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STATE OF MICHIGAN

IN THE SUPREME COURT

LAWANNA SMITH, as Personal Representative of the Estate of JACQUELINE HARRIS, Dec'd.

Plaintiff-Appellee,

v

TRI COUNTY ORTHOPEDICS, P.C.; and JACK D. LENNOX, D.O.,

Defendants-Appellants,

and

BEAUMONT HEALTH, Jointly and Severally,

Defendant.

Supreme Court No. 167720
COA No. 365062

Oakland County Circuit Court
Case No. 21-187353-NH
Hon. Nanci Grant

DEFENDANTS-APPELLANTS TRI COUNTY ORTHOPEDICS, P.C. AND JACK D. LENNOX, D.O.'S REPLY TO PLAINTIFF-APPELLEE'S SUPPLEMENTAL RESPONSE BRIEF ON APPEAL

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

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I. THE COURT OF APPEALS ERRED WHEN IT REVERSED THE TRIAL COURT FOR ABUSE OF DISCRETION AND DIRECTED THE TRIAL COURT TO CONSIDER *DEAN/DURAY* FACTORS IN ITS CONSIDERATION OF PLAINTIFF'S MOTION TO AMEND WITNESS LIST.

The Court of Appeals committed reversible error when it held that the trial court abused its discretion in its initial consideration and denial of Plaintiff-Appellee's Motion to Amend to File a Second Amended Witness List and when it directed the trial court to consider the *Dean/Duray* factors in deciding the motion. Specifically, the appellate court failed to appreciate that the trial court appropriately considered Michigan court rules and case law, which enforce a "good cause" analysis in cases like this one.

In her reply, Plaintiff-Appellee inaccurately distills the defendants' arguments to identify a difference without a distinction between barring replacement of a disqualified (or disqualifiable) expert and precluding a witness from testifying as a sanction for untimely discovery. However, Plaintiff-Appellee fails to acknowledge that the subject of this appeal is not merely about an untimely-named expert; it is about an invalid Affidavit of Merit fatal to her claim, intentionally misleading the court, ignoring proper procedure, and *then* failing to show good cause for amendment to save her claim at the nth hour. The trial court recognized Plaintiff-Appellee's gamesmanship for what it was, appropriately denied the motion to amend, and was within its discretion when it dismissed the case on its stated grounds.

A. <u>The trial court's denial of Plaintiff-Appellee's motion to amend her witness list was not a discovery sanction and Defendants-Appellants' argument regarding same does not constitute a difference without a distinction.</u>

As Plaintiff-Appellee points out in her brief, MCR 2.401(I)(2) provides that "[t]he trial court may order that any witness not listed in accordance with [MCR 2.401(I)] will be

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prohibited from testifying at trial *except upon good cause shown*." Notably, MCR 2.401(I) does not implicate or discuss sanctions. So long as the original witness list that the moving party seeks to amend was timely filed in accordance with the trial court's scheduling order and MCR 2.401(I)(1),[1] there is no violation of a court order, court rule, or law to warrant sanctions under MCR 2.313(B). Thus, the appropriate standard in determining whether to allow amendment/addition of experts under MCR 2.401(I) involves a good cause analysis.

Michigan appellate courts have routinely held that late motions to amend witness lists fail to demonstrate good cause when "'the movant fails to provide an adequate explanation and show that diligent efforts were made to secure the presence of the witness." *Cox v Hartman*, 322 Mich App 292, 315; 911 NW2d 219 (2017), quoting *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1991); see also *Hayes-Albion v Kuberski*, 421 Mich 170, 188; 364 NW2d 609 (1984). Where the movant fails to do so, denial of the motion to amend is proper. *Id.* The appellate courts have also clearly recognized that it is soundly within a trial court's discretion to strike or reject proposed new witnesses. See, e.g., *Hayes-Albion,* 421 Mich at 188; *Herrera v Levine*, 176 Mich App 350, 355-356; 176 Mich App 350; 439 NW2d 378 (1989) (per curiam); *Carmack v Macomb County Community College*, 199 Mich App 544, 546; 502 NW2d 746 (1993).

In *Tisbury*, the plaintiff in a medical malpractice action filed a motion to amend their timely-filed witness list to add a new expert after the witness list deadline because their previous expert revoked support for the case and would not testify. 194 Mich App at 20.

[1] MCR 2.401(I)(1) dictates that "the parties shall file and serve witness lists…[which] must include…the name of each witness,…whether the witness is an expert, and the field of expertise" by some time directed by the court.

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The motion asserted that the expert never indicated "in any way, shape, or form that he was not going to testify," which suggested that the revocation of support was a complete surprise to the plaintiff. *Id.* Concurrently, the plaintiff also filed a motion to adjourn trial. The trial court denied both motions and dismissed the case on the defendant's motion for summary disposition for lack of expert support. *Id.* at 19.

On appeal, the *Tisbury* panel of the Court of Appeals reviewed the trial court's decisions on the two motions for abuse of discretion. When considering the two motions, the *Tisbury* panel established two factors to be contemplated: (1) whether the moving party adequately explained its reason for delay in naming the new witness and (2) whether the non-moving/opposing party would be prejudiced. *Id.* at 20. The *Tisbury* panel ultimately reversed the trial court's denial both motions, holding that the plaintiff adequately explained the absence of the expert, thereby justifying grant of the motion to amend, and that no prejudice would result from granting either of the motions. *Id.* at 21. The panel further noted that the "drastic remedy" of summary disposition was contrary to policy, which favors determination of issues on the merits. *Id.*

In *Morris v St. Clair Orthopaedics & Sports Medicine, P.C. and Glenn Minster, M.D.*, No. 367109 (Mich Ct App Sept. 19, 2024) (**AT Appx 15-23**), which was released just one week after the Court of Appeals released its decision on this matter, another panel of the Court of Appeals held that dismissal was proper where the plaintiff filed a late amended witness list and failed to show good cause for amendment. Similarly, in *Red Fit, LLC v Red Effect International Franchise, LLC*, No. 363686, 2024 WL 2790504 (Mich Ct App May 30, 2024) (**Supp Appx 392-410**), which involved the same factual basis, the Court of Appeals held "[t]he *Dean* factors are considered when deciding on a sanction,

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such as dismissal, for failing to timely file a witness list, *not as a consideration for accepting a late-filed witness list*" (**Supp Appx 405**). The *Red Fit* Court further concluded that "the trial court's decision to not accept the late-filed witness list was not a sanction for their failure to timely file a witness list," but rather, "a decision to adhere to the court's scheduling order"—a decision that is squarely within the trial court's power and discretion. (**Supp Appx 405**).

These cases clearly contemplate and emphasize that the trial court's authority to consider late amendments to witness lists does not implicate sanctions, and thus, precluding late additions to a timely-filed witness list is not a discovery sanction. It is a function of pretrial procedures and case management, which falls squarely within the trial court's discretion under MCR 2.401 and involves a good cause analysis. Contrary to Plaintiff-Appellee's assertion, there clearly is a meaningful distinction between these cases and cases that fall under the *Dean/Duray* framework, and this distinction causes a difference that has clearly been considered before by the appellate courts.

In her response, Plaintiff-Appellee almost exclusively discusses factually distinguishable cases where parties violated a scheduling order or committed other specific discovery violations (i.e., failure to appear for deposition and failure to progress the case). She uses these discovery sanction cases to assert the Court of Appeals "has consistently applied the *Dean* factors" in such cases and/or has held that preclusion of witnesses as a discovery sanction should be exercised cautiously. See Plaintiff-Appellee's Supplemental Response Brief at 15-18. Inexplicably, she brushes over the fact that discovery sanctions were not at all implicated in this case as "a distinction without a difference." See Plaintiff-Appellee's Supplemental Response Brief at 19.

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Plaintiff-Appellee also discusses the Court of Appeals' decision in *Tisbury* to reiterate that that the discovery sanction of witness preclusion should be exercised cautiously and to assert that the "drastic remedy" of summary disposition is not appropriate where an expert is suddenly AWOL and unavailable to testify. She likens the *Tisbury* panel's limited analysis of prejudice to the *Dean/Duray* factors and argues the *Dean/Duray* factors therefore apply to this case.

Yet, contrary to Plaintiff-Appellee's reading of *Tisbury*, the Court of Appeals' ruling on prejudice was with respect to a motion to adjourn trial, not the at-issue motion to amend, and the Court's analysis with respect to the motion to amend the witness list only involved good cause and good faith—an "adequate explanation" for the need to amend and "diligent efforts to secure the presence of the witness." *Id.* at 20. As will be further discussed below, the *Tisbury* Court's analysis involves the same two factors that were requested by the trial court in this case and that Plaintiff-Appellee failed to demonstrate. Moreover, what Plaintiff-Appellee continuously fails to acknowledge is that sanctions were not applicable in this case and the analysis for cases involving sanctions—i.e., application of *Dean/Duray* factors to weigh the violation against the punishment—is fundamentally different than the facts and issues at hand.

In this case, there is a clear distinction and substantial difference: Plaintiff-Appellee did not violate the scheduling order or otherwise commit a discovery violation with her initial witness list and the trial court was not sanctioning Plaintiff-Appellee for doing so. It is undisputed that Plaintiff-Appellee timely filed her original witness list. The pertinent issues in this case are that Plaintiff-Appellee filed an invalid Affidavit of Merit and subsequently discovered that her only standard of care expert, Dr. Bal—whom she had

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retained years prior and had years to confirm his qualification as an expert under MCR 600.2169—was not qualified to provide standard of care testimony in this case; refused to produce Dr. Bal for deposition to address the issue; and then intentionally disregarded proper procedure in her attempt to conceal this fact.[2] Months after the deadline for witness lists had passed and years after she should have exercised due diligence in verifying her experts, she filed a late amended witness list without first requesting leave from the court to do so, which is clearly prohibited under the court rules. The court properly struck the amended witness list on these grounds.

Thereafter, when the trial court presented Plaintiff-Appellee with an opportunity to right her ship with the motion to amend, Plaintiff-Appellee again failed to sufficiently show good cause for amendment. She never provided a reliable explanation for why amendment was necessary, nor did she demonstrate any difficulty contacting Dr. Bal while securing his affidavit, scheduling his deposition, communicating regarding his alleged emergency on the morning of his August 15, 2022 deposition, or after even after cancelling his August 15, 2022 deposition. Indeed, Plaintiff-Appellee necessarily would have had to be in contact with Dr. Bal in order to communicate regarding the emergency and to cancel the deposition. To date, Plaintiff-Appellee has supplied no evidence that

[2] In further attempt to confuse the issues and muddy the waters in this case, Plaintiff-Appellee asserts that Defendants-Appellant should have challenged Dr. Bal's qualifications sooner. Given that this issue is not properly before this Honorable Court, Defendants-Appellants will not brief in full unless otherwise instructed by this Court. Notwithstanding this deferral, the Defendants' challenge of Dr. Bal's qualifications was not the igniting factor in Plaintiff-Appellee's initial appeal and the appeal now before this Court. The igniting factor was Plaintiff-Appellee's failure to produce Dr. Bal for deposition, thereby depriving Defendants of the opportunity to obtain testimony from Dr. Bal on his affidavit and qualifications, and further, Plaintiff-Appellee's improper attempt to substitute Dr. Hall for Dr. Ball without requesting leave from the trial court (which then prompted further investigation by Defendants and the subsequent Motions to Strike). As pointed out in Co-Defendant-Appellant's reply, by raising this argument, Plaintiff-Appellee necessarily uproots her own position that the reason for substituting Dr. Bal was his abrupt unavailability and an inability to reestablish contact thereafter, which allegedly had nothing to do with his qualification as an expert.

she even attempted to contact Dr. Bal after his deposition was cancelled. She also has never demonstrated any other discernable, legally sufficient reason for why Dr. Bal needed to be replaced. Plaintiff-Appellee's complete lack of demonstrable evidence cannot meet the standard for a showing of good cause in any court. Without a showing of good cause, prohibiting amendment of witnesses is proper under MCR 2.401(I)(2).

It stands to be reiterated that Plaintiff-Appellee did not violate the scheduling order and implicate discovery sanctions under MCR 2.313(B); she filed a defective Affidavit of Merit, violated a court order by failing to address the defective AOM, disregarded proper procedure for requesting leave to file a late amended witness list, and then failed to show good cause for amendment, which left her without proper expert support and was fatal to her claim. Accordingly, the trial court properly dismissed the case for failure to obtain adequate expert support and lack of a valid Affidavit of Merit.

It also stands to be emphasized that *even though Plaintiff-Appellee failed to act in good faith or establish good cause*, she did not commit any other discovery offense that warrants sanctions under MCR 2.313(B), and the trial court did not consider the imposition of same. This is the critical component that sets this case apart from *Dean*, *Duray*, and other cases cited by Plaintiff-Appellee. The trial court's appropriate denial of Plaintiff-Appellee's motion to amend her witness list and subsequent dismissal on the above-stated grounds were not discovery sanctions and are readily distinguishable from such, which is made clear by the appellate courts' decisions in cases like *Morris* and *Red Fit*.

Moreover, requiring the trial court to apply the *Dean/Duray* factors for sanctions to a case that does not involve sanctions is an improper interference with the trial court's

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authority to manage its caseload, which is granted by the Michigan Court Rules. Under MCR 2.401(B)(1), the trial court has the authority to set timelines with scheduling orders and other means of case management to facilitate the "fair and expeditious disposition of the action." The trial court also has "the discretion to decline to consider motions filed after [its] deadline." *Velez v Tuma*, 283 Mich App 396, 402; 770 NW2d 89 (2009) (citing *Kemerko Clawson, LLC v RXIV Inc*, 269 Mich App 347, 349; 711 NW2d 801 (2005)). Like MCR 2.401(I), subsection (B) is silent as to considering or imposing sanctions for failure to comply with the court's case management. Forcing a framework involving the consideration of sanctions upon a case where there are none is improper interference with the trial courts authority over case management.

Instead of requiring the stringent application of *Dean/Duray* to this factually and legally distinguishable case solely for the purpose of keeping Plaintiff-Appellee's case alive in spite of its failings, the Court of Appeals should have followed its prior decisions in cases like *Morris* and *Red Fit.*

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals committed clear error in issuing conflicting opinions in this case and *Morris v St. Clair Orthopaedics & Sports Medicine, P.C. and Glenn Minster, M.D.*, and these Defendants-Appellants face material injustice as a result. The decision that must be affirmed is that which was issued by the Court of Appeals panel in *Morris* and *Red Fit, LLC v Red Effect International Franchise, LLC*.

Specifically, the *Morris* panel's decision is the right one to apply in this case on the following grounds: the numerous evidentiary issues brought before the lower courts were properly within the discretion of the trial court; the trial court properly denied Plaintiff-

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Appellee's various evidentiary motions regarding her expert witnesses; and the trial court properly struck her untimely amended witness lists pursuant to the good cause analysis standard set forth by the Michigan Court Rules and relevant case law.

In light of the trial court's sound decisions that were not an abuse of discretion, this Honorable Court must find that the trial court properly denied Plaintiff-Appellee's Motion to Amend her Witness List and Motion for Voluntary Dismissal, and thus, appropriately granted summary disposition in favor of Defendants-Appellants. The trial court's rulings are solidly based in medical malpractice law, the court rules, and case precedent. Accordingly, the trial court's grant of summary disposition resulting in dismissal of Plaintiff-Appellee's Complaint must be affirmed by this Honorable Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH MCR 7.312 AND 7.212

I, Lauren T. Rhoads, certify that Defendants-Appellants Tri County Orthopedics, P.C. and Jack D. Lennox, D.O.'s Reply to Plaintiff-Appellee's Supplemental Response Brief on Appeal to the Michigan Supreme Court complies with the type-volume requirements and limitations set forth in MCR 7.312 and 7.212. I am relying on the word count of the word-processing system used to produce this document. Defendants-Appellants' Answer uses 12-point Arial font, one-inch margins, and double-line spaced text, and the word count is 2,864.

Respectfully submitted,

FOLEY, BARON, METZGER & JUIP, PLLC

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CERTIFICATE OF SERVICE

I state that I am employed with the firm of Foley, Baron, Metzger & Juip, PLLC, and I hereby certify that on December 10, 2025, on behalf of Defendants-Appellants Tri-County Orthopedics, P.C. and Jack D. Lennox, D.O., I served the foregoing document upon counsel of record via the MiFile E-File and Serve System which will send notification of such filing to the following:

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