

STATE OF MICHIGAN
COURT OF APPEALS

KAREN COLE and KEVIN COLE,

Plaintiffs-Appellees,

v

MOHAMMAD M. YUSAF, M.D.,
WYANDOTTE HOSPITAL & MEDICAL
CENTER, a Michigan corporation, d/b/a HENRY
FORD WYANDOTTE HOSPITAL, and HENRY
FORD HEALTH SYSTEM, a Michigan
corporation,

Defendants-Appellants.

UNPUBLISHED

April 26, 2005

No. 251349

Wayne Circuit Court

LC No. 99-928120-NH

Before: Kelly, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Defendants appeal by leave granted from an order granting plaintiff Karen Cole¹ a new trial on the ground that the trial court improperly refused to dismiss certain jurors for cause during voir dire. We reverse and remand. This appeal is being decided without oral argument under MCR 7.214(E).

A trial court's decision whether to grant a new trial is reviewed for an abuse of discretion. *Setterington v Pontiac General Hospital*, 223 Mich App 594, 608; 568 NW2d 93 (1997). The trial court's underlying interpretation of the relevant law and its application to the facts are reviewed de novo. *In re Blackshear*, 262 Mich App 101, 107; 686 NW2d 280 (2004).

A trial court's decision whether to grant or deny a juror challenge for cause is generally discretionary, but "in cases where apprehension [about the challenged juror] is reasonable, [the court should] err on the side of the moving party." *Poet v Traverse City Osteopathic Hospital*, 433 Mich 228, 238; 445 NW2d 115 (1989). However, although "a degree of prejudice can be presumed when a party is improperly compelled to use a peremptory challenge," reversal on the basis of an improperly denied challenge for cause requires "additional proof of prejudice." *Id.* at

¹ Kevin Cole was dismissed from the action with prejudice at the beginning of trial.

240. Specifically, our Supreme Court has explained that where a trial court has allegedly erroneously overruled a for-cause juror challenge:

in the interest of requiring an independent and objective manifestation of actionable prejudice . . . in order for a party to seek relief . . . , there must be some clear and independent showing on the record that: (1) the court improperly denied a challenge for cause, (2) the aggrieved party exhausted all peremptory challenges, (3) the party demonstrated the desire to excuse another subsequently summoned juror, and (4) the juror whom the party wished later to excuse was objectionable. [*Poet, supra* at 241 (footnotes omitted).]

Poet explained that “objectionable” is a lesser standard than “excusable for cause,” and is defined as “causing or tending to cause an objection, disapproval, or protest.” *Id.* at n 15 (quoting *The Random House Dictionary of the English Language: Unabridged Edition*). However, “objectionable” requires a specific indication on the record and an articulation of “particular reasons why the juror is objectionable.” *Id.*

Three jurors are at issue in this case. Initially, we note that juror Athalia Cargile fails to meet the objectionableness prong because plaintiff only stated that she “had some reservation as to the juror” and declined the opportunity to elucidate. In the absence of an explanation on the record why plaintiff “had some reservation,” Cargile cannot be considered “objectionable” as defined by our Supreme Court. *Id.* Therefore, plaintiff cannot obtain relief on the basis of Cargile.

However, there is no dispute that the trial court erred when it refused both parties’ requests to dismiss juror Christine Cencer for cause, satisfying the first prong of the *Poet* test. Furthermore, plaintiff exhausted her peremptory challenges, satisfying the second prong. Therefore, the issue before us is whether plaintiff can use the remaining juror, Johnny Johnson, to satisfy the remaining two prongs of the *Poet* test. Specifically, the questions presented on appeal are whether the complaints plaintiff raised about Johnson rise to the level of “objectionable” and whether Johnson is a “subsequently summoned juror.” *Poet, supra*, at 241.

We conclude that Johnson cannot satisfy the requirement of being “subsequently summoned.” While our Supreme Court did not define the phrase “subsequently summoned,” we have previously treated it as synonymous with “subsequently called.” *People v Legrone*, 205 Mich App 77, 81-82; 517 NW2d 270 (1994). From the phrasing of our Supreme Court’s articulation of the test in *Poet*, we conclude that “subsequently summoned” or “subsequently called” must refer to an event taking place either after the aggrieved party has exhausted his or her peremptory challenges, or after the trial court has improperly denied a challenge for cause. However, Johnson was the first juror called, and he remained seated from the beginning to the end. Thus, it is impossible for him to have been called, summoned, or seated subsequently to any event during voir dire.

Because Johnson cannot fulfill the third prong of the *Poet* test, it is unnecessary to address whether plaintiff’s objections to his presence on the jury rise to the level of “objectionable.” The test articulated in *Poet* requires all four prongs to be satisfied in order to demonstrate sufficient actionable prejudice to warrant relief. *Poet, supra* at 241. Not all prongs

can be met under the circumstances, so the trial court erred in its application and should not have granted plaintiff a new trial.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ David H. Sawyer
/s/ Kurtis T. Wilder