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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,

v

BEAUMONT HEALTH,

Defendant-Appellant,

and

TRI COUNTY ORTHOPEDICS, PC AND JACK D. LENNOX, D.O., JOINTLY AND SEVERALLY,

Defendants.

Supreme Court No. 167716

Court of Appeals No. 365062

Oakland County Circuit Court
Case No. 21-187353-NH

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Plaintiff-Appellee,

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BEAUMONT HEALTH,

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DEFENDANT-APPELLANT BEAUMONT HEALTH'S SUPPLEMENTAL REPLY BRIEF

NAUTS, DWAIHY,
BEACH & MORAN, PLLC

By: KAREN E. BEACH (P75172)
PAUL J. DWAIHY (P66074)
Attorneys for Defendant-Appellant
Beaumont Health
38777 Six Mile Road, Suite 101
Livonia, MI 48152
(313) 964-4500
karen.beach@tnmdlaw.com
paul.dwaihy@tnmdlaw.com

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STATEMENT OF QUESTION PRESENTED

I. Did the Court of Appeals err by reversing the trial court's opinion denying Plaintiff's motion to amend her witness list to add a new standard of care expert based on the trial court's failure to evaluate the *Dean/Duray* factors, where those factors are only applicable to decisions barring experts as discovery sanctions?

Plaintiff- Appellee says "No."

Defendant-Appellant says "Yes."

The trial court says "Yes."

The Court of Appeals says "No."

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ARGUMENT

The Court of Appeals erred by requiring the trial court consider the *Dean/Duray* factors before denying Plaintiff's motion to amend her witness list.

A. A trial court does not deny a party's request to amend a timely-filed expert witness list as punishment for the party's violation of a court order or court rule. Therefore, the sanctions factors of *Dean* and *Duray* do not apply.

Plaintiff continues to ignore the fundamental truth that an adverse ruling does not become a "sanction" simply because it harms the losing party's case or even results in judgment against the losing party. Black's Law Dictionary defines "sanction" as "[a] penalty or coercive measure that results from failure to comply with a law, rule, or order." *Black's Law Dictionary* (8th ed. 2005), p 1112. A ruling denying a party's motion to amend its timely-filed expert witness list under MCR 2.401(I)(2) is not a "sanction" because it does not "result from failure to comply with a law, rule or order." The party seeking to ***amend*** the expert witness list has necessarily complied with the relevant court rule, MCR 2.401(I)(1), by timely filing the original expert witness list by the time specified in the court's scheduling order. It has also not violated the court's scheduling order or any other order of the court that would expose it to sanctions. Instead, the moving party seeks amendment as a matter of grace and upon a showing of good cause and diligence for the late addition of a new expert. That is the standard explicitly set forth in MCR 2.401(I)(2), and applied in cases like *Cox v Hartman*, 322 Mich App 292, 315; 911 NW2d 219 (2017), *Levinson v Sklar*, 181 Mich App 693, 698-699; 449 NW2d 682 (1989), and *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1991). All of those cases involve a motion to amend a timely-filed expert witness list, not a motion to file a late original expert witness list.

The *Dean/Duray* factors only come into play when a party is being sanctioned "as a penalty or coercive measure." This fault-based scheme balances the need to punish and discourage

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violations of court rules and court orders against the harshness of dismissing a case or prejudicing a party as punishment for that violation. The focus is to ensure that the punishment fits the "crime," by asking whether the violation was "willful or accidental," whether the party has violated other court orders, and whether the violation appears to be part of a "deliberate delay." *Duray Dev, LLC v Perrin*, 288 Mich App 143, 165; 792 NW2d 749 (2010). Plaintiff cites two prior opinions of this Court as evidence that this Court has always viewed dismissal as a "last resort" to be exercised only with caution and under extreme circumstances. *North v Dep't of Mental Health*, 427 Mich 659; 397 NW2d 793 (1986); *MacArthur Patton Christian Farm Ass'n v Farm Bureau Ins Group*, 403 Mich 474; 270 NW2d 101 (1978). But these cases were dismissed for discovery violations (failure to appear for a deposition and failure to make adequate progress), such that the Court wanted to ensure that dismissal—the harshest punishment—was proportionate to the offense. The *Dean/Duray* factors apply that proportionality standard where the court rules or a court order has been violated, not where a litigant seeks leave of the court to do something as a matter of grace. Instead, the party seeking relief (here, amendment of a timely-filed witness list) must satisfy the neutral legal standard for its request. There is a distinction, and it does make a difference.

Plaintiff identifies no cases applying the *Dean/Duray* factors to a ruling that dismisses a case absent a discovery or court rule violation. This demonstrates that Michigan courts have long recognized the difference between dismissal as a sanction for misconduct and dismissal for an inability to prove the legal elements of a claim. Where dismissal is used as a sanction, there are specific considerations that must be satisfied, including the *Dean/Duray* factors. Where dismissal is not intended as a punitive sanction, those considerations are irrelevant and other considerations

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(i.e., good cause) apply. Michigan courts have not and should not graft the *Dean/Duray* sanctions factors onto the "good cause" standard.

Plaintiff points to the *Tisbury* Court's determination that the "drastic remedy" of summary disposition is not appropriate where an expert is unavailable to testify, because Michigan courts favor determination of actions on the merits (Response, pp 22-23). Upon closer examination, *Tisbury's* ruling was made in the context of two motions filed by the plaintiff: a motion to adjourn trial, and a motion to amend their witness list. The *Tisbury* panel identified the factors supporting denial of a motion to adjourn trial as "numerous past continuances, failure of the movant to exercise due diligence, and lack of any injustice to the movant." 194 Mich App at 20. The panel then identifies denial of a motion to amend a witness list as "proper where the movant fails to provide an adequate explanation and show that diligent efforts were made to secure the presence of the witness." *Id.*[1] Thus, the factor which Plaintiff identifies as similar to the *Dean/Duray* factors—"lack of any injustice to the movant"—is relevant when ruling on a motion to adjourn trial, not a motion to amend the witness list. A careful reading of *Tisbury* does not support Plaintiff's position that the *Dean/Duray* factors apply to her request to amend her witness list.

Even to the extent that the *Dean/Duray* factors overlap somewhat with *Tisbury's* standard, the *Dean/Duray* factors go further and stack the deck in the moving party's favor by requiring the court to consider (and in most cases, choose) less drastic measures than dismissal. As explained in Defendant's opening supplemental brief, this ties the hands of trial courts in managing their dockets by requiring them to allow new witnesses to be added simply because refusal will result in dismissal. If the *Dean/Duray* factors are applied in medical malpractice cases, courts will have

[1] Plaintiff accuses Defendant of conflating the two standards, when the opposite is true (Response, p 24 fn 6).

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to let plaintiffs add and substitute experts at any time unless the plaintiff has behaved egregiously in delaying the litigation. This will rarely be the case outside of circumstances where dismissal could be used as a sanction, subject to the *Dean/Duray* factors. Considering that plaintiff medical malpractice experts are almost always deposed before the corresponding defense experts, allowing untimely substitutions of expert witnesses could delay the litigation for months or years. However, the trial court would rarely be empowered to reject such substitutions because then cases would be dismissed, and a lesser "sanction" would always serve the interest of justice. "Good cause" (the standard for amendment under the court rule) would inevitably yield in every case to the question of whether the *Dean/Duray* factors allow dismissal—and the answer to that is almost always, "no." This Court should not tie the trial courts' hands in managing dockets by making it nearly impossible to refuse a request to amend a witness list, no matter how late in the litigation.

B. Plaintiff admits that her position would require courts to apply the *Dean/Duray* factors to every ruling that results in dismissal of a case.

Plaintiff recognizes that her request for application of the *Dean/Duray* factors to amendment of witness lists would logically extend to any decision resulting in dismissal of the case for lack of expert testimony. She explicitly asks this Court to find that the *Dean/Duray* factors would apply to a trial court's ruling that an expert witness is not qualified to testify under MCL 600.2169, MCL 600.2955 and/or MRE 702 (Response, pp 25-26). Plaintiff cites Justice Michael Cavanagh's concurrence in *Woodard v Custer*, 473 Mich 1; 702 NW2d 522 (2005), as supporting application of the *Dean/Duray* factors to a medical malpractice plaintiff's request to add a new expert after the original expert was found unqualified under MCL 600.2169(1). Justice Cavanagh "would hold that where the trial court determined that the requirements of MCL 600.2169 had not been met, it should also have found that plaintiffs demonstrated good cause to seek additional time

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to add a new expert," and that "disposition on the merits outweighed any prejudice a short delay might have caused defendants." 473 Mich at 14 (Cavanagh, J., concurring). However, Justice Cavanagh makes clear that his assessment of the prejudice to the plaintiff was based on the then-existing "unsettled nature and complexity of MCL 600.2169." *Id.* at 13. "[A] plaintiff who has made a good-faith effort to satisfy unconstrued statutory criteria [on the matching of medical specialties] should not be penalized for ostensibly failing to meet the criteria with the ultimate sanction of dismissal with prejudice." *Id.* at 14. Of course, the issue with Dr. Bal's qualifications is not whether he practices the same specialty as the defendant physician, but whether he was practicing that specialty in the year before the alleged malpractice.

Twenty years after *Woodard*, the once-unclear nature of the "matching specialty" requirement of MCL 600.2169 is now well-settled, and was recently relaxed by this Court in *Stokes v Swofford*, 514 Mich 423; 22 NW3d 97 (2024) (ruling that only the general specialties of experts need to match, not sub-specialties). It is now easier than ever for a plaintiff attorney to assess, at the outset of the litigation, whether a proposed expert meets the requirements of MCL 600.2169. Conversely, a ruling that an expert is not qualified does not warrant an automatic amendment of the witness list to replace the expert in lieu of dismissing the case. Indeed, Michigan courts have routinely refused to apply the "dismissal as a last resort" standard of *Dean/Duray* in cases where the plaintiff seeks to replace an expert who has been ruled unqualified. *Cox v Hartman*, 322 Mich App 292; 911 NW2d 219 (2017); *Witt v Glazer*, unpublished opinion per curiam of Court of Appeals, issued January 20, 2011; 2011 WL 192391 (Docket No. 294057) (**13a-18a**); *Howard-Reed v Braver*, unpublished opinion per curiam of Court of Appeals, issued May 19, 2022; 2022 WL 1593795 (Docket No. 356200) (**19a-27a**); *Pawlowski v Kosar*, unpublished opinion per

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curiam of Court of Appeals, issued May 30, 2024; 2024 WL 2795604 (Docket No. 365803) (**28a-35a**);; *Snead v Ascension Providence Hospital*, unpublished per curiam opinion of Court of Appeals, issued December 14, 2023; 2023 WL 8660933 (Docket No. 362008) (**320a-325a**). Justice Cavanagh's desire to apply the *Dean/Duray* factors to a qualification dispute did not command a majority of this Court at the time it was stated, and that position clearly has not garnered any support in the intervening decades. Dismissing a case because the plaintiff's sole expert witness is not qualified to testify is not a "sanction," and therefore the *Dean/Duray* factors do not apply.

Plaintiff would open the floodgates of limitless witness lists even wider by asking this Court to apply the *Dean/Duray* factors "any time an essential expert cannot or will not support the party's case and the preclusion of a new witness will [effectively] result in the dismissal of the case" (Response, p 25). Under this standard, plaintiff counsel need not even verify that the expert supports the allegations in the case. Instead, if the expert provides inconvenient testimony in his or her deposition, he or she can simply be swapped out for a new, supportive expert. The Court of Appeals rejected this tactic in *Morris v St Clair Orthopaedics & Sports Medicine, PC*, unpublished opinion per curiam of Court of Appeals, issued September 19, 2024; 2024 WL 4249304 (**36a-42a**), the case that was decided only a week prior to the instant case. The plaintiff's expert in *Morris* gave deposition testimony that did not fully support the allegations of malpractice stated in his affidavit of merit, which he signed based on an incomplete review of the medical records. The Court of Appeals denied the plaintiff's request to name a new expert after the original expert withdrew from the case, finding no good cause for the late addition of a new expert. The Court ruled the *Dean/Duray* factors were inapplicable, and noted the plaintiff's failure to submit a

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supportive affidavit from the proposed new expert. *Id.* at *6-7 (**39a-40a**). Again, the plaintiff's standard of care expert is usually the first of many experts deposed in a medical malpractice lawsuit. Defense experts and causation experts are prepared for deposition based on their opinions. Allowing unlimited and tardy substitutions of these experts would materially delay the completion of discovery, even if substitution was sought prior to the close of discovery, as in this case. This would in turn delay other important events such as facilitation/case evaluation, dispositive motions, and the trial itself.

The fact that discovery remained open for another month at the time the trial court ruled on the motion to amend the witness list did not require the trial court to grant the motion. The parties were scheduled to facilitate the case at the discovery deadline, in December. Without deposing Plaintiff's standard of care expert, Defendants would have been at a significant disadvantage when facilitating the case. Nor did the trial court's statements that Plaintiff could and should file a motion to amend the witness list rather than simply filing the list mean that the trial court lacked the discretion to deny that motion once filed. The trial court gave Plaintiff ample opportunity to demonstrate the required good cause and diligence in securing the witness, and appropriately denied the motion when Plaintiff failed to make that showing to the trial court's satisfaction.

C. Plaintiff cannot blame Defendants for not challenging Dr. Bal's qualifications earlier, when the alleged reason for withdrawing Dr. Bal was his unavailability, not his lack of qualification.

Plaintiff suggests that the delay in seeking amendment was caused by co-Defendant's failure to challenge Dr. Bal's qualifications earlier in the litigation despite knowing of a potential challenge—a delay not attributable to this Defendant, who did not take the deposition of Dr. Bal before this case was filed, and therefore was not privy to his testimony regarding his retirement

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date. Plaintiff criticizes Defendants for filing their challenge to Dr. Bal's qualification to sign the affidavit of merit more than 63 days after the affidavit was served, in violation of MCR 2.112(L)(2)(b). However, this ignores that the stated impetus for substituting Dr. Bal (according to Plaintiff) was his alleged unavailability in August 2022. In other words, the dispute over Dr. Bal and Plaintiff's concomitant desire to substitute Dr. Hall did not begin with the challenge to Dr. Bal's qualification—it started when Plaintiff failed to produce Dr. Bal for his scheduled deposition, then tried to substitute Dr. Hall without leave of court, and then tried to dismiss the case and refile it with Dr. Hall as her expert. Defendants' motions to strike Dr. Bal as unqualified were filed ***after*** all of this occurred. Plaintiff's claim that she would have moved to substitute Dr. Bal earlier if his qualifications had been challenged earlier only casts more doubt on her representation to the trial court that Dr. Bal was substituted for being unresponsive and/or uncooperative in August 2022, not because he was unqualified to sign the affidavit of merit in April 2021. She still produces no evidence that Dr. Ball was *incommunicado* at any time following his cancelled deposition.

If plaintiff counsel was telling the truth when he cancelled Dr. Bal's deposition based on an "emergency" of the witness (**214a-215a**), he was necessarily in contact with Dr. Bal at that time, and has shown no evidence that he was subsequently unable to reach Dr. Bal to reschedule the deposition. Instead, the text messages showing that counsel was attempting to secure a new expert only two days after the cancelled deposition suggest that he made the conscious decision to switch experts upon realizing that Dr. Bal could not meet the expert qualification standards of MCL 600.2169 (**228a**). Absent proof to the contrary, the trial court was entitled to find that Plaintiff had failed to show "good cause" for substituting an expert at this late stage of the litigation.

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D. Cases involving rebuttal witnesses are inapposite here.

One of the cases Plaintiff cites involve a trial court's decision to permit or prevent undisclosed rebuttal witnesses from testifying at trial. See Response, p 15, discussing *Pastrick v General Telephone Co*, 162 Mich App 243, 245; 412 NW2d 279 (1987) (stating that "[t]rial courts should not be reluctant to allow unlisted witnesses to testify where justice so requires, ***particularly with regard to rebuttal witnesses***") (emphasis supplied). Those rebuttal witnesses were "unlisted" because the need for their testimony did not arise until literally the middle of trial and could not have been anticipated by the parties. Here, Plaintiff knows and has always known she needed qualified expert testimony on the standard of care, and as the trial court noted, had well over a year to sort out any "issues" with her retained expert's qualifications. The "options" that must be considered by a trial court when faced with a mid-trial request for a rebuttal witness are different from the considerations that apply when a party makes a pre-trial request to substitute a witness based on lack of qualifications.

E. Plaintiff's challenge to the dismissal with prejudice is not relevant to the question asked by the Court and is unpreserved.

Plaintiff further criticizes the trial court's decision to dismiss Plaintiff's claims with prejudice because plaintiff counsel did not have a reasonable belief that Dr. Bal was qualified to sign the affidavit of merit (Response, pp 30-33). That is not relevant to the issue before this Court, which is whether the trial court should have applied the *Dean/Duray* factors to Plaintiff's motion to amend her witness list. Plaintiff did not file a cross-application asking the Court to address this issue, and therefore failed to preserve it for review. MCR 7.307.

While space does not permit a full response to Plaintiff's position on this issue, Defendant would note that MCR 2.112(L)(2)(b), the rule permitting Plaintiff to file an "amended" affidavit

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of merit from a new expert that would relate back to the date of the original affidavit, explicitly incorporates the standards of MCL 600.2912d, including its requirement that the plaintiff attorney reasonably believe the expert is qualified. Therefore, an affidavit that does not meet the "reasonable belief" requirement of MCL 600.2912d is not eligible for amendment under MCR 2.112(L)(2)(b). The Court of Appeals in *Legion-London v Surgical Institute of Michigan Ambulatory Surgical Ctr, LLC*, 331 Mich App 364; 951 NW2d 687 (2020) did not reach the issue of whether the original affidavit was filed with a reasonable belief in the affiant's qualifications, but instead assumed that the belief was reasonable.

Defendant would further note that if the motion to amend the witness list was properly denied by the trial court, then dismissal of Plaintiff's claims with prejudice would be required in any event because Plaintiff would be left without an expert witness on the standard of care, given Dr. Bal's unavailability.

Beaumont Health asks this Court to reverse the Court of Appeals ruling requiring application of the *Dean/Duray* factors and affirm the trial court's decision denying leave to amend the witness list.

Respectfully submitted,

NAUTS, DWAIHY,
BEACH & MORAN, PLLC

By: /s/ *Karen E. Beach*
KAREN E. BEACH (P75172)
PAUL J. DWAIHY (P66074)
Attorneys for Defendant-Appellant
Beaumont Health
38777 Six Mile Road, Suite 101
Livonia, MI 48152
(313) 964-4500

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