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STATE OF MICHIGAN

IN THE SUPREME COURT

LAWANNA SMITH, as Personal Representative of the Estate of JACQUELINE HARRIS, Deceased,

Plaintiff-Appellee,

-vs-

BEAUMONT HEALTH,

Defendant-Appellant,

and

TRI COUNTY ORTHOPEDICS, PC and JACK D. LENNOX, D.O., Jointly and Severally,

Defendants.

AND

LAWANNA SMITH, as Personal Representative of the Estate of JACQUELINE HARRIS, Deceased,

Plaintiff-Appellee,

-vs-

BEAUMONT HEALTH,

Defendant,

and

TRI COUNTY ORTHOPEDICS, PC and JACK D. LENNOX, D.O., Jointly and Severally,

Defendants-Appellants.

_____/

Supreme Court No. 167716

Court of Appeals No. 365062

Oakland County Circuit Court No. 21-187353-NH

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF PURSUANT TO THE COURT'S JUNE 11, 2025 ORDER

*****ORAL ARGUMENT REQUESTED*****

Supreme Court No. 167720

Court of Appeals No. 365062

Oakland County Circuit Court No. 21-187353-NH

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STATEMENT OF QUESTIONS PRESENTED

I. SHOULD THIS COURT AFFIRM PORTION OF THE COURT OF APPEALS SEPTEMBER 12, 2024 OPINION HOLDING THAT THE CIRCUIT COURT SHOULD HAVE CONSIDERED THE FACTORS SET OUT IN *DEAN V TUCKER*, 182 MICH APP 27; 451 NW2D 571 (1990), IN ADDRESSING PLAINTIFF'S MOTION TO AMEND HER WITNESS LIST TO ADD A STANDARD OF CARE EXPERT IN THIS MEDICAL MALPRACTICE ACTION?

Plaintiff-Appellee says "Yes."

Defendants-Appellants say "No."

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STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

This is a medical malpractice action in which Lawanna Smith, the Personal Representative of the Estate of Jacqueline Harris, alleges that Ms. Harris died of an acute pulmonary embolism on June 28, 2019, a month after undergoing total knee replacement surgery performed by an orthopedic surgeon, Dr. Jack Lennox, because Dr. Lennox failed to prescribe anticoagulant medication despite Ms. Harris's known risk factors for development of thromboembolic events.

Ms. Smith filed a complaint on April 9, 2021, naming Beaumont Health (hereinafter "Beaumont") and Dr. Lennox and Tri County Orthopedics, PC (hereinafter "Tri County" or in conjunction with Dr. Lennox, "the Tri County defendants"). Complaint (Apx 78a-89a).[1] Ms. Smith alleged that Dr. Lennox breached the standard of care in failing to prescribe anticoagulant medication to Ms. Harris, which would have prevented her death. *Id.*, ¶¶32-36. She also alleged claims of vicarious liability against Tri County and Beaumont. *Id.*, ¶¶38-44.

Ms. Smith filed with the complaint an affidavit of merit, signed by an orthopedic surgery expert Dr. B. Sonny Bal, M.D. Affidavit of Merit (Apx 54a-60a). In that affidavit, Dr. Bal represented that he "devot[ed] a majority of my professional time in the preceding year to, the clinical practice of orthopedic surgery...." (Apx 57a). Dr. Bal attested that Dr. Lennox's failure to prescribe anticoagulation medications post-operatively breached the standard of care applicable to an orthopedic surgeon and proximately caused Ms. Harris's death. *Id.*

The circuit court issued an initial scheduling order on June 22, 2021. Scheduling Order (Apx 134a). According to the scheduling order, the parties were to name their experts and submit witness

[1] All citations to "Apx __a" refer to the appendix filed with Beaumont Health's supplemental brief. All citations to the appendix filed with this brief are referred to as "Apx __b."

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lists to opposing counsel and the court by May 6, 2022. *Id.* Discovery was originally set to close by June 7, 2022. *Id.*

Ms. Harris filed a timely witness list on April 25, 2022. Witness List (Apx 121a-130a). She listed Dr. Bal as her sole orthopedic surgery expert, which matched Dr. Lennox's area of practice. *Id.*, ¶21(a).

The parties engaged in discovery and plaintiff's counsel provided various dates and times for the depositions of experts, including Dr. Bal, to be completed before the discovery cutoff. Correspondence (Apx 99a-115a, 117a, 119a-120a). Notably, the circuit court entered a stipulated order adjourning the scheduling order dates on June 23, 2022. Stipulated Order (Apx 135a-136a). In that order, the discovery cutoff date of June 7, 2022 was adjourned to December 12, 2022, the facilitation date agreed upon by the parties. *Id.*

Dr. Bal's deposition was scheduled for August 15, 2022, within the discovery time period set forth in the June 23, 2022 stipulated order adjourning dates. The day of the deposition, Dr. Bal had an emergency and had to cancel the deposition. Correspondence 8/15/22 (Apx 214a). Plaintiff's counsel advised counsel for the defendants of the cancellation of Dr. Bal's deposition and indicated that new dates would be offered. *Id.*

After the cancellation of Dr. Bal's deposition, the Tri County defendants filed a motion on September 9, 2022, to compel Dr. Bal's deposition. Motion to Compel (Apx 71a-76a). These defendants sought an order compelling the deposition of Dr. Bal within 14 days of entry of an order granting their motion, so as to provide them with sufficient time to prepare motions for summary disposition and prepare for a "meaningful" facilitation. *Id.*

On September 16, 2022, plaintiff's counsel sent correspondence to counsel for defendants

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indicating that he had been attempting to reconnect with Dr. Bal to obtain new dates for his deposition but "[u]nfortunately, we are having an extraordinarily difficult time doing so without success." Correspondence 9/16/22 (Apx 215a).

Because of the unforeseen difficulties in communicating with Dr. Bal, plaintiff's counsel filed an amended witness list on September 16, 2022. Amended Witness List (Apx 217a-227a). The amended witness list named Dr. John Hall, M.D. as plaintiff's orthopedic surgery expert, replacing Dr. Bal. *Id.* At the time of the filing of the amended witness list, approximately three months remained in the discovery period, which was set to close on December 12, 2022. Stipulated Order (Apx 135a-136a).

On September 20, 2022, counsel for plaintiff provided dates for Dr. Hall's deposition to the defendants, including October 14, November 4, and November 11, 2022, all three within the discovery cut-off date set by the circuit court. Correspondence 9/20/22 (Apx 1b-4b). Counsel for the Tri County defendants responded that they would be filing a motion to strike the amended witness list because no motion to amend had been sought and no stipulation had been requested. *Id*. Counsel for plaintiff thereafter requested that counsel for defendants stipulate to the proposed amendment and indicated that a motion to amend would be filed if the request for a stipulation was denied. Correspondence 9/21/22 (Apx 1b-2b). Counsel for the Tri County defendants stated that they instead wished to proceed with the motion to strike and indicated that if the motion to strike was denied, "then the court will allow you to amend." *Id*.

On September 21, 2022, the Tri County defendants filed a motion to strike the amended witness list. Motion to Strike (Apx 229a-244a). They argued in that motion that the circuit court should exercise its discretion and strike Dr. Hall as a witness due to plaintiff's failure to comply with

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the deadline for submission of witness lists and disclosure of expert witnesses. *Id.* The Tri County defendants further argued that the circuit court should not allow "gamesmanship" by plaintiff in naming a new expert beyond the deadlines established in the scheduling order, "as defendants are now subject to a trial by surprise." *Id.* (Apx 242a-243a). The defendants contended that they would be "severely impaired" in defending the action if the court were to allow the substitution of plaintiff's orthopedic surgery expert in violation of the scheduling order, and argued that plaintiff's attempt to replace Dr. Bal with Dr. Hall was "abusive to the litigation process, is an attempt to conduct a trial by surprise, and requires re-litigation of this matter if permitted." *Id.*

Plaintiff argued in response to the motion to strike that the amended witness list was filed because Dr. Bal had not been cooperative and needed to be replaced. Response to Motion to Strike (Apx 245a-251a). Plaintiff noted that the need for naming a new expert was done out of "necessity rather than gamesmanship or surprise." *Id.* Plaintiff highlighted the fact that discovery remained open until December 12, 2022, which would afford the parties sufficient time to depose Dr. Hall and "allow all parties time to fully prepare this matter for trial." *Id.* Plaintiff argued that it should not be considered a violation of the circuit court's scheduling order "when plaintiff complied with [the order] and afterwards, circumstances changed," necessitating the naming of a new expert.

The circuit court held a hearing on the motion to compel Dr. Bal's deposition and the motion to strike plaintiff's amended witness list on October 12, 2022. Tr. 10/12/22 (Apx 252a-265a). Counsel for plaintiff advised the circuit court at the hearing that he had been "unable to reestablish contact" with Dr. Bal and agreed to withdraw Dr. Bal as an expert witness. *Id.* (Apx 255a-256a, 259a). Counsel for the Tri County defendants objected to plaintiff withdrawing Dr. Bal as an expert

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on the basis that they should be afforded the opportunity to depose Dr. Bal to determine whether he was qualified to author the affidavit of merit. *Id.* (Apx 257a-259a).[2]

The circuit court ordered that Dr. Bal be deposed "within the next three weeks" and stated that if he failed to make himself available for deposition, "then you can make the appropriate motion at that time." *Id.* (Apx 261a). The circuit court also granted the motion to strike plaintiff's amended witness list, holding that plaintiff was required to file a motion for leave to file the amended witness list but failed to do so:

> THE COURT: You made a deliberate decision as an attorney to go ahead, knowing you were filing something late, instead of asking permission.
>
> So it now puts everyone in the position of, well, you have violated a court order without seeking permission for violating that court order.
>
> MR. HUBRIS [counsel for plaintiff]: I should not have done it, your Honor, and I recognize that when they filed – when Mr. Tucciarone contacted us and I immediately offered to strike our amended witness list and take the appropriate steps to file a motion to amend.
>
> THE COURT: I think you should do that. So I am – I'm granting the motion only in terms of, I want to see the appropriate motion seeking permission for these witnesses and add it into the list. All right?
>
> Tr. 10/12/22 (Apx 263a-264a).

The circuit court entered two orders on October 12, 2022, which were consistent with the rulings from the bench. The first order granted the motion to compel the deposition of Dr. Bal and ordered that Dr. Bal "shall appear for a deposition within 21 days (i.e., by November 2, 2022)."

---

[2] Notably, counsel for plaintiff indicated at the October 12, 2022 hearing that any challenge to the affidavit of merit would be untimely under the court rules. Tr. 10/12/22 (Apx 257a-258a). Pursuant to MCR 2.112(L)(2), all challenges to an affidavit of merit, including challenges to the qualifications of the signer, must be made by motion, filed pursuant to MCR 2.119, within 63 days of service of the affidavit on the opposing party.

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Order (Apx 266a-267a). The second order granted the motion to strike plaintiff's amended witness list and provided that plaintiff "may file a motion to amend their witness list to be heard on a later date and time." Order (Apx 268a-269a).

Plaintiff filed an emergency motion for leave to file an amended witness list on October 19, 2022. Motion (Apx 270a-276a). Plaintiff argued that "good cause" exists for allowing plaintiff to amend her witness list to replace Dr. Bal with Dr. Hall due to Dr. Bal's ongoing failure to communicate. *Id.* Plaintiff indicated that Dr. Hall's testimony was not anticipated to be needed when the original witness list was filed, and it was only after Dr. Bal became uncooperative that the need for a replacement standard of care expert became known. *Id.* Plaintiff again highlighted that discovery remained open until December, which provided sufficient time for Dr. Hall's deposition and would allow the parties time to prepare the case for trial. *Id.* Plaintiff further noted that none of the potential reasons for denying her request for leave to file an amended witness list set forth in *Dean v Tucker*, 182 Mich App 27; 451 NW2d 571 (1990), applied in this matter. *Id.*

Defendants argued in response to the motion that leave to amend should be denied because plaintiff failed to demonstrate "good cause" for allowing the amendment. Tri County Defendants Response to Motion (Apx 277a-289a); Beaumont Response to Motion (Apx 290a-295a). Defendants argued that plaintiff failed to demonstrate that she had any difficulty contacting Dr. Bal after the August 15, 2022 canceled deposition, and contended that plaintiff was merely engaged in "gamesmanship" to shield Dr. Bal from being deposed. *Id.* Defendants maintained that the deposition of Dr. Bal would reveal that he was not qualified to author an affidavit of merit, which would "invalidate" plaintiff's lawsuit. *Id.*

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On November 1, 2022, plaintiff also filed a motion for voluntary dismissal of the case pursuant to MCR 2.504(A)(2). Motion (Apx 302a-307a). Plaintiff contended that she was not in a "meaningful position to advance the case under the deadlines set forth in the current scheduling order," and sought leave to voluntarily dismiss the action without prejudice, which would allow her to re-file the action. *Id.* Plaintiff noted that the statute of limitations had not expired as to her claims and maintained that defendants would not be prejudiced by the dismissal "as any litigation work product that has been conducted on this case can be carried over to the subsequent lawsuit." *Id.*

Defendants objected to the motion for voluntary dismissal and instead sought dismissal of the case with prejudice. Tri County Defendants Response (Apx 5b-19b); Beaumont Response (Apx 20b-26b). Defendants argued that dismissal with prejudice was proper because the affidavit of merit signed by Dr. Bal was "invalid" because Dr. Bal was not qualified to author the affidavit of merit. *Id.* Defendants attached Dr. Bal's LinkedIn Profile and excerpts from depositions he had given in other actions in support of their argument that Dr. Bal was not qualified to author the affidavit of merit. Bal Dep 9/23/20 (Apx 61a-65a); Bal Dep 8/28/19 (Apx 66a-67a); Bal LinkedIn Profile (Apx 68a-70a).[3]

The circuit court waived oral argument on the motion for voluntary dismissal and the motion for leave to file an amended witness list and issued an order and opinion on these motions on

[3] One of the deposition transcripts that defendants attached was from a Michigan case, *Humerickhouse v Ascension St. Joseph Hospital*, Iosco County Circuit Case No. 19-001844-NH. (Apx 61a-65a). The deposition was taken in September 2020, before this action was filed in April 2021. Notably, the defendants in the *Humerickhouse* case were represented by an attorney from Foley, Baron, Metzger & Juip, PLLC, the same law firm that represents Tri County and Dr. Lennox in this action.

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November 14, 2022. Order 11/14/22 (Apx 308a-309a). The circuit court denied both motions, holding it would be "highly" prejudicial to grant the motions at this "late" stage of the proceedings:

> This matter is before the Court on Plaintiff's Motion for Voluntary Dismissal Without Prejudice, Plaintiff's Motion for Leave to File Plaintiff's Second Witness List, and Defendant Beaumont Health's Objection to Voluntary Dismissal. The Court waives oral argument pursuant to MCR 2.119(E)(3) and denies the Motions. The Court finds a voluntary dismissal without prejudice at this stage of the litigation is highly prejudicial to Defendants. This matter was filed on April 9, 2021. Witness lists were due by May 6, 2022 with discovery closing on June 7, 2022. Trial in this matter is currently set for February 7, 2023. Allowing an amended witness list at this late stage is also highly prejudicial.
>
> Order 11/14/22 (Apx 308a-309a).

The circuit court also acknowledged defendants' arguments challenging the validity of Dr. Bal's affidavit of merit, but held that the court "cannot make a dispositive ruling absent a properly noticed dispositive motion citing MCR 2.116." *Id.*

Plaintiff filed a motion for reconsideration of the circuit court's November 14, 2022 order, which the circuit court denied by order entered on December 8, 2022. Order 12/8/22 (Apx 314a-315a). The circuit court found no palpable error, holding:

> Plaintiff again argues that her witness, Dr. Bal, is "uncooperative" and that the Court abused its discretion in denying her Motion. The Court disagrees. Dr. Bal signed Plaintiff's Affidavit of Merit. Pursuant to MCL 600.2912d, prior to filing a medical malpractice suit, a plaintiff must obtain an affidavit of merit signed by a physician qualified to testify as to the nature of the alleged malpractice. This must be done at the outset of every medical malpractice suit.
>
> Plaintiff filed her Complaint, along with her Affidavit of Merit, on April 9, 2021. Discovery was open until June 7, 2022. Plaintiff is now claiming that Dr. Bal is "uncooperative" despite having over one year to sort out any issues with her experts. Had Plaintiff diligently prosecuted her case, she would have realized Dr. Bal was uncooperative and/or unqualified to testify much sooner than November of 2022. At this stage of the litigation, a voluntary dismissal without prejudice or leave to file an amended witness list is simply inappropriate.

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Order 12/8/22 (Apx 314a-315a).

While plaintiff's motions for leave to amend the witness list and for voluntary dismissal were pending, defendants filed motions for summary disposition challenging the March 2021 affidavit of merit signed by Dr. Bal. Tri County Defendants Motion (Apx 27b-41b); Beaumont Motion (Apx 42b-55b). Defendants argued in these motions that Dr. Bal had been retired for more than a year prior to the events at issue in this case and therefore was not qualified to author the affidavit of merit due to lack of sufficient practice or instruction in the specialty area (i.e., orthopedic surgery) within the time frame required by MCL 600.2169. *Id.* Defendants argued that plaintiff's counsel did not have a reasonable belief that Dr. Bal was qualified to author the affidavit of merit as required by MCL 600.2912d, and therefore requested dismissal of the case with prejudice. *Id.* Defendants again relied upon Dr. Bal's LinkedIn Profile and his prior deposition testimony in support of their argument that Dr. Bal was not qualified to author the affidavit of merit because he had retired from the practice of medicine in November 2017, and therefore did not devote a majority of his professional time to the active clinical practice of orthopedic surgery in 2018, the year preceding the alleged malpractice. Bal Dep 9/23/20 (Apx 61a-65a); Bal Dep 8/28/19 (Apx 66a-67a); Bal LinkedIn Profile (Apx 68a-70a).

Plaintiff argued in response that, at the time the complaint was filed, her attorneys had a reasonable belief that Dr. Bal was qualified to author the affidavit of merit, such that dismissal was improper. Response (Apx 56b-68b). She also argued that Dr. Bal's prior deposition testimony fails to demonstrate that he is not qualified to offer expert testimony in this case because he testified that he was still continuing to perform surgeries, even after his purported "retirement." *Id.*

The circuit court waived oral argument on the motions for summary disposition and issued

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an opinion and order granting the motions on December 14, 2022. Order 12/14/22 (Apx 310a-313a). The circuit court found that plaintiff had failed to establish that Dr. Bal was qualified to author the affidavit of merit:

> It is troubling that Plaintiff cautions the Court in relying upon deposition and trial testimony from other cases when plaintiff cannot produce any evidence from her own witness to refute what Defendant is arguing. Again, this case was filed in April of 2021. Plaintiff retained Dr. Bal prior to that date because he signed her Affidavit of Merit. Plaintiff had over one year to work out any issues with her experts. The Court agrees that Plaintiff's counsel may "reasonably" rely upon the statements of experts, but discovery ended in June of 2022; over one year after her Complaint was filed. Dr. Bal was the expert she relied upon to file her claim in the first place. He has not been produced for deposition and Plaintiff has not attached any evidence of any kind indicating that he was in fact qualified to sign the Affidavit of Merit in this case.

Order 12/14/22 (Apx 312a).

The circuit court therefore concluded that Dr. Bal was not qualified to author the affidavit of merit. Based on that ruling, the circuit court held that Dr. Bal's affidavit of merit was invalid, necessitating dismissal of plaintiff's claims:

> Here, Defendant provided sworn testimony which suggests the statements contained in Plaintiff's Affidavit of Merit surrounding Dr. Bal's qualifications are untrue. Namely, that he was engaged in practice or teaching in the one-year period prior to the alleged conduct. Plaintiff has not come forward with any evidence to suggest otherwise.
>
> Defendant's Motion is granted.
>
> The Court finds Plaintiff's Affidavit of Merit invalid. Absent a valid affidavit of merit, a complaint for medical malpractice fails as a matter of law. Therefore, this is a final order and closes the case.

Order 12/14/22 (Apx 313a).

Plaintiff filed a motion for reconsideration of the December 14, 2022 order granting summary disposition, which the circuit court denied by order entered on February 3, 2023. Order 2/3/23 (Apx

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69b-71b).

Ms. Smith filed an appeal as of right in the Court of Appeals. Following briefing and oral argument, a panel of the Court of Appeals issued an unpublished decision on September 12, 2024, vacating the circuit court's orders denying plaintiff's motion for leave to file an amended witness list and granting summary disposition in favor of defendants. *Harris v Beaumont Health*, unpublished opinion per curiam of the Court of Appeals, issued September 12, 2024 (Docket No. 365062) (Apx 1a-12a).

In that decision, the Court of Appeals first held that the circuit court abused its discretion by denying plaintiff's motion to amend the witness list. *Harris*, at 3-7. The Court of Appeals held that while a showing of good cause is the typical standard when deciding a motion to amend a witness list to add an expert after the deadline, a more rigorous standard applies when the denial of the motion to amend would effectively result in a dismissal. *Id.*, at 4. The Court of Appeals held that the denial of the motion to amend the witness list to add a new expert witness effectively resulted in a dismissal here because a medical malpractice action must be established through the testimony of a standard of care expert. *Id.*, at 5-6. The Court of Appeals therefore found that the more rigorous standard applies here. *Id.*

After holding that the circuit court's denial of plaintiff's motion to amend the witness list was effectively a dismissal, the Court of Appeals held that the circuit court was required to consider other, less severe options rather than dismissal. *Id.*, at 6. The Court of Appeals further held that Michigan caselaw also requires the consideration of a number of factors, generally referred to as the *Dean* factors, which were outlined in the Court's earlier decision in *Dean v Tucker*, 182 Mich App 27; 451 NW2d 571 (1990). The Court of Appeals stated the *Dean* factors as follows:

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> Among the factors that should be considered in determining the appropriate sanction are: (1) whether the violation was wilful or accidental, (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses), (3) the prejudice to the defendant, (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice, (5) whether there exists a history of plaintiff engaging in deliberate delay, (6) the degree of compliance by the plaintiff with other provisions of the court's order, (7) an attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. This list should not be considered exhaustive.

Harris, at 6, citing *Dean*, 182 Mich App at 32-33 (Apx 6a).

The Court of Appeals held that the trial court abused its discretion in failing to consider the *Dean* factors and in failing to consider other potential sanctions on the record before entering the order denying plaintiff's motion to amend the witness list, which "effectively amounts to a dismissal." *Harris*, at 7. The Court concluded:

> In sum, by denying plaintiff's motion for leave to file an amended witness list, the trial court effectively dismissed plaintiff's case for a failure to timely file a final witness list. Although the sanction is not named in the same order, the effect was preordained by the substance of the order. Briefly, without an expert witness in orthopedic surgery, plaintiff's case simply could not progress. Because the trial court's decision amounted to a dismissal, the trial court was required to consider the *Dean* factors, especially the possibility of sanctions other than an effective dismissal, such as a fine for the late amendment and the additional discovery needed to be undertaken by the defense. The trial court's failure to do so was an abuse of discretion, warranting reversal and a remand for further proceedings at which time the trial court can engage in the proper analysis with reference to the proper facts. See *Vicencio*, 211 Mich App at 506.

Harris, at 7 (Apx 7a).

Of note, the Court of Appeals also held that the circuit court's analysis of prejudice to the defendants – one of the factors set forth in *Dean* – was based on a misunderstanding of the procedural status of the case. *Id.* The Court of Appeals noted that the circuit court held that amendment of the witness list was improper because defendants were prejudiced due to the fact that

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discovery had closed. *Id.* The Court of Appeals pointed out that discovery was still open, "which, at the very least, reduces any prejudice to the defense." *Id.*

After finding that the circuit court abused its discretion in failing to consider the *Dean* factors, the Court of Appeals analyzed the circuit court's grant of summary disposition based upon Dr. Bal's qualifications to sign the affidavit of merit. *Id.*, at 7-11 (Apx 7a-11a). The Court of Appeals held that the summary disposition motion was "premature," necessitating reversal, in light of the fact that "there is a possibility plaintiff will be permitted to amend the witness list and have a qualified expert witness." *Id.*, at 10-11 (Apx 10a-11a).

Defendants filed applications for leave to appeal in this Court. On June 11, 2025, this Court issued an order instructing the Clerk to schedule oral argument on defendants' applications for leave to appeal. *Harris v Beaumont Health*, ___ Mich ___; 21 NW3d 204 (2025) (Apx 72b-73b). The Court directed the parties to address a single issue:

> [W]hether the Court of Appeals correctly held that the Oakland Circuit Court abused its discretion when it failed to consider the factors set forth in *Dean v Tucker*, 182 Mich App 27 (1990), during its consideration of the plaintiff's motion to amend her witness list to add an expert witness.

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ARGUMENT

I. THE COURT OF APPEALS PROPERLY HELD THAT THE CIRCUIT COURT ABUSED ITS DISCRETION IN FAILING TO CONSIDER OTHER SANCTIONS SHORT OF DISMISSAL AND IN FAILING TO APPLY THE FACTORS SET FORTH IN *DEAN V TUCKER* WHEN CONSIDERING PLAINTIFF'S MOTION TO AMEND HER WITNESS LIST TO ADD AN EXPERT WITNESS.

MCR 2.401 governs pretrial procedures in the circuit court. MCR 2.401(A) provides that the circuit court may direct the parties' appearance at an early scheduling conference after the commencement of the action. MCR 2.401(A); MCR 2.401(B)(1). At the early scheduling conference, a circuit court must issue a scheduling order establishing the times for events, including the exchange of witness lists. MCR 2.401(B)(2)(a)(vi).

MCR 2.401(I)(1) in turn requires a party to file and serve a witness list within the time directed by the court under subrule (B)(2)(a), containing the name and address of each witness and identifying expert witnesses and their areas of expertise. MCR 2.401(I)(2) further provides that if a witness is not listed in such a witness list, the court "may" prohibit that witness from testifying at trial "except upon good cause shown." MCR 2.401(I) provides in full:

> (I) Witness Lists.
>
> (1) No later than the time directed by the court under subrule (B)(2)(a), the parties shall file and serve witness lists. The witness list must include:
>
> (a) the name of each witness, and the witness' address, if known; however, records custodians whose testimony would be limited to providing the foundation for the admission of records may be identified generally;
>
> (b) whether the witness is an expert, and the field of expertise.
>
> (2) The court may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown.

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> (3) This subrule does not prevent a party from obtaining an earlier disclosure of witness information by other discovery means as provided in these rules.

MCR 2.401(I)(2) therefore provides that a circuit court has discretion to allow the addition of a witness upon a showing of "good cause." And as this Court has held, good cause "simply means a satisfactory, sound or valid reason." *People v Buie*, 491 Mich 294, 319; 817 NW2d 33 (2012) (quotation marks omitted).

A. The Dean Factors Should Apply to Any Decision to Preclude a Witness When The Effect of Preclusion Is Dismissal of the Action.

It is well established that witness lists are part of the discovery process. *Grubor Enterprises, Inc v Kortidis*, 201 Mich App 625, 628; 506 NW2d 614 (1993). The objective of discovery is to make available to the parties, in advance of trial, the relevant facts that might be admitted at trial so as to avoid "trial by surprise." *Id.* Where justice so requires, a trial court should not be reluctant to allow an unlisted witness to testify. *Pastrick v Gen Tel Co of Mich*, 162 Mich App 243, 245; 412 NW2d 279 (1987).

In cases involving the failure to file a witness list in accordance with the scheduling order, the Court of Appeals has consistently applied the *Dean* factors to determine whether an unidentified witness should be allowed to testify at trial. The Court of Appeals has recognized that it is within the trial court's discretion to impose a sanction against that party, which may include the preclusion of witnesses. *Dean*, 182 Mich App at 32; *Duray Development LLC v Perrin*, 288 Mich App 143, 164; 792 NW2d 749 (2010). But the *Dean* Court emphasized that in situations in which expert testimony is essential, where the sanction is the barring of an expert witness effectively resulting in the dismissal of the action, "the sanction should be exercised cautiously." *Dean*, 182 Mich App at

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32.

The *Dean* Court recognized that because the decision whether to bar an expert witness or dismiss an action as a sanction for the failure to timely file a witness list is in the trial court's discretion, trial courts should consider "the circumstances of each case to determine if such a drastic sanction is appropriate." *Dean*, 182 Mich App at 32; *Duray*, 288 Mich App 164-165. Among the factors that should be considered in determining the appropriate sanction are:

> (1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the defendant; (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice; (5) whether there exists a history of plaintiff's engaging in deliberate delay; (6) the degree of compliance by the plaintiff with other provisions of the court's order; (7) an attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. This list should not be considered exhaustive.

Dean, 182 Mich App at 32-33.

The decision in *Dean* is wholly consistent with decisions of this Court holding that a trial court's authority to dismiss an action for discovery violations should be exercised cautiously. For example, in *MacArthur Patton Christian Ass'n v Farm Bureau Ins Group*, 403 Mich 474; 270 NW2d 101 (1978), the circuit court dismissed plaintiff's complaint because plaintiff's agent failed to attend a deposition. In *MacArthur*, the attorneys agreed to adjourn the deposition of Renato Varani, an agent of the plaintiff, because plaintiff's attorney was ill. 403 Mich at 475. On the morning of the re-scheduled deposition, the secretary for the plaintiff's attorney contacted the defendant's attorney and informed him that neither she nor the plaintiff's attorney had been able to contact Mr. Varani and that neither Mr. Varani nor plaintiff's attorney would be present at the deposition. *Id.*, at 476. Neither Mr. Varani nor plaintiff's counsel appeared at the deposition and the

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defendant filed a motion for dismiss, arguing that dismissal was proper due to plaintiff's violation of GCR 1963, 313.4, the predecessor to MCR 2.313(D). The trial court subsequently granted the motion to dismiss and the Court of Appeals affirmed. *Id.*

This Court reversed the dismissal of plaintiff's complaint, holding that while the trial court clearly had the authority to dismiss the action due to a violation of the court rules, dismissal was improper based upon the facts of the case:

> The authority of the circuit judge to take the most drastic step of dismissal of plaintiff's complaint with prejudice is clear. However, we believe that such measures should be exercised cautiously. This is not a case where the failure to respond to discovery requests extends over substantial periods. E.g., *Krim v Osborne*, 20 Mich App 237; 173 NW2d 737 (1969). Nor is it a case in which the failure to provide discovery is in violation of a direct order of the trial court. E.g. *Humphrey v Adams*, 69 Mich App 577; 245 NW2d 167 (1976). In this case, in view of the relatively short time that elapsed between the failure to appear and the motion to dismiss, and the ambiguous showing of willfulness on the part of the plaintiff's agent, we conclude that the trial judge should have chosen less drastic measures to compel discovery. *Richards v O'Boyle*, 21 Mich App 607; 175 NW2d 874 (1970). Certainly, the trial judge could have imposed costs on the plaintiff. She could have ordered the plaintiff to produce the deponent at a specified time. If she found that the failure of Mr. Varani to appear was the result of the failure of plaintiff's attorney to notify him or the plaintiff, sanctions could have been imposed against the attorney directly. We hold only that the use of the most drastic sanction of dismissal with prejudice was not justified by the facts of this case.
>
> *MacArthur*, 403 Mich at 477-478.

Similarly, in *North v Dep't of Mental Health*, 427 Mich 659; 397 NW2d 793 (1986), a case involving the dismissal of a complaint for lack of progress, this Court again recognized the trial court's authority to dismiss a complaint with prejudice, but explained that dismissal is a harsh remedy to be invoked "cautiously" and only in "extreme" circumstances. This Court's decision was informed by our court system's preference for disposition of issues on their merits, which this Court found "will frequently be found to be overriding" any other considerations:

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> Our legal system is also committed to a countervailing policy favoring disposition litigation on the merits, see *Hurt v Cambridge*, 21 Mich App 652; 176 NW2d 450 (1970), which will frequently be found to be overriding. Thus, appellate courts have often warned "that dismissal with prejudice is … to be applied only in extreme situations." Wright & Miller, Practice and Procedure, § 2369, p 193.
>
> Mindful of the fact that dismissal is a harsh remedy to be invoked cautiously, the trial court should evaluate the length, circumstances, and reasons for delay in light of the need for administrative efficiency and the policy favoring the decisions of cases on their merits, considering among other factors: 1) the degree of the plaintiff's personal responsibility for the delay, 2) the amount of prejudice to the defendant caused by the delay, 3) whether there exists a lengthy history of deliberate delay, and 4) whether the imposition of lesser sanctions would not better serve the interests of justice. *Davis v Williams*, 588 F2d 69, 70 (CA 4, 1978).

North, 427 Mich at 662.

This Court's recognition in *North* of our legal system's preference for disposition of litigation on the merits is mirrored in other decisions of this Court. See *Wood v Detroit Automobile Inter-Ins Exchange*, 413 Mich 573, 585-586; 321 NW2d 653 (1982) (noting that contemporary procedural philosophy encourages trial on the merits and discourages defaults); *Rogers v JB Hunt Transport, Inc*, 466 Mich 645, 654; 649 NW2d 23 (2002) (noting our court system's preference for disposition of issues on their merits); *Woodard v Custer*, 473 Mich 1, 12; 702 NW2d 522 (2005) (Cavanagh, J, concurring) (recognizing that in considering a motion to amend a witness list, an important consideration is "our legal system's preference for disposition of litigation on the merits.").

What is striking about this Court's holdings in *MacArthur* and *North* is that this Court instructs trial courts to consider certain factors before imposing the "drastic" sanction of dismissal. And the factors outlined in *MacArthur* and *North* – whether the violation was wilful or accidental, whether there exists a history of deliberate delay, and whether a lesser sanction would better serve the interests of justice – are identical to the factors set out in *Dean.*

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It is defendants' position that the *Dean* factors do not apply here because those factors are only applicable to decisions barring experts as "discovery sanctions." Defendants point to decisions of the Court of Appeals holding that the *Dean* factors apply only to cases that involve the complete failure to file a witness list rather than the omission of a witness from the timely-filed witness list. See e.g., *Gay v Select Specialty Hosp*, 295 Mich App 284, 308; 813 NW2d 354 (2012) (Whiteck, dissenting) (stating that plaintiff's reliance on *Dean* was misplaced, and that the *Dean* factors were inapplicable, because *Dean* involved precluding a witness from testifying as a sanction for untimely discovery rather than the replacement of an expert witness); *Howard-Reed v Braver*, unpublished opinion per curiam of the Court of Appeals, issued May 19, 2022 (Docket No. 356200).

The difficulty with defendants' argument, however, is that whether the exclusion of a witness occurs as the result of the failure to file a timely witness list or the failure to timely identify the witness on the initial witness list is a distinction without a difference. In both situations, the potential exclusion of the witness arises because the party failed to comply with the requirements of MCR 2.401(I)(1). And in both situations, the circuit court may order that any witness not listed "will be prohibited from testifying at trial except upon good cause shown." MCR 2.401(I)(2). In other words, the sanction of the exclusion of a witness occurs under both situations as the result of a discovery violation – for failure to name an expert within the time period required by the court rules and the trial court's scheduling order.

Stated somewhat differently, defendants would have this Court draw a sharp distinction between the striking of potential witnesses as a discovery sanction and a trial court's mere refusal to allow a witness list to be amended. But where, as here, the witness to be added by amendment is essential to plaintiff's case moving forward, there is no practical difference between these two

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situations. Both implicate the fundamental policy favoring litigation on the merits. *North*, 427 Mich at 662; *Rogers*, 466 Mich at 654; *Wood*, 413 Mich at 585-586.

It is illuminating that the defendants, who insist that the *Dean* factors are inapplicable here because these factors apply only in the context of the imposition of sanctions, readily characterize plaintiff's request to amend the witness list as a violation of the circuit court's scheduling orders. See Tri County Defendants Brief, at 12 ("Plaintiff-Appellee's attempt to untimely replace Dr. Bal with Dr. Hall, in violation of the trial court's scheduling order, was abusive to the litigation process...."); Beaumont Brief, at 6, 14, 19 (noting that the circuit court did not extend the time for the filing of witness lists or the disclosure of expert witnesses in its amended scheduling order and arguing that sanctions, including striking a party's experts and dismissing the case, are available when a party violates a court order; "The court rules and Michigan's appellate courts protect a trial court's authority and discretion to control proceedings through scheduling orders."). Yet where the exclusion of a witness is the imposed discovery sanction and the exclusion will result in the dismissal of the action, *Dean* requires that the sanction for violation of the court rules be exercised "cautiously." *Dean*, 182 Mich App 27, 32.

Consistent with the holdings in *Dean*, *MacArthur*, and *North*, where the action of a court in excluding an expert witness effectively results in the dismissal of the action, such an action "should be exercised cautiously" upon consideration of the various factors set forth in these cases. There is no sound basis for requiring this exercise of caution only when the exclusion of a witness occurs as a result of a complete failure to file a witness list and not when there is a failure to include a witness on the initial witness list, when the end result of the exclusion of the witness is the effective dismissal of the case. See *Woodard*, 473 Mich at 10-13 (Cavanagh, J, concurring) (holding that,

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when deciding whether to allow a plaintiff to add an expert witness, a trial court should give due weight to whether the denial of a motion to add an expert witness would extinguish a plaintiff's cause of action, citing *Dean*, and "recognize that it has other, less drastic, measures available to it by which to ameliorate any inconvenience caused to the opposing party," including requiring the plaintiff to pay any deposition or other costs, including attorney fees, associated with the delay caused by the plaintiff's failure to timely name the witness.).

The fact that defendants are advocating for the imposition of a less-rigorous and *harsher* standard in situations where a party initially complies with MCR 2.401(I) by filing a timely witness list makes little sense. Defendants are essentially taking the position that a party who complies with MCR 2.401(I)(1) by filing a timely witness list but later finds it necessary to amend the witness list due to the non-cooperation of a witness could be subject to dismissal of the action without any analysis of the factors outlined by this Court and the Court of Appeals in *MacArthur*, and *North*, and *Dean*.

Conversely, both defendants urge the Court, in assessing plaintiff's request to amend her witness list, not to apply the final *Dean* factor requiring an examination of "whether a lesser sanction will better serve the interests of justice." Beaumont Brief, at 3-4, 19-20; Tri County Brief, at 10-12. But in making this argument, defendants ask the Court to reach the incongruous result that greater protection is to be afforded a party who is being sanctioned for violating a court rule and/or a court order than a party who complies with a court's order by filing a timely witness list, but simply later seeks to amend that witness list. The defendants offer no explanation why a party being sanctioned should receive more favorable treatment than a party who has abided by the court rules and court orders.

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As recognized by this Court in *Higgins v Henry Ford Hosp*, 384 Mich 633, 637; 186 NW2d 337 (1971), while the court rules give direction to the process of administering justice and must be followed, their application "should not become a fetish to the extent that justice in an individual case is not done." This is consistent with the stated purpose of the court rules set forth in MCR 1.105, which provides:

> These rules are to be construed, administered, and employed by the parties and the court to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties.
>
> MCR 1.105.

Allowing for the dismissal of an action upon preclusion of a witness without requiring the exercise of caution under circumstances where the party initially complied with the court rules violates this call for justice.[4]

In any event, there is no merit to defendants' argument that the *Dean* factors are "extratextual" and have no basis in the plain language of the court rule. Even cases that solely address the "good cause" standard set forth in MCR 2.401(I)(2) require *some* analysis regarding whether the opposing party would be prejudiced by the naming of a new witness, even absent such a requirement in the court rule.

In *Tisbury v Armstrong*, 194 Mich App 19, 21; 486 NW2d 51 (1991), a case involving the addition of a witness not otherwise identified on a timely-filed witness list, the Court of Appeals

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[4] In its brief, Beaumont asserts that the *Dean* factors should not be applied in this case because "[t]reating the decision to amend a witness list like a sanction would improperly insert considerations of justice and proportionality into the 'good cause' standard that governs such requests." Beaumont Brief, at 18. Plaintiff would suggest that defendants' effort to remove considerations of justice and proportionality from a court's decision-making on this subject stands in stark contrast to the construction of the court rules called for by MCR 1.105.

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applied a "good cause" analysis to determine whether a motion to amend the witness list should be granted.[5] Under the holding in *Tisbury*, in determining whether the trial court abused its discretion in denying a motion to add an expert witness, Courts are to consider two factors: first, whether the party seeking to add an expert has adequately explained its reason for delay in naming the witness, and second, whether the opposing party would be prejudiced. 194 Mich App at 21. In determining prejudice, the *Tisbury* holding directs Courts to consider a number of factors, including (1) whether the original expert witness has already been deposed, (2) whether the addition of an expert would affect any mediation evaluation, (3) whether the party seeking to add the expert has caused repeated delays because of a lack of diligence, and (4) whether the failure to allow the addition of an expert will deny a party a determination on the merits of their claim. *Id.*

A showing of prejudice for naming a new witness is not solely limited to the civil context. As in civil cases, a showing of "prejudice" is required in the criminal context, even absent such a requirement in the plain language of the statute governing the exchange of witness lists. MCL 767.40a(3) requires the prosecuting attorney to send to the defendant, not less than thirty days before trial, a list of the witnesses the prosecutor intends to produce at trial. MCL 767.40a(4) provides that a prosecutor may "add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties." But this Court has recognized that even if the statute is violated, a defendant "must show prejudice from the violation." *People v Hana*, 447 Mich 325, 358 n 10; 524 NW2d 682 (1994), citing *People v Williams*, 188 Mich App 54, 58-59; 489 NW2d 4 (1991).

The factors outlined in *Dean*, *MacArthur*, and *North* are designed to evaluate the issue of

[5] Although *Tilbury* was released a year after *Dean*, it did not address the holding in *Dean*.

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"prejudice," which entails both the diligence of the plaintiff and the prejudice to the opposing party that would result from the violation of MCR 2.401(I)(1). And what is important with respect to the *Dean*, *MacArthur*, and *North* factors related to prejudice to the opposing party is that they are substantially similar to the factors outlined in *Tisbury*. Under *Tisbury*, courts must consider whether the party seeking to add the expert has caused repeated delays because of a lack of diligence, which a majority of the *Dean* factors also address. Not only are the *Tisbury* factors similar, but they are also not exclusive and would not preclude trial courts from considering the additional, non-exhaustive factors outlined in *Dean*, *MacArthur*, and *North*.[6]

While defendants argue that a "diligent plaintiff" who has good cause to amend the witness list "easily satisfies the burden of MCR 2.401(I)(2)" and that the "additional protections" afforded to parties under *Dean* are unnecessary, that certainly was not the case here. Defendants' argument ignores the fact that Ms. Smith was a "diligent plaintiff" who had not caused repeated delays in the case because of a lack of diligence, she sought to amend the witness list before the close of discovery, and also had good cause to amend the witness list due to the non-cooperation of her expert witness. Yet the circuit court still denied her motion for leave to file an amended witness list pursuant to MCR 2.401(I)(2). Had the circuit court evaluated the *Dean* factors, there would have

[6] It bears noting that the question of "diligence" in *Tisbury* was phrased in terms of whether a trial had been repeatedly postponed because of a lack of diligence by the party. *Tisbury*, 194 Mich App at 21. The "diligence" question therefore looks to whether the party seeking to add the expert witness has caused repeated delays in the litigation because of a lack of diligence. Although defendants argue that *Tisbury* requires a showing of "diligent efforts to secure the presence of the witness" in order to demonstrate "good cause" for a motion to amend a witness list, Tri County Defendants Brief, at 6; Beaumont Brief, at 2, 14, 20, 22, this applies the incorrect standard. As *Tisbury* makes clear, the required showing of "diligent efforts to secure the presence of the witness" applies to the grant or denial of a motion for *adjournment*. *Tisbury*, 194 Mich App at 20. Defendants improperly conflate the two standards.

been no basis to preclude Dr. Hall as an expert witness.

Plaintiff therefore submits that the *Dean* factors must be considered any time an essential expert cannot or will not support the party's case and the preclusion of a new witness will effetely result in the dismissal of the case. This would necessarily include situations where the expert is unavailable because of death or infirmity or, like here, where the expert becomes uncommunicative or unwilling to support the case. Plaintiff notes that this is not solely an issue that plagues plaintiffs – expert unavailability can and does happen to defendants as well, for the same reasons it happens to plaintiffs. The difference, of course, is that the effect of not being able to name a new expert is fatal to a plaintiff's medical malpractice claim. This is generally not the case for defendants, who may rely upon the testimony of the defendant healthcare providers to support a defense to a medical malpractice action. But regardless of whether the unavailability of an expert witness occurs to a plaintiff or a defendant, Courts should employ the *Dean* factors when the preclusion of a witness will result in the dismissal or default of a party's claims.

Defendants argue, however, that the *Dean* factors are inapplicable in situations where the expert is deemed unqualified to offer testimony. In contrast to cases involving an expert who is no longer able or willing to support the case, defendants point to various decisions of the Court of Appeals in which that Court has declined to consider the *Dean* factors in cases where a party seeks to name a new expert after the trial court determines that an expert listed on the witness list is not qualified to offer testimony at trial. See *Cox v Hartman*, 322 Mich App 292; 911 NW2d 219 (2017); *Morris v St Clair Orthopaedics & Sports Medicine, PC*, unpublished opinion per curiam of the Court of Appeals, issued September 19, 2024 (Docket No. 367109). Plaintiff submits that a consideration of the *Dean* factors also should be required under such circumstances when the denial of the ability

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to name a new expert would effectively result in the dismissal of the action. While the *Dean* factors may weigh in favor of the opposing party under such circumstances, the requirement that the Court exercise caution and evaluate the *Dean* factors when the preclusion of the witness would result in dismissal should not be ignored under these circumstances. There is no valid basis to exclude the evaluation required under *Dean*, *MacArthur*, and *North* in this context.

B. In Any Event, Plaintiff Established the Requisite "Good Cause" for Amendment of Her Witness List.

Even assuming defendants are correct and only the "good cause" standard applies absent any consideration of the *Dean* factors, the Court of Appeals still properly reversed the circuit court's decision denying the motion to amend the witness list. In *Tisbury*, the Court of Appeals held that "good cause" existed to allow leave to amend the witness list under substantially similar facts to the case at bar. 194 Mich App at 20-21. In *Tisbury*, a medical malpractice action, plaintiffs filed a motion to amend the witness list to add a new expert because their expert witness informed them that he would not testify in their behalf. 194 Mich App at 20. Plaintiffs asserted in the motion that "at no time did this expert ever indicate in any way, shape or form, that he was not going to testify." *Id.* The trial court denied plaintiffs' motion to amend the witness list and thereafter granted summary disposition because plaintiffs could not carry their burden of proof without the assistance of an expert witness. *Id.*

The Court of Appeals reversed the circuit court's denial of plaintiffs' motion to amend the witness, holding that plaintiffs provided an adequate explanation for the absence of their expert witness. *Id.*, at 21. The Court further held that no prejudice would have resulted if the motion had been granted and that the "drastic remedy" of summary disposition was contrary to the policy of this

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state, which favors the meritorious determination of issues:

> In our opinion, plaintiffs provided an adequate explanation for the absence of their expert witness, and we do not believe any prejudice would have resulted if their motions had been granted. The original expert witness had not yet been deposed and there would not necessarily have been any effect on mediation. See *Levinson v Sklar,* 181 Mich App 693, 699; 449 NW2d 682 (1989). In addition, there is no indication on the record that the trial had been repeatedly postponed because of a lack of diligence on plaintiffs' part. We also find it significant that the court's decision on plaintiffs' motions put an end to this lawsuit. Given the policy of this state favoring the meritorious determination of issues, *Wood v Detroit Automobile Inter–Ins Exchange,* 413 Mich 573; 321 NW2d 653 (1982), we do not believe that the drastic remedy of summary disposition is appropriate in this case.

194 Mich App at 21.

Here, the initial scheduling order required the parties to submit witness lists by May 6, 2022. Scheduling Order (Apx 134a). Ms. Smith timely filed her witness list on April 25, 2022, naming Dr. Bal as her standard of care expert in orthopedic surgery. Witness List (Apx 121a-130a). Due to Dr. Bal's ongoing failure to communicate with plaintiff's counsel, Ms. Smith sought to replace Dr. Bal as her orthopedic surgery expert by motion filed on October 19, 2022. Motion to Amend (Apx 270a-276a). While Ms. Smith's motion to add a new expert witness was filed more than five months after the due date for filing and serving witness lists, it was filed two months prior to the close of discovery and the scheduled facilitation date and four months prior to the scheduled trial date. Order 6/23/22 (Apx 135a-136a).

Ms. Smith argued that good cause existed for allowing her to amend her witness list to replace Dr. Bal with Dr. Hall. She argued that Dr. Hall's testimony was not anticipated to be needed in this matter when the original witness list was filed. Motion to Amend, at 3 (Apx 272a). She submitted that it was only after plaintiff's counsel experienced "much difficulty contacting the current expert, Dr. Bal, that the need for a replacement expert witness became known." *Id.*

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As the Court of Appeals noted in its decision, the sum total of the circuit court's reasoning with respect to its denial of Ms. Smith's motion to amend the witness list was as follows:

> The matter was filed on April 9, 2021. Witness lists in this matter were due by May 6, 2022, with discovery closing on June 7, 2022. Trial in this matter is currently set for February 7, 2023. Allowing an amended witness list at this late stage is also highly prejudicial.
>
> Order 11/14/22 (Apx 308a-309a).

The circuit court notably made no finding as to the adequacy of the explanation for the absence of plaintiff's expert witness, Dr. Bal. Order 11/14/22 (Apx 308a-309a). Nor did the circuit court consider any of the factors outlined in *Tisbury* regarding a finding of prejudice. There was no reference to the fact that Dr. Bal had not yet been deposed in the action or that the defendants' orthopedic surgery experts had not yet been deposed, that the addition of an expert would have no effect on the facilitation that was scheduled for December 12, 2022, or that the plaintiff had not caused repeated delays in the case because of a lack of diligence. Nor was there any reference to the fact that plaintiff had already secured a new expert, Dr. Hall, and had even provided potential dates for Dr. Hall's deposition to opposing counsel, which fell within the discovery time period. The circuit court instead found that allowing an amended witness list was "highly prejudicial" due to the fact that discovery closed on June 7, 2022, when in fact it had not. As the Court of Appeals noted, the circuit court failed to recognize that discovery was extended from June 7, 2022 until December 12, 2022, by order entered on June 23, 2022. Order 6/23/22 (Apx 135a-136a).

Most importantly, nowhere in the circuit court's November 14, 2022 order was there any recognition of the fact that prohibiting Dr. Hall from testifying as an expert at trial would deny Ms. Smith a determination on the merits of her claim. *Tisbury*, 194 Mich App at 21. As noted by the

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Court of Appeals, the circuit court's decision made it so plaintiff did not have an expert witness regarding standard of care and breach thereof. *Harris*, at 5 (Apx 5a). And because plaintiff no longer had an expert witness to testify regarding the standard of care and breach, this was fatal to plaintiff's medical malpractice claims, which must be supported by expert testimony. See *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995). Therefore, under the well founded reasoning of *Tisbury*, the Court of Appeals properly reversed the circuit court's decision denying the motion to amend the witness list.

There are additional factors that weigh in favor of a finding of "good cause" for the addition of Dr. Hall as plaintiff's expert witness. In denying reconsideration of the order denying plaintiff's motion to amend the witness list, the circuit court held that leave to file an amended witness list was "inappropriate" because plaintiff had "over one year to sort out any issues with her experts." Order 12/8/22 (Apx 314a-315a). The circuit court held that had plaintiff "diligently" prosecuted her case,[7] "she would have realized Dr. Bal was uncooperative and/or unqualified to testify much sooner than November of 2022." *Id.*

The Court should note, however, the untimeliness of defendants' challenge to Dr. Bal's affidavit of merit. MCR 2.112(L)(2) provides that all challenges to the qualifications of the signer of an affidavit of merit must be filed within 63 days of service of the affidavit, unless the court allows a later challenge for good cause:

> (2) In a medical malpractice action, unless the court allows a later challenge for good cause: ***

[7] Notably, the circuit court again incorrectly found that discovery had closed on June 7, 2022, when in fact it had been extended until December 12, 2022. Order 12/8/22 (Apx 315a); Order 6/23/22 (Apx 135a-136a).

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> (b) all challenges to an affidavit of merit or affidavit of meritorious defense, including challenges to the qualifications of the signer, must be made by motion, filed pursuant to MCR 2.119, within 63 days of service of the affidavit on the opposing party. An affidavit of merit or meritorious defense may be amended in accordance with the terms and conditions set forth in MCR 2.118 and MCL 600.2301.
>
> MCR 2.112(L)(2)(b).

Here, there is no dispute that defendants did not challenge the affidavit of merit within the 63-day time period set forth in MCR 2.112(L)(2)(b).[8] The complaint and affidavit of merit were filed and served in the spring of 2021. Defendants, however, did not challenge the affidavit of merit until November 2022.

There was no finding by the circuit court of "good cause" for the defendants' untimely challenge to the affidavit of merit. And there is no question that had defendants timely challenged Dr. Bal's affidavit of merit within the 63-day time period set forth in MCR 2.112(L)(2)(b), plaintiff

[8] Plaintiff acknowledges that MCR 2.112(L)(2) allows the court to allow "a later challenge for good cause." Had this provision been invoked to justify the late challenge to Dr. Bal's affidavit, the trial court might well have been required to address the question of when the defendants first reached the conclusion that Dr. Bal did not meet the qualifications of MCL 600.2912d and MCL 600.2169 because he had retired more than one year before the malpractice alleged in this case. Had the issue been raised, the circuit court would have had to address the fact that one of the depositions used to support the defendants' argument that Dr. Bal was unqualified had been taken in 2020, months before this case was even filed, and it was taken by a lawyer for the same law firm that represents the Tri County defendants in this case. See fn 3, *supra*. The defendants would have had to explain whether they either knew or should have known of this potential challenge to Dr. Bal's ability to sign an affidavit of merit within the 63-day period provided in MCR 2.112(L)(2)(b), but decided for strategic reasons to wait to challenge that affidavit until the case had progressed for enough time that the court would be much less likely to allow plaintiff to name a new expert. The gamesmanship that defendants repeatedly accuse plaintiff's counsel of employing may not be quite as one-sided as defendants suggest.

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would have had sufficient time to file a witness list naming a new expert.[9] The circuit court issued an initial scheduling order requiring that witness lists be filed by May 6, 2022. Initial Scheduling Order (Apx 134a). Therefore, had defendants timely challenged the affidavit of merit in the summer of 2021, plaintiff could have found and named a new expert by the May 6, 2022 witness list cutoff date. These facts weigh in favor of a finding of "good cause" for naming Dr. Hall as an expert witness on an amended witness list beyond the time for the filing of witness lists.

This procedural irregularity regarding the timing of defendants' challenge to the affidavit of merit is compounded by yet another procedural defect in the circuit court's decision – the dismissal of plaintiff's action *with* prejudice based upon the circuit court's finding that Dr. Bal's affidavit of merit did not satisfy MCL 600.2912d. In seeking summary disposition, Beaumont and the Tri County defendants argued that Ms. Smith's complaint should be dismissed because Dr. Bal was not qualified under MCL 600.2169 to sign the affidavit of merit, as required under MCL 600.2912d, and plaintiff's counsel could not have reasonably believed that Dr. Bal met the requirements of § 2169. The Tri County defendants further argued that the "failure of a plaintiff to comply with the strict requirements of MCL 600.2912d and MCL 600.2169(1)(b)(i)-(ii) is fatal to their claim." Tri County Defendants' Motion for Summary Disposition, at 7-8 (Apx 31b-32b).

The circuit court, after finding Dr. Bal's affidavit of merit "invalid," held that plaintiff's medical malpractice complaint "fails as a matter of law" and dismissed the action in its entirety.

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[9] Consistent with the Court of Appeals decision in *Legion-London v Surgical Inst of Michigan Ambulatory Surgery Ctr, LLC*, 331 Mich App 364; 951 NW2d 687 (2020), plaintiff also would have been afforded the opportunity to file an amended affidavit of merit signed by a different expert, which would relate back to the filing of the original affidavit of merit. As held by the Court of Appeals in *Legion-London*, the 2010 court rules were adopted, at least in part, to address concerns about medical malpractice cases being dismissed on the basis of defects in the affidavit of merit without providing an opportunity to cure. 331 Mich App at 376-377.

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Order 12/15/22 (Apx 310a-313a). Because the circuit court did not provide that the dismissal was *without* prejudice, the order of dismissal operated as an adjudication on the merits pursuant to MCR 2.504(B)(3). See *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 419; 733 NW2d 755 (2007) (holding that, in the absence of any language in an order of dismissal limiting the scope of the merits decided, MCR 2.504(B)(3) "plainly provides that the order operates as an adjudication of the entire merits of a plaintiff's claim.").

The circuit court's dismissal of this action *with* prejudice due to a purportedly defective affidavit of merit is completely indefensible. The circuit court's order runs contrary to this Court's binding precedent holding that dismissal *with* prejudice is *not* an appropriate remedy for the filing of a defective affidavit of merit. *Kirkaldy v Rim*, 478 Mich 581; 734 NW2d 201 (2007). Pursuant to this Court's holding in *Kirkaldy*, the appropriate sanction to be imposed for the filing of a defective affidavit of merit is dismissal *without prejudice*, whereby *plaintiff would be afforded the time remaining in the limitations period in which to re-file the complaint with an affidavit of merit signed by a qualified expert*. *Kirkaldy*, at 586.

Therefore, even assuming the circuit court correctly held that Dr. Bal is not qualified to sign an affidavit of merit and that plaintiff's counsel did not have a "reasonable belief" that Dr. Bal was qualified, this Court's holding in *Kirkaldy* precludes the action taken by the trial court here – dismissal of Ms. Smith's action *with* prejudice. Had the circuit court followed *Kirkaldy*, this action would have been dismissed *without* prejudice, allowing plaintiff to re-file the case with an appropriate expert. In other words, the circuit court's proper application of *Kirkaldy* would render moot the question now before this Court – whether it was an abuse of discretion for the circuit court to deny plaintiff's motion to amend the witness list due to the perceived prejudice to the defendants

(which, as noted above, did not exist here where discovery had not yet closed).

While these issues may not directly address the issue raised by this Court, which focuses on the necessity of the circuit court's evaluation of the *Dean* factors, these issues certainly factor into the "good cause" analysis that is required under MCR 2.401(I)(2). And these facts demonstrate a clear abuse of discretion by the circuit court in this matter in denying plaintiff's motion to amend her witness list to name Dr. Hall as an expert witness in place of Dr. Bal.

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RELIEF REQUESTED

For the foregoing reasons, plaintiff-appellee Lawanna Smith, as personal representative of the estate of Jacqueline Harris, respectfully requests that this Court affirm the Court of Appeals September 12, 2024 ruling (1) reversing the circuit court's November 14, 2022 order denying plaintiff's motion to amend the witness list and the December 8, 2022 order denying plaintiff's motion for reconsideration, and (2) reversing the circuit court's December 15, 2022 order granting defendants' motion for summary disposition and the February 3, 2023 order denying plaintiff's motion for reconsideration, and remand this case to the Oakland County Circuit Court for further proceedings.

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Dated: November 12, 2025.

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CERTIFICATION PURSUANT TO MCR 7.312(A)(1)

Beth A. Wittmann, attorney for plaintiff-appellee, hereby certifies pursuant to MCR 7.312(A)(1) and MCR 7.212(B)(1) that this brief was typed using the Corel Word Perfect word processing program. That program has a function which can calculate the total number of words contained in a document. According to that program function, there are 11,263 allowable words in this brief.

/s/ Beth A. Wittmann
Counsel for Plaintiff-Appellee