care to Joseph. *Id.*, p. 14. (And Defendant never gave forms to Mrs. Wier for keeping track of attendant care – not in 1996 and not in 2012 when the claim was re-opened. *Id.*, p. 15.)

Mrs. Wier testified to the attendant services she provided and her expectation of payment.

> Q. And just to back up for a minute, you expressed to Ms. Bradford your concern about who would take care of Joe. Since Joe's accident in 1996 and he comes home from the hospital, who was the person that took care of him from that point in time up until 2014 when you were talking to Ms. Bradford?
>
> A. His family. Mostly me.
>
> Q. All right. Probably now we can just segue into the attendant care for Joe. Does Joe need help taking his medication?
>
> A. Yes.
>
> Q. Does he take medication on a daily basis?
>
> A. Yes.
>
> Q. Why does he need help taking his medication?
>
> A. He won't take it. He will forget it partly, or he just won't take it.
>
> Q. So what happens if Joe refuses to take his medication?
>
> A. He becomes very hostile.
>
> Q. What can you do about it if he is 34 years old and he refuses to take his

medication?

A. I practically open his mouth and stick a pill in.

Q. You kind of mentioned it, but how can you tell for sure whether Joe's taken his medication? I mean, if you don't give it to him, how do you know if he did or didn't take it?

A. I can walk by his pill box. I set up his pills on a daily basis. And if he hasn't taken it, then I will walk by his pill box and say, hey, take your chill pill.

Q. Does he need assistance with personal hygiene?

A. Yes.

Q. Why?

A. He would go weeks on end without taking a shower if he wasn't said -- if I didn't say, Joe, you stink, go take a shower.

Q. Okay.

A. He would sit and do nothing if I didn't push to get him going.

Q. Is Joe dangerous to himself or others if he's not supervised?

A. He could be.

Q. Why is that?

A. Because he gets irritated and he gets upset.

Q. Was there a situation not too long ago when you were driving him somewhere and there was some --

A. At McDonald's?

Q. I don't know.

A. At McDonald's.

Q. What happened?

A. There was a guy and he was in a hurry, we was going through the drive-thru, and I was -- I actually ordered our food first and this guy tried to cut me off. And Joe got out and stood in front of his car and would not allow him to go anywhere. And I'm yelling, Joe, get back in this car and -- yeah.

Q. Does Joe ever sneak out to ride his bike late at night?

A. He has a couple of times.

Q. Do you know where he goes?

A. Around the block.

Q. Did you ever do anything to make the house more secure or know whether or not Joe tries to -- if Joe's trying to sneak out?

A. I put my bed up close to the wall, so when he comes up the steps, he makes any noise, and with his weight and my old house, the stairs automatically

squeak. And my bed is right there, so when he comes up those stairs I can hear his every move.

Q. Did you put anything on the windows or the door locks to let you know --

A. I have locks on all my windows.

Q. Is there anything that makes a noise if he leaves?

A. I did have a bell on the door. And I told him if he removed it and I caught him he would be in trouble.

Q. Is the bell still on the door or did he remove it?

A. No, it's been removed and it hangs beside the door and now he just bumps it with his arm as he goes out the door.

Q. Does Joe ever sneak off and go to Emily's Deli?

A. All the time.

Q. How do you know that he's there?

A. I usually see him sneaking across the parking lot. But if I come up missing him I immediately walk over and say what are you doing over here.

Q. Does anybody assist you in taking care and supervising Joe during the day?

A. Not now. I did have some assistance with his brother and his father at one point, but now it's pretty much on me since his brother's working. Occasionally on Fridays and Saturdays his brother will help me.

Q. Can you describe a typical day with Joe? Just take us kind of quickly through there. What happens – and I'm talking currently because he's not going to – his appointments are less and he's not in therapy and so forth.

A. Well, Right now we'll get him up -- I'll get him up, if I'm lucky, by 11:00. I get him showered. I tell him to get his shower. And my grandson, we go pick up my grandson. I make sure he takes his pill. We pick up my grandson. We will typically go Pokemon hunting and spend a couple of hours with that. Then we go back to our house and my grandson and him will play video games and they'll go outside and they'll play games outside, like toss games and they ride their -- or they play their cars and stuff like that. And then we'll have dinner. And a lot of times he'll help me prepare dinner. He likes to cook. And then in the evening he usually goes to his room. Sometimes we won't have dinner till 9:00, 10:00, when his brother gets home. We have family dinner every night. And then he'll go to his room and I make sure he's in bed before I go to bed.

Q. Did Joe ever promise to pay you money for attendant care, for watching and supervising him?

A. Yes, he did.

Q. And has he paid you any money?

A. No.

Q. Has he told you he'll pay you money if Allstate pays him?

A. Yes.

Q. Did your first attorney fill out some attendant care forms for you to sign?

A. Yes, he did.

Q. Do you know whether or not they were submitted to Allstate?

A. That, I don't know.

Q. With regard to medical appointments, I think we covered this, do you take Joe to all of his medical appointments?

A. Yes, I do.

Q. Do you go on almost every one of them?

A. Yes.

Q. Do you worry about what will happen to Joe when you're not around?

A. Yes. [Transcript, 7/21/2017, pp. 161-166]

Joseph Wier testified that he promised to pay his mother (Brenda Wier) for attendant care and supervising she performed every day. (Transcript, 7/22/2016, p.72.) But to this day, he has made no such payment. *Id.* He does, however, request that Defendant pay Ms. Wier the money he owes to her. *Id.*, pp. 72-73.

Mr. Remski, Defendant's senior claim consultant, testified he received an envelope of affidavits signed by Mrs. Wier, Adam Wier, and Joseph Wier, Sr., "all indicating basically the same type of services." (Transcript, 7/26/2016, pp. 28-30.) But the actual reason for Defendant's denial was not poor record keeping. Defendant had decided by January 13, 2015, the requested no-fault benefits were not connected to the accident. (Transcript, 7/26/2016, pp. 25-26.) Defendant had no interest in precise records; Defendant had decided "claims for attendant care, residential care, recreational therapy and vocational rehabilitation were not related to the motor vehicle accident from 1996." *Id.*, p. 26.

The trial court denied Defendant's motion for directed verdict.

> THE COURT: Well, what has come into evidence, there has been testimony that they have been -- you introduce that testimony through the

witness, how they were signed, you indicated that all the parties signed them, the number of hours – you introduced all that.

What was also introduced is they didn't even know they had the right to request attendant care, and it was the attorney that then submitted the bill or prepared the application for benefits for attendant care on their behalf and submitted it, they not knowing that they were entitled to that. That all becomes an issue, the not knowing and not being able to fill that out, it's relevant.

Now, the amount that has been testified to is that on an average day 16 hours would have been appropriate. You've indicated, do you need it when he's sleeping. She indicates yes, even when he's sleeping she would have to monitor his behavior. Obviously not when he's in therapy, you're right, and we have the therapy records that can be -- that we have the amount of therapy and the times for the therapy that could determine how much there would not be attendant care on a daily basis because those billings are included. [Transcript, 7/26/2016, p. 138]

* * *

THE COURT: Now she's saying 16 hours or 11 hours -- 16 or whatever it was she's saying now times whatever they approved, $8 an hour. If it was good enough for a handwritten note then, why isn't it now?

* * *

THE COURT: She already said that I watch him 24 hours a day. Now, she said I don't when he goes to therapy, but I do when he's sleeping, I have to be there, I do when he wakes. So it still would amount to, as I recall her testimony, in excess of 16 hours a day, so they're not totally speculating. Your motion is denied. [Transcript, 7/26/2016, p. 141]

The trial court added that Defendant's argument regarding the form of Plaintiff's claim for attendant care benefits was raised tardily. Any objection to the form was waived.

THE COURT: I want to take exception, counsel, that we knew there was no specific records filed at the inception of this litigation, that throughout this litigation we were aware that there was no specific logs with specific times. To bring the motion at this time, I think is totally inappropriate. You would have waived any irregularity in the file as to the content of the request for attendant care. I just added that to my denial.

* * *

THE COURT: You had in your file from the inception of this litigation the request for attendant care in the manner in which it was requested, knowing that there was no specific times or log notes or anything else associated with that

request. The only request came from the original attorney back in 2014, I think is when you received it. Here I am in 2016 and the first objection to the manner in which it was submitted and its contents comes in today at the close of proofs.

If there was a deficiency in the manner of its presentation and its content in 2014, it's totally inappropriate for you to bring it up today knowing that the submission had already taken place two years ago. How do we wait till the close of proofs to say this is not good enough and we're not going to pay it? I receive those objections all the time before trial, and that this is what we received, it is not adequate and it is not adequate for reimbursement, motion to strike and it's not admitted and there is no testimony and there is no payment because it would be speculation.

But we're not going to go through a whole trial and say, Judge, guess what, I've been holding these, we're all aware of these and we've known about them since 2014, today I'm going to say we're not going to let the jury consider them. No. Any objection would have been waived.

Besides, the testimony the Court has heard, your motion is denied.

The trial court understood it must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in favor of the nonmoving party, granting the motion only when no factual question exists upon which reasonable minds may differ. *Brisboy v. Fibreboard Corp.,* 429 Mich. 540, 549, 418 N.W.2d 650 (1988); *Meagher v. Wayne State University*, *supra*, 222 Mich.App. 708. Applying controlling criteria, the trial court properly denied the motion for directed verdict.

ISSUE V

THE TRIAL COURT SUBMITTED A PROPER VERDICT FORM TO THE JURY. EVEN IF (ARGUENDO) THE FORM WAS TECHNICALLY DEFICIENT, THIS COURT SHOULD AFFIRM THE JUDGMENT, WHERE THE VERDICT FORM WAS NOT INCONSISTENT WITH SUBSTANTIAL JUSTICE.

Standard of Review

Defendant challenges the verdict form, but the form was consistent with no-fault law. Rather, Defendant asserts the form somehow misled the jury, but its contention is wrong.

The proper standard of review is that which applies to jury instructions: whether the instruction is inconsistent with substantial justice. *Johnson v. Corbet*, 423 Mich. 304, 327, 377 N.W.2d 713 (1985); *Lewis v. LeGrow*, 258 Mich.App. 175. 212-213, 670 N.W.2d 675 (2003). Moreover, the issue must be preserved for review. Here, Defendant did not object to the verdict form after the trial court instructed the jury; the issue is waived.

MCR 2.512(C) provides: "A party may assign as error the giving of or the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict (or, in the case of instructions given after deliberations have begun, before the jury resumes deliberations), stating specifically the matter to which the party objects and the grounds for the objection." In *Veal v. Spencer*, 453 Mich.App. 560, 565-566, 220 N.W.2d 158 (1974), the Court held:

> According to *Hunt v. Deming*, 375 Mich. 581, 584-585, 134 N.W.2d 662 (1965), the only way to preserve, for appellate review, objections to allegedly erroneous jury instructions, is to make a request for a jury instruction before the instructions are given to the jury, and to object to the allegedly erroneous instructions after the jury has been so advised. * * * [W]e find that the instant issue has not been preserved for appellate review.

Accord, *Harper v. National Shoes, Inc.*, 98 Mich.App. 353, 357, 296 N.W.2d 1 (1979). In *May v. William Beaumont Hosp.*, 180 Mich.App. 728, 766-767, 448 N.W.2d 497 (1989), this Court held, "[W]hether a requested jury instruction is applicable and accurately states the law is within the discretion of the trial court. If the jury instruction is erroneous or inadequate, reversal is required only where failure to reverse would be inconsistent with substantial justice." [Citation and internal quotation marks omitted.]

In *Case v. Consumers Power Co.*, 463 Mich. 1, 6, 615 N.W.2d 17 (2000), the Court held, "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. We

will only reverse for instructional error where failure to do so would be inconsistent with substantial justice. MCR 2.613(A).[38]" [Citation omitted.]

In *People v. Wade*, 485 Mich. 986, 774 N.W.2d 919 (Mem 2009), vacated on reconsideration, 486 Mich. 909 (2010), the Court held that an erroneous verdict form (unlike the proper verdict form in this appeal) was overcome by the trial court's instructions.

> [W]e REVERSE the judgment of the Court of Appeals. The jury verdict form was not dispositive because the trial court properly instructed the jury. On the basis of the trial court's instructions, the jury would have clearly understood [what was required]. * * * In light of the jury instructions, the trial court's error in using the improper verdict form was harmless * * *.

The Court's Memo decision is persuasive although not (on its own) precedential, demonstrating an erroneous verdict form is not dispositive. The appellant must demonstrate the error was harmful, and Defendant does not fulfill its obligation to demonstrate reversible error.

Substantive Argument

Plaintiff proposed the verdict form should reflect the elements of a first-party, no-fault claim: (i) did the plaintiff sustain an accidental injury; (ii) did the injury arise from the operation of a motor vehicle on September 9, 1996; (iii) were there allowable expenses incurred by the plaintiff after September 14, 2013, arising out of the accidental bodily injury referred to in question number two; and (iv) was payment for any entitled benefits overdue? [39]

Plaintiff moved for directed verdict on the first two questions, and the trial court granted the motion. It stated, "They agree. They [Defendant] think it's superfluous including it in the verdict form, but they [Defendant] agree that the answers for those should be yes, and it will be so

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[38] "An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice."
[39] Transcript, 7/27/2016, pp. 39-40.

included as yes in the verdict form." (Transcript, 7/26/2016, pp. 146-147.)

Defendant insists that the verdict form is confusing. Even assuming *arguendo* another form might be clearer, Defendant ignores closing argument.

Plaintiff informed the jury, "Question three is where your work comes in. Question three: Were allowable expenses incurred by or on behalf of the plaintiff from September 14, 2013 through the present arising out of the accidental bodily injury referred to in question number two?" (Transcript, 7/27/2016, pp. 39-40.) Plaintiff acknowledged the conflict among the experts: Plaintiff's experts trace the current injuries to the accident, but Defendant's expert Kezlarian testified that Joseph Wier's current problems were due to bipolar disorder. *Id.*, p. 7. And Defendant's expert Hanks opined that Wier had an antisocial personality disorder. *Id.*

The jury perceived the issue before it: whether (i) Joseph Wier's injuries traced to the automobile accident, or (ii) his current injuries were independent of the accident (e.g., reflecting bipolar disease or antisocial personality disorder). It defies imagination that the jury misunderstood. It knew: (i) tracing the injuries trace to the auto accident implied an award, but (ii) finding no causal connection between the 1996 accident and the current claims implied no award. Defendant grasps for reversal by proposing jury obliviousness beyond belief.

Defendant's closing argument was articulate and impossible for the jury to misunderstand: "The question you are here to answer is, from 2012 to today, the services that he has received, did they arise out of that accident back in 1996. That's what you're going to be asked to decide in this case." Defendant could not be clearer. It explained its theory of bipolar disease to the jury, at length. *Id.*, pp. 46-48. Defendant further explained that no award must issue, if Joseph's injuries (leading to his claims) did not arise from the 1996 accident, noting that the judge would so instruct the jury. (Transcript, 7/27/2016, p. 48)

Plaintiff was clear; Defendant was clear; and the jury verdict form was clear. The trial

court instructed the jury, "If you find that Joe Wier developed bipolar disorder unrelated to the September 9, 1996 motor vehicle accident, Joe Wier is not entitled to no-fault benefits as of onset date of the bipolar disorder." *Id.*, p. 88.

This Court should affirm the trial court judgment.

RELIEF REQUESTED

WHEREFORE, Plaintiff-Appellee JOSEPH WIER, by his attorneys, respectfully prays this Honorable Court affirm the judgment below and remand to the trial court for determination of an attorney fee award.

Respectfully submitted,

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August 14, 2017