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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,

BEAUMONT HEALTH, Jointly and Severally,

Defendant.

Supreme Court No. _____
COA No. 365062

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

BRIAN J. McKEEN (P34123)
VICTOR BALTA (P77805)
KENNETH D. LEE (P75886)
Attorneys for Plaintiff-Appellee
2000 Town Center, Suite 1200
Southfield, Michigan 48075
(313) 961-4400
vbalta@mckeenassociates.com
klee@mckeenassociates.com

MARK GRANZOTTO (P31492)
BETH A. WITTMANN (P63233)
Co-Counsel for Plaintiff
2684 Eleven Mile Road, Suite 100
Berkley, Michigan 48072
(248) 546-4649

ENRICO G. TUCCIARONE (P52767)
LAUREN T. RHOADS (P86427)
Attorney for Defendants-Appellants
Tri County Orthopedics, P.C.
and Jack D. Lennox, D.O.
38777 Six Mile Road, Suite 300
Livonia, Michigan 48152
(734) 742-1800/ Fax (734) 521-2379
etucciarone@fbmjlaw.com
lrhoads@fbmjlaw.com

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

NOTICE OF FILING SUPREME COURT APPLICATION FOR LEAVE TO APPEAL

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Notice of Filing Supreme Court Application for Leave to Appeal

Michigan Supreme Court No. _____
Michigan Court of Appeals No. 365062
Oakland County Circuit Court No. 21-187353-NH

To:

Clerk of the Court
Oakland County Circuit Court
1200 North Telegraph Rd.
Building 12E
Pontiac, MI 48341
(*Via MiFILE*)

Angela DiSessa, District Clerk
Michigan Court of Appeals
201 W. Big Beaver Rd.
Suite 800
Troy, MI 48084
(*Via MiFILE)*

Defendants-Appellants TRI COUNTY ORTHOPEDICS, P.C. and JACK D. LENNOX, D.O. have filed an Application for Leave to Appeal to the Michigan Supreme Court in the above referenced matter.

FOLEY, BARON, METZGER & JUIP, PLLC

/s/ Enrico G. Tucciarone
By: */s/ Lauren T. Rhoads*
ENRICO G. TUCCIARONE (P52767)
LAUREN T. RHOADS (P86427)
Attorney for Defendants-Appellants
Tri County Orthopedics, P.C.
and Jack D. Lennox, D.O.
38777 Six Mile Road, Suite 300
Livonia, Michigan 48152
(734) 742-1800/(734) 521-2379
etucciarone@fbmjlaw.com
lrhoads@fbmjlaw.com

Dated: October 24, 2024

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IN THE SUPREME COURT

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

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BEAUMONT HEALTH, Jointly and Severally,

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Supreme Court No. _____
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 APPLICATION FOR LEAVE TO APPEAL

APPENDIX FOR DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL (Attached Separately)

Oral Argument Requested on Appeal

By: ENRICO G. TUCCIARONE (P52767)
LAUREN T RHOADS (P86427)
FOLEY, BARON, METZGER & JUIP, PLLC
Attorneys for Defendants-Appellants
Tri County Orthopedics, P.C.
and Jack D. Lennox, D.O.
38777 Six Mile Road, Suite 300
Livonia, MI 48152
(734) 742-1800/(734) 521-2379
etucciarone@fbmjlaw.com
lrhoads@fbmjlaw.com

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STATEMENT OF ORDERS APPEALED FROM

Defendants-Appellants Tri County Orthopedics, P.C. and Jack D. Lennox, D.O. hereby seek leave to appeal or other relief from the Court of Appeals' September 12, 2024 Opinion vacating the trial court's orders (1) denying Plaintiff-Appellee's motion to file an amended witness list (dated November 14, 2022) and (2) granting summary disposition in favor of Defendant Beaumont and dismissing the case (dated December 12, 2022).

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STATEMENT OF JURISDICTION

Under MCL 600.215, MCR 7.303(B)(1), and MCR 7.305(H)(1), this Honorable Court may grant leave to appeal or order other just relief after a decision of the Court of Appeals. This application for leave to appeal is timely filed within 42 days of the Court of Appeals' September 12, 2024 Opinion pursuant to MCR 7.305(C)(5)(a), and is filed in compliance with MCR 7.212(B).

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STATEMENT OF QUESTIONS PRESENTED

I. **WHETHER THE COURT OF APPEALS ERRED WHEN IT ISSUED CONFLICTING UNPUBLISHED OPINIONS ON TWO CASES WITH MATERIALLY SIMILAR CASE FACTS WHEN IT ISSUED ITS SEPTEMBER 12, 2024 OPINION IN THE INSTANT CASE, WHICH OVERTURNED THE TRIAL COURT'S DISMISSAL, AND ITS SEPTEMBER 19, 2024 OPINION IN *MORRIS V ST. CLAIR ORTHOPAEDICS & SPORTS MEDICINE, P.C. AND GLENN MINSTER, M.D.*, WHEREIN IT AFFIRMED THE TRIAL COURT'S DISMISSAL, AND WHETHER THE CONFLICTING OPINIONS WILL RESULT IN CLEAR ERROR AND MATERIAL INJUSTICE TO PARTIES UNTIL THE MICHIGAN SUPREME COURT DECIDES THE ISSUES?**

Plaintiff-Appellee answers: No.

Defendants-Appellants answer: Yes.

The trial court was not asked this question.

The Court of Appeals was not asked this question.

II. **WHETHER THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND CORRECTLY DENIED PLAINTIFF-APPELLEE'S EMERGENCY MOTION FOR HER SECOND AMENDED WITNESS LIST AND STRUCK PLAINTIFF-APPELLEE'S FIRST AND SECOND AMENDED WITNESS LISTS WHEN IT IS WITHIN THE TRIAL COURT'S DISCRETION TO STRIKE NEW AND/OR UNTIMELY NAMED WITNESSES, PLAINTIFF-APPELLEE FAILED TO SHOW GOOD CAUSE TO AMEND HER WITNESS LIST, PLAINTIFF-APPELLEE HAD A DUTY TO SUPPLEMENT DISCOVERY ANSWERS UNDER THE MICHIGAN COURT RULES, AND *DEAN V TUCKER* FACTORS WEIGH IN DEFENDANTS-APPELLANTS' FAVOR?**

Plaintiff-Appellee answers: No.

Defendants-Appellants answer: Yes.

The trial court answered: Yes.

The Court of Appeals answered: No.

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III. **WHETHER THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND CORRECTLY DENIED PLAINTIFF-APPELLEE'S MOTION FOR VOLUNTARY DISMISSAL WITHOUT PREJUDICE WHEN PLAINTIFF-APPELLEE'S AFFIDAVIT OF MERIT IS INVALID AND PLAINTIFF-APPELLEE DELIBERATELY VIOLATED TWO SEPARATE COURT ORDERS AND, AS A RESULT, HER LAWSUIT SHOULD REMAIN DISMISSED WITH PREJUDICE?**

Plaintiff-Appellee answers: No.

Defendants-Appellants answer: Yes.

The trial court answered: Yes.

The Court of Appeals declined to answer.

IV. **WHETHER THE TRIAL COURT DID NOT PREMATURELY OR INCORRECTLY AWARD SUMMARY DISPOSITION IN FAVOR OF DEFENDANTS WHEN PLAINTIFF-APPELLEE'S AFFIDAVIT OF MERIT WAS INVALID BECAUSE PLAINTIFF-APPELLEE'S STANDARD OF CARE WITNESS, SONNY BAL, M.D., DID NOT MEET EXPERT WITNESS REQUIREMENTS, PLAINTIFF-APPELLEE COULD NOT REASONABLY BELIEVE THAT DR. BAL DID MEET THE SAME UNDER MCL 600.2169 AND MICHIGAN CASE LAW?**

Plaintiff-Appellee answers: No.

Defendants-Appellants answer: Yes.

The trial court answered: Yes.

The Court of Appeals answered: No.

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STANDARD OF REVIEW

This appeal seeks review, pursuant to MCR 7.305(C)(5)(a), of the Court of Appeals' September 12, 2024 Opinion vacating the trial court's orders (1) denying Plaintiff-Appellee's motion to file an amended witness list and (2) granting summary disposition in favor of Defendant Beaumont and dismissing the case, and remanding back to the trial court for further proceedings. Review of this decision is appropriate because it conflicts with another unpublished decision of the Court of Appeals, dated September 19, 2024, in the matter of *Morris v St. Clair Orthopaedics & Sports Medicine, P.C. and Glenn Minster, M.D.*, No. 367109 (Mich. Ct. App. Sept. 19, 2024), wherein another panel of the Court of Appeals found the trial court did not abuse its discretion by denying the plaintiff's motion for leave to amend her witness list after the close of discovery and affirmed summary disposition for lack of standard of care testimony, resulting in dismissal in favor of the defendants. This Honorable Court reviews *de novo* a Court of Appeals decision that conflicts with another decision of the Court of Appeals, and further, for clear error and material injustice. MCR 7.305(B)(5).

In the alternative, should this Honorable Court peremptorily reverse or remand to the Court of Appeal as on leave granted, this Honorable Court reviews a trial court's rulings on evidentiary and discovery issues for abuse of discretion. *LaFleche v Ybarra*, 242 Mich. App. 692, 695; 619 N.W.2d 738 (2000). It is proper to review evidentiary rulings, including whether to admit or exclude expert testimony, under the abuse of discretion standard. *General Electric Co. v. Joiner*, 522 U.S. 136 (1997). "An abuse of discretion occurs if the trial court's decision falls outside the range of principled outcomes." *Macomb Cnty. Dep't of Human Servs. v Anderson*, 304 Mich. App. 750, 754; 849 N.W.2d 408

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(2014) (citing *Woods v SLB Prop. Mgt., LLC*, 277 Mich. App. 622, 630; 750 N.W.2d 228 (2008)). The abuse of discretion standard acknowledges there are circumstances in which no single outcome is correct and there can be multiple reasonable and principled outcomes. *People v Babcock*, 469 Mich. 247, 269; 666 N.W.2d 231 (2003). When a trial court selects one of the principled outcomes, there is no abuse of discretion, and it is proper for the reviewing court to defer to the trial court's judgment. *Id.* When the trial court selects an outcome outside of the principled outcomes and does not have a substantial and compelling reason for its departure, an abuse of discretion has occurred. *Id.*; see also *Conoco, Inc., v JM Huber Corp.*, 289 F.3d 819, 826 (C.A.Fed. 2002); see also *Maldonado v Ford Motor Co.*, 476 Mich. 372, 388; 719 N.W.2d 809 (2006).

Furthermore, this Honorable Court reviews *de novo* a trial court's grant of summary disposition with prejudice. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(8) "tests the legal sufficiency of a claim based on the factual allegations in the complaint." *El-Khalil v Oakwood Healthcare, Inc.*, 504 Mich 152, 159; 934 NW2d 665 (2019). When considering such a motion, a trial court "must accept all factual allegations as true, deciding the motion on the pleadings alone." *Id.* at 160. Where claims are based in whole or in part upon writings attached to the pleading(s), such as an Affidavit of Merit, the writings are part of the pleading to which it is attached. MCR 2.113(C)(2). A court is not required to accept allegations that are belied by the documentary evidence made a part of the pleadings as true, nor must the Court accept conclusory statements that are unsupported by factual allegations. See *Churella v Pioneer State Mut. Ins. Co.,* 258 Mich App 260, 272 (2003) ("Conclusory statements, unsupported by factual allegations, are insufficient to state a cause of action"). A motion

for summary disposition under MCR 2.116(C)(8) may only be granted when a claim is "so clearly unenforceable that no factual development could possibly justify recovery." *El-Khalil*, 504 Mich at 160; see also *Johnson v Pastoriza*, 491 Mich 417, 435 (2010); *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380-381 (1997).

A motion under MCR 2.116(C)(10) "tests the factual sufficiency of a claim." *El-Khalil*, 504 Mich at 160 (citation and emphasis omitted). In considering a motion under MCR 2.116(C)(10), the trial court "must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id.* (citation omitted). The plaintiff may not rest upon the mere allegations or denials of his complaint, "but must, by affidavits or as otherwise provided in [MCR 2.116], set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4). A (C)(10) motion "may only be granted when there is no genuine issue of material fact." *El-Khalil*, 504 Mich at 160 (citation omitted). "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *Id.* (quotation and citation omitted). If the plaintiff doesn't respond with appropriate evidence of a material issue of fact, the Court must enter judgment against him. *Maiden*, 461 Mich at 120-121; MCR 2.116(G)(4).

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INTRODUCTION

The crux of this application for leave to appeal arises out of two conflicting, unpublished opinions by the Court of Appeals that were issued just 7 days apart on cases with substantially similar case facts. Those opinions are attached as exhibits to this application. (**Appx 3-14; 15-23**). These Defendants-Appellants respectfully request this Honorable Court to review the conflicting opinions and issue a decision as to a trial court's (1) authority to direct the time for filing and serving witness lists; (2) discretion in allowing additions or amendments to witness lists; and (3) application of Michigan law with respect to awarding summary disposition where a plaintiff's Affidavit of Merit is invalid.

The key issue in both cases on appeal is the fatal effect of an invalid Affidavit of Merit on a plaintiff's claim. In a Michigan medical malpractice action, a plaintiff is required to file an Affidavit of Merit (AOM) along with their Complaint. MCL 600.2912d. The medical professional who executes the AOM must meet the requirements of MCL 600.2169(1)(b)(i)-(ii). 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. See, e.g., *Kiefer v Markley*, 283 Mich App 555 (2009); *Reeves v Carson City Hosp (On Remand)*, 274 Mich App 622 (2007).

In the instant case, Plaintiff-Appellee filed an Affidavit of Merit (AOM) executed by orthopedic surgeon Sonny Bal, M.D. with her Complaint. Through the course of discovery, questions of whether Dr. Bal met expert witness requirements under MCL 600.2169(1)(b)(i)-(ii) arose, and thus, the question of whether Plaintiff-Appellee's AOM was valid became a key issue. Plaintiff-Appellee never produced Dr. Bal for deposition to establish his expert qualifications or substantiate his affidavit with standard of care

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testimony. Instead, Plaintiff-Appellee attempted to file a late amended witness list naming a new expert, which was stricken, and then filed an emergency motion to amend her witness list pursuant to a court order, which the trial court denied for lack of good cause shown and undue prejudice to Defendants.

Ultimately, the trial court determined Plaintiff-Appellee's AOM was invalid, Plaintiff-Appellee failed to timely and properly name an additional standard of care expert and secure a valid AOM within the appropriate discovery window, and thus, Plaintiff-Appellee failed to establish her claim under Michigan law. The trial court awarded summary disposition in favor of Defendants and dismissed the case on December 14, 2022. The Court of Appeals overturned the trial court's decision for abuse of discretion and judicial error, and remanded the case for further proceedings on September 12, 2024. Specifically, the Court of Appeals found that the trial court failed to "engage in more rigorous considerations" before precluding Plaintiff-Appellee's witness in a manner that effectively resulted in a dismissal, including analysis of *Dean v Tucker* and *Duray Dev, LTC v Perrin* factors.

In *Morris v St. Clair Orthopaedics & Sports Medicine, P.C. and Glenn Minster, M.D.*, the plaintiff filed an AOM executed by orthopedic surgeon Peter G. Whang, M.D. with her Complaint on December 6, 2021. Between the date of the AOM's filing and Dr. Whang's deposition on March 31, 2023, Dr. Whang abandoned his opinions and provided no testimony in support of his affidavit at the deposition, thereby rendering the AOM invalid. The plaintiff moved to amend her witness list after the close of discovery, which the trial court denied for lack of good cause shown and undue prejudice to the defendants.

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Under the circumstances of that case, the appellate court determined that the trial court did not abuse its discretion when it denied the plaintiff's motion for leave to amend her witness list, and further, the trial court did not err in granting summary disposition in favor of the defendants because the plaintiff failed to provide favorable standard of care testimony in support of her AOM, failed to submit a new affidavit by another expert to validate the standard of care opinions set forth in the initial AOM, and took no further action to survive a motion for summary disposition on the facts. Thus, the appellate court ruled that dismissal was appropriate.

These conflicting decisions pose questions as to the extent of a trial court's (1) authority to direct the time for filing and serving witness lists; (2) discretion in allowing additions or amendments to witness lists; and (3) application of Michigan law with respect to awarding summary disposition where a plaintiff's Affidavit of Merit is deemed invalid. Parties on either side of these conflicting decisions will face material injustice until this Honorable Court decides the above-listed issues.

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STATEMENT OF FACTS & PROCEDURAL HISTORY

Plaintiff-Appellee filed this lawsuit against Defendants-Appellants Tri County Orthopedics, P.C. and Jack Lennox, D.O., among others, alleging claims of medical malpractice and wrongful death, on or around April 9, 2021. Attached to the Complaint was an Affidavit of Merit (AOM) signed and executed before a notary by orthopedic surgeon B. Sonny Bal, M.D. on March 11, 2021. Specifically, the Complaint alleged that orthopedic surgeon Dr. Lennox failed to prescribe the decedent, Jacqueline Harris, outpatient Lovenox or anticoagulation medication after her May 29, 2019 right total knee arthroplasty, and instead prescribed Aspirin as her sole anticoagulation medication. (**Appx 28-30**). Plaintiff-Appellee further alleges that the decedent expired on June 28, 2019 of an "overwhelming thromboembolic event" due to an inappropriate anticoagulation regimen. (**Appx 28**). Based on the date of treatment and pursuant to MCL 600.2169, Plaintiff-Appellee was required to demonstrate to the court that Dr. Bal was board certified in orthopedic surgery and devoted a majority of his professional time to the active clinical practice of orthopedic surgery or the instruction of orthopedic surgery residents/students from May 29, 2018 to May 29, 2019 in order to author a valid AOM and provide standard of care testimony.

On June 22, 2021, the trial court entered an initial scheduling order, which stated: "All parties shall name their experts by 05/06/2022." (Emphasis in original). The initial scheduling order further stated: "Each party shall submit its witness list and a list of proposed exhibits to opposing counsel and the court by 05/06/2022." (Emphasis in original) (**Appx 42**).

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Initial witness lists were filed by Plaintiff-Appellee on April 25, 2022 and these Defendants-Appellants on May 4, 2022. Dr. Bal was listed as the **only** anticipated orthopedic surgery expert to match Dr. Lennox's area of practice in Plaintiff-Appellee's initial witness list. (**Appx 52**). Plaintiff-Appellee's sole reliance on Dr. Bal in the area of orthopedic surgery was reiterated multiple times thereafter, including in Plaintiff-Appellee's May 9, 2022 responses to these Defendants-Appellants' interrogatories regarding expert witnesses, in which Plaintiff-Appellee responded as follows:

> **INTERROGATORIES**
>
> 1. With respect to each of Plaintiff's experts, please state in detail:
>
> a. The substance of the facts and opinions on which he/she will testify;
>
> b. A summary of the grounds for each opinion of each expert;
>
> c. His/her experience in the area of similar or comparable medical occurrences, injuries, illnesses, or disabilities.
>
> **ANSWER:**
>
> **Please reference the attached Affidavit of Meritorious Claim of B. Sonny Bal M.D., and the Preliminary report of Dr. Michael Thomson PhD. Dr. Kelty Baker, and Dr. Willis Wagner will testify on causation and damages.**

(**Appx 54**); and again in Plaintiff-Appellee's June 23, 2022 supplemental responses, where she only disclosed Sonny Bal, M.D., Michael Thomson, Ph.D, Kelty Baker, M.D., and Willis Wagner, M.D. (**Appx 144-145**).

Dr. Bal signed the AOM before a notary on March 11, 2021, attesting (incorrectly): "[D]uring the relevant time period at issue in this matter, I was a licensed and practicing

physician, specializing in Orthopedic Surgery, and devoting a majority of my professional time for the preceding year to, the clinical practice of orthopedic surgery." (**Appx 58**).

On March 21, 2022, counsel for these Defendants-Appellants first requested deposition dates for Dr. Bal from Plaintiff-Appellee's counsel. Many email communications were sent back and forth amongst the parties between March 21, 2022, and June 6, 2022 to schedule Dr. Bal's deposition. It was determined that Dr. Bal's deposition would take place on August 15, 2022. At no point over those months did Plaintiff-Appellee's counsel indicate his office had any trouble with contacting Dr. Bal.

Dr. Bal's deposition was mutually agreed to proceed on August 15, 2022 at 1:00 p.m. On August 15, 2022, at 7:28 a.m., Plaintiff-Appellee's counsel contacted defense counsel via email at Dr. Bal's request because Dr. Bal allegedly had "an emergency" and needed to cancel the deposition. Plaintiff-Appellee's counsel advised "[w]e will be in touch with new dates." Thus, according to this email, Plaintiff-Appellee was in contact with Dr. Bal as of August 15, 2022. A mere two days later, on August 17, 2022, Plaintiff-Appellee's office texted with her new potential orthopedic surgery standard of care expert, John H. Hall, M.D. Plaintiff-Appellee's counsel then met with Dr. Hall on August 25, 2022.

After Plaintiff-Appellee's last-minute cancellation on August 15, 2022 and contact with Dr. Hall on August 17, 2022, no new dates were provided by Plaintiff-Appellee's counsel for Dr. Bal's deposition. On August 28, 2022, counsel for these Defendants-Appellants emailed Plaintiff-Appellee's counsel to request new deposition dates for Dr. Bal in September 2022. Again, no dates were provided. To these Defendants-Appellants' knowledge, there were no further attempts by Plaintiff-Appellee to contact Dr. Bal.

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Plaintiff-Appellee filed her first amended witness list, naming John H. Hall, M.D. as her new orthopedic surgery standard of care expert, on September 16, 2022; more than four months after the court-ordered witness list due date. (**Appx 156**). Plaintiff-Appellee failed to file a motion to amend her witness list or request stipulation from the other parties, including these Defendants-Appellants, even though the amended witness list came 133 days after the filing due date. Plaintiff-Appellee concedes that she did not disclose Dr. Hall until she filed her first amended witness list. (**Appx 161-164**).

It then came to the attention of these Defendants-Appellants that back in September 2020, Dr. Bal was deposed in an unrelated matter and confirmed that he retired in 2017 and had been wrapping up his practice since approximately 2015. Specifically, Dr. Bal testified:

> Q. In 2016-2017 timeframe you were in the academic practice at the University of Missouri?
>
> A. That's true.
>
> Q. Give me a thumbnail sketch of what your typical week looked like in that timeframe in terms of your professional activities as an orthopedic surgeon.
>
> A. By that time I dialed it down to clinic one day a week, surgery one day a week, but mostly handing off the practice to a couple colleagues that we had hired to take over my practice. I had a very busy practice and we were anticipating and preparing for what was the planned retirement.

(*Dr. Bal's Deposition Transcript in Unrelated Lawsuit*, p. 16).

***

> Q. Was that variable through the course of these two years or was that pretty steady?
>
> A. No, variable. It was dialing down. Essentially last time I had a full-time practice was, a very busy practice, was 2015, and then at that time I discussed with my chairman staying on until 2017 when I turned the right age to get retirement from the University and he left me with the option of

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either returning to full-time medical practice or exiting. At that time I wasn't certain, so then I started dialing it down in 2000, late 2015, early 2016.

(*Id.*, p. 17-18).

***

Q. But you stopped seeing new patients?

A. Correct.

Q. So that means you probably went well below that 30 hours per week?

A. No, because it was a very big practice I've had for almost 20 years and patients would still come and I would work them up, introduce another surgeon and hand over the future management because patients with hip and knee problems generally need continuity of care.

Q. So in terms of retirement you're speaking of not that you reached an age requiring it, just that you chose to and it was a benefit provided by the University?

A. And the earliest you can do it is 55; no sooner.

A. Plus a certain number of years of service.

(*Id.*, p. 19).

In fact, during a 2019 trial in Mississippi, Dr. Bal confirmed that he stopped practicing medicine in November 2017:

Q. You haven't practiced medicine since how long?

A. November 2017.

Q. And you quit practicing medicine to devote all of your attention to other pursuits?

A. Correct.

(*Dr. Bal's Trial Transcript in Unrelated Lawsuit*, p. 60).

This testimony is further confirmed by Dr. Bal's CV, dated August 14, 2019, which was produced by Plaintiff-Appellee in her Responses to these Defendants-Appellants' Expert Witness Discovery. In the medical professional highlights listed in Dr. Bal's CV,

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detailing his practice from 1994-Present (August 14, 2019), it indicates Dr. Bal was affiliated with University of Missouri-Columbia in academic practice in arthroplasty surgery from 1999-2017. (**Appx 58**). Dr. Bal's CV further states that his academic appointment and hospital affiliation with University of Missouri Health System-Columbia, as well as his academic appointment with Missouri Science & Technology University-Rolla, ended on November 6, 2017. (**Appx 61-63**).

This testimony is confirmed further still by a resume for Dr. Bal, his LinkedIn profile, and a personal website developed by Dr. Bal, which indicate he practiced as an orthopedic surgeon and Professor of Orthopaedic Surgery from around 1995 to November 2017:



SINTX Technologies
CEO & President
October 2018 - Present (4 years 2 months)
Greater Salt Lake City Area

Amedica Corporation
CEO & President
October 2014 - Present (8 years 2 months)
Greater Salt Lake City Area

Missouri S&T
Adjunct Professor
January 2005 - November 2017 (12 years 11 months)
Rolla, Missouri, United States
Optimizing bioactive glasses for bone repair, basic science research in ceramic technology

University of Missouri Health Care
Professor of Orthopaedic Surgery
September 1999 - November 2017 (18 years 3 months)
University of Missouri-Columbia
Hip and Knee surgery, educator and researcher

Jackson County Orthopaedics, Inc.
Orthopaedic Surgeon and Partner
January 1995 - January 1999 (4 years 1 month)
Blue Springs, Missouri

(*Resume of B. Sonny Bal, M.D.*).

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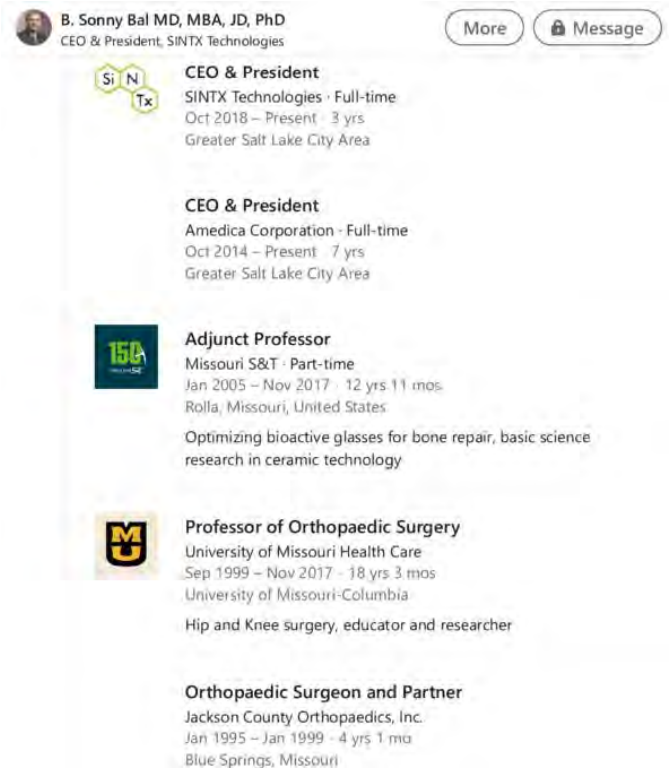

(*B. Sonny Bal, M.D. LinkedIn Profile*).[1]

> For more than 18 years, he was an orthopaedic surgeon and Professor of Orthopaedic Surgery at the University of Missouri, in Columbia, Missouri. He performed thousands of hip and knee replacement surgeries, serving patients from all over the country and even overseas.
>
> Currently, he is the **Chief Executive Officer and President of SINTX Technologies**, a high-tech manufacturing company in Salt Lake City. SINTX develops and makes silicon nitride ceramics. Learn more about silicon nitride and its potential.

(*Dr. Bal's Personal Website*).[2]

To confirm the above, and after multiple requests for the deposition of Dr. Bal, these Defendants-Appellants filed a motion to compel Dr. Bal's deposition and a motion to strike Plaintiff-Appellee's amended witness and exhibit list, which were heard by the

[1] B. Sonny Bal, MD, MBA, JD, PhD, LinkedIn (Sept. 29, 2021, 1:13 PM), www.linkedin.com/in/sonnybal; Dr. Bal's LinkedIn profile, retrieved from the link provide in the Resume of B. Sonny Bal, M.D.

[2] *About Dr. Bal*, Hip and Knee News (Sept. 28, 2023, 2:50 PM), https://hipandknee.com/about-dr-bal/; Dr. Bal's former personal website, retrieved from the link provided in *Resume of B. Sonny Bal, M.D.*

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trial court on October 12, 2022. At the hearing, Plaintiff-Appellee's counsel attempted to withdraw Dr. Bal as their witness to shield him from being deposed. (**Appx 326-327**). In response to Plaintiff-Appellee's attempt to withdraw Dr. Bal as an expert witness, the trial court stated: "I don't think you can be doing that. If you do that, then – by doing that you're basically saying you don't have a case…" (**Appx 328**). Further, the court stated: "Well, I guess you can say it just for purposes of this motion only, that [Dr. Bal wasn't] qualified for that affidavit of merit." (**Appx 331**). The court granted both motions, compelling Dr. Bal to appear for a deposition by November 2, 2022 and striking Plaintiff-Appellee's first amended witness and exhibit list, while also allowing Plaintiff-Appellee to file a motion to amend later on a show of good cause. (**Appx 336-341**).

In response to the trial court's direction to file a motion to amend, Plaintiff-Appellee filed said emergency motion for leave to file her second amended witness list on October 19, 2022. In her motion, Plaintiff-Appellee alleged that Dr. Bal "has not been cooperative, and he needs to be replaced," with Dr. Hall. (**Appx 160**). According to her motion, Plaintiff-Appellee's "good cause" stemmed from her alleged inability to get into contact with Dr. Bal: "[i]t was only after Plaintiff was having much difficulty contacting the current expert, Dr. Bal, that the need for a replacement expert witness became known." (**Appx 161**). It stands to be noted that there were no communication issues between Plaintiff-Appellee's counsel and Dr. Bal to get the AOM, originally schedule the deposition, or cancel the deposition on its eve. Thus, Plaintiff-Appellee's "good cause" was unsubstantiated and used to avoid the inevitability of dismissal for lack of a valid AOM.

Plaintiff's motion further relied on *Dean v Tucker*, 182 Mich App 27 (1990), arguing that there would be no prejudice to Defendants-Appellants and Defendant Beaumont

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Health because discovery remained open, and trial was not set to occur until February 2023. (**Appx 161-162**). Despite her reliance on the apparently long-off trial date as justification for springing new expert discovery on Defendants-Appellants and Defendant Beaumont, Plaintiff-Appellee failed to address why she could not or would not continue to attempt to reestablish contact with her original expert, Dr. Bal, over that course of time.

Contemporaneously on October 19, 2022, Defendants-Appellants' counsel requested deposition dates for Dr. Bal per the court order to produce Dr. Bal; however, Plaintiff-Appellee did not respond to Defendants-Appellants' request and no dates were provided. Instead, Plaintiff-Appellee attempted to unilaterally dismiss her lawsuit without prejudice on October 26, 2022. The proposed order was rejected, so Plaintiff-Appellee filed her Motion for Voluntary Dismissal without Prejudice on November 1, 2022. (**Appx 342-349**).

Plaintiff-Appellee's attempted voluntarily dismissal is merely a concession she did not have a valid lawsuit. If actually produced for deposition, Dr. Bal would have to admit that his AOM statement about his clinical practice in May 2018 through May 2019 was, at best, a misstatement under oath, and at worst, outright false. Moreover, he could have to retract trial and deposition testimony in other cases that stated he retired in November 2017. This would invalidate the AOM and Plaintiff-Appellee's Complaint altogether. Accordingly, Plaintiff-Appellee proceeded with cancellation of the deposition, attempts to amend her witness lists, and then voluntary dismissal of the case to try to refile and meet medical malpractice pleading requirements.

Defendants-Appellants and Defendant Beaumont each filed responses to Plaintiff-Appellee's Emergency Motion for Leave to File Plaintiff's Second Amended Witness List

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and Motion for Voluntary Dismissal Without Prejudice. (**Appx 350-364**) These Defendants-Appellants filed their responses on October 28, 2022 and November 4, 2022, respectively, requesting the trial court deny Plaintiff-Appellee's motion to amend and dismiss Plaintiff-Appellee's claims with prejudice. Defendant Beaumont's responses, filed on October 31, 2022 and November 4, 2022, echoed the relief requested by these Defendants-Appellants.

These Defendants-Appellants filed their Motion for Summary Disposition to Dismiss Plaintiff's Claims due to Plaintiff's Invalid Affidavit of Merit, Response to Plaintiff-Appellee's Motion for Voluntary Dismissal, and secondarily, their Motion for Partial Summary Disposition Regarding Plaintiff's Economic Damages Claims, on November 4, 2022. These Defendants-Appellants argued Plaintiff-Appellee's AOM was invalid because her initial orthopedic surgery expert, Dr. Bal, failed to meet the expert witness requirements under MCL 600.2169 and Michigan case law, which rendered Dr. Bal unqualified to execute the AOM on Plaintiff-Appellee's behalf. Without a valid AOM to accompany the Complaint, Plaintiff-Appellee failed to properly initiate her claim for medical malpractice and dismissal of Plaintiff-Appellee's case was required. Defendant Beaumont also filed its Motion for Summary Disposition due to Plaintiff's Improperly Attested Affidavit of Merit on November 4, 2022 on analogous grounds.

The trial court found voluntary dismissal without prejudice and/or allowing an amended witness list at that late stage of litigation to be highly prejudicial to the Defendants and denied Plaintiff-Appellee's motions in the court's November 14, 2022 Order. (**Appx 380**). The court also denied Plaintiff-Appellee's subsequent Motion for Reconsideration of the November 14, 2022 Order and Opinion on December 8, 2022,

finding that, "[h]ad Plaintiff diligently prosecuted her case, she would have realized Dr. Bal was uncooperative and/or unqualified to testify much sooner than November of 2022." (**Appx 383**).

The trial court's final ruling on this matter was issued on December 14, 2022, when the court granted Defendant Beaumont's November 4, 2022 Motion for Summary Disposition due to Plaintiff's Improperly Attested Affidavit of Merit. (**Appx 384-387**), *12/14/2022 Order and Opinion*). The court waived oral arguments pursuant to MCR 2.119(E)(3) and granted the motion in light of the statutory language of MCL 600.2169 and Michigan case law. Subsequently, the court denied Plaintiff-Appellee's January 4, 2023 Motion for Reconsideration of the Final Order on February 3, 2023.

Plaintiff-Appellee (then Plaintiff-Appellant-Cross-Appellee) timely filed her Claim of Appeal by Right on February 23, 2023 and her Brief on Appeal on July 28, 2023. Defendant Beaumont (then Defendant-Appellee-Cross-Appellant) Claim of Cross Appeal and Brief on Cross Appeal timely followed. These Defendants-Appellants (then Defendants-Appellees) filed their Response Brief to Plaintiff's Appeal on September 29, 2023. Plaintiff-Appellee and Defendant Beaumont each filed timely responses to their respective appeal and cross-appeal. Oral arguments were scheduled before the Court of Appeals on September 4, 2024.

Following oral argument, the Court of Appeals issued the September 12, 2024 Opinion at issue, wherein the court sided with Plaintiff-Appellee, vacating the trial court's orders that denied Plaintiff-Appellee's Motion to File her Second Amended Witness list and granted Defendant Beaumont's Motion for Summary Disposition due to Plaintiff's Improperly Attested Affidavit of Merit. (**Appx 3-14**). The appellate court reversed and

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remanded the case back to the trial court for further proceedings consistent with that opinion.

On September 19, 2024, a different panel of the Court of Appeals issued its opinion on substantially similar facts, wherein the appellate court upheld the trial court's denial of the plaintiff's motion for leave to amend a witness list to add a new expert and the trial court's grant of summary disposition in favor of the defendants, on the grounds that the plaintiff failed to secure standard of care testimony in support of her claims. (**Appx 15-23**).

This application for leave to appeal is timely brought to respectfully request that this Honorable Court review the cited conflicting opinions of the Court of Appeals and issue a decision regarding a trial court's a trial court's (1) authority to direct the time for filing and serving witness lists; (2) discretion in allowing additions or amendments to witness lists; and (3) application of Michigan law with respect to awarding summary disposition where a plaintiff's Affidavit of Merit is deemed invalid.

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STATEMENT OF LAW AND ARGUMENT

I. THE COURT OF APPEALS ISSUED CONFLICTING, UNPUBLISHED OPINIONS ON TWO CASES WITH MATERIALLY SIMILAR CASE FACTS WHEN IT ISSUED ITS SEPTEMBER 12, 2024 OPINION IN THE INSTANT CASE, WHICH OVERTURNED THE TRIAL COURT'S DISMISSAL, AND ITS SEPTEMBER 19, 2024 OPINION IN *MORRIS V ST. CLAIR ORTHOPAEDICS & SPORTS MEDICINE, P.C. AND GLENN MINSTER, M.D.*, WHEREIN IT AFFIRMED THE TRIAL COURT'S DISMISSAL, AND THE CONFLICTING OPINIONS WILL RESULT IN CLEAR ERROR AND MATERIAL INJUSTICE TO PARTIES UNTIL THE MICHIGAN SUPREME COURT DECIDES THE ISSUES.

The Court of Appeals committed clear error in issuing conflicting opinions on substantially similar case facts, 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 v St. Clair Orthopaedics & Sports Medicine, P.C. and Glenn Minster, M.D.*, No. 367109 (Mich. Ct. App. Sept. 19, 2024).

In a Michigan medical malpractice action, a plaintiff is required to file an Affidavit of Merit (AOM) along with their Complaint. MCL 600.2912d. The medical professional who executes the AOM must meet the expert witness requirements of MCL 600.2169(1)(b)(i)-(ii). 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. See, e.g., *Kiefer v Markley*, 283 Mich App 555 (2009); *Reeves v Carson City Hosp (On Remand)*, 274 Mich App 622 (2007). Expert testimony is required to prove the elements of a medical malpractice claim, including (1) the applicable standard of care; (2) breach of the standard; (3) causation; and (4) damages. *Locke v Pachtman*, 446 Mich 216; 521 NW2d 786 (1994); see also *Cox v Bd of Hospital Managers*, 467 Mich 1, 44; 651 NW2d 356 (2002).

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Under MCR 2.401(B)(2)(a), trial courts are required to issue a scheduling order setting a deadline for the exchange of witness lists, including expert witness lists. MCR 2.401(I)(1) provides that all parties must file and serve witness lists within the time allotted by the trial court. *Duray Dev, LTC v Perrin*, 288 Mich App 143, 162-163 (2010). MCR 2.401(I)(2) further provides that "[t]he trial 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." *Id.*; see also *Dean v Tucker*, 182 Mich App at 32-34 (1990). Where a party does not follow the court's orders, sanctions up to and including stricken expert witnesses and dismissal, may be available under MCR 2.313(B).

In the instant case, questions of whether Dr. Bal met expert witness requirements under MCL 600.2169(1)(b)(i)-(ii) arose, and thus, validity of Plaintiff-Appellee's AOM became a key issue. Plaintiff-Appellee never produced Dr. Bal for deposition to establish his expert qualifications or substantiate his affidavit with standard of care testimony, which left Plaintiff-Appellee without the requisite expert support to establish her claims. To correct her failure, Plaintiff-Appellee attempted to file a late amended witness list naming a new expert 133 days after the witness list deadline. At no point did Plaintiff-Appellee show that she had good cause to replace Dr. Bal or file a late amended witness list, as is required under MCR 2.401(I)(2). The most that Plaintiff-Appellee did to show cause was claim that she had difficulty re-establishing contact with Dr. Bal following his cancelled deposition, without actually demonstrating that she made any attempts to contact Dr. Bal. To cover up her multiple failures, Plaintiff-Appellee filed an emergency motion to amend her witness list. The trial court denied the motion for lack of good cause shown (again) and undue prejudice to Defendants. The trial court acted well-within the authority granted

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by MCR 2.401 when it set the deadline for witness lists, ordered Plaintiff-Appellee to show good cause for a late amendment to her witness list, struck her single orthopedic expert witness and denied her motion to amend for lack of good cause shown, and ultimately dismissed her case.

In its decision, the Court of Appeals acknowledged that 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, however, it went on to state that a more rigorous consideration involving the factors set forth in *Dean* and *Duray* is required before issuing discovery sanctions. (**Appx 4-5**). In its application and analysis of the *Dean* and *Duray* factors, the court cited multiple Court of Appeals decisions that dealt with violated court orders and issued discovery sanctions but did not apply MCR 2.401 or contemplate a showing of good cause. The court did not explain why the instant case was better compared with discovery sanction cases that rose to the higher standard, as opposed to more factually similar cases that applied the good cause standard, including *Morris v St. Clair Orthopaedics & Sports Medicine, P.C. and Glenn Minster, M.D.*, and reaches an opposite conclusion; accordingly, this Honorable Court should review the appellate court's decision for err and decide which is the correct standard to be applied

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II. THE TRIAL COURT CORRECTLY DENIED PLAINTIFF-APPELLEE'S EMERGENCY MOTION FOR HER SECOND AMENDED WITNESS LIST AND CORRECTLY STRUCK PLAINTIFF-APPELLEE'S FIRST AND SECOND AMENDED WITNESS LISTS BECAUSE IT IS WITHIN THE TRIAL COURT'S DISCRETION TO STRIKE NEW AND/OR UNTIMELY NAMED WITNESSES, PLAINTIFF-APPELLEE FAILED TO SHOW GOOD CAUSE TO AMEND HER WITNESS LIST, PLAINTIFF-APPELLEE HAD A DUTY TO SUPPLEMENT DISCOVERY ANSWERS UNDER THE MICHIGAN COURT RULES, AND *DEAN V TUCKER* FACTORS WEIGH IN DEFENDANTS-APPELLANTS' FAVOR.

Denial of Plaintiff-Appellee's Emergency Motion for her Second Amended Witness and striking her First and Second Amended Witness Lists were entirely proper and based in the Michigan Court Rules and well-established case law. Primarily, Plaintiff-Appellee has failed to establish that the trial court abused its discretion when it struck Plaintiff-Appellee's new, untimely named witness. Secondarily, Plaintiff-Appellee failed to show good cause to amend her witness list, as requested by the trial court; failed to meet her duty to supplement discovery answers under the Michigan Court Rules; and failed to recognize that the factors laid out in *Dean v Tucker* actually support the position of these Defendants-Appellants and support the relief granted by the trial court.

A. The trial court did not abuse its discretion when it struck Plaintiff-Appellee's Amended Witness List and disallowed Plaintiff-Appellee from substituting a new and untimely named orthopedic surgery standard of care expert witness under the Michigan Court Rules and case law.

Witness lists are an essential element of discovery. *Stepp v Dep't of Natural Resources*, 157 Mich App 774, 778 (1987). The ultimate objective of pretrial discovery is to make available to all parties, in advance of trial, all relevant facts or expert opinion and testimony which might be admitted into evidence at trial. *Wilson v Borchard*, 370 Mich 404, 410 (1963). MCR 2.401(I)(1) provides that all parties must file and serve witness lists within the time allotted by the trial court. *Duray Dev, LTC v Perrin*, 288 Mich App 143,

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162-163 (2010). Specifically, the Michigan Court Rules state: "[n]o later than the time directed by the court under subrule (B)(2)(a), 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." MCR 2.401(I)(1)(a)-(b). MCR 2.401(I)(2) provides that "[t]he trial 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." *Duray*, 288 Mich App at 162-163; see also *Dean v Tucker*, 182 Mich App at 32-34 (1990).

Importantly, a trial court's decision to strike or reject proposed new witnesses is generally well within its discretion. See, e.g., *Hayes-Albion v Kuberski*, 421 Mich 170, 188 (1984) (affirming a trial court's refusal to admit an unlisted witness as it was an issue "for the trial court to decide in the exercise of discretion"); *Herrera v Levine*, 176 Mich App 350, 355-356 (1989) (per curiam) (affirming a trial court's refusal to permit an unlisted expert to testify after a case was placed on standby status for trial); *Carmack v Macomb County Community College*, 199 Mich App 544, 546 (1993) (The Court of Appeals "will not disturb a trial court's decision regarding whether to permit a witness to testify, after a party has failed to comply with a deadline for submission of a witness list, absent an abuse of discretion"). Michigan appellate courts have routinely affirmed and upheld the trial court's discretion to strike untimely named witnesses.

In this case, Plaintiff-Appellee solely disclosed Sonny Bal, M.D. as her only orthopedic surgery standard of care expert witness between April 9, 2021 and September 16, 2022. For more than a year and throughout the course of discovery, Plaintiff-Appellee named Dr. Bal numerous times as her only orthopedic surgery standard of care expert, including in her initial and supplemental disclosures, witness list, and discovery

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responses. Throughout the entire Notice of Intent period and litigation up through September 16, 2022, Defendants-Appellants relied on Plaintiff-Appellee's representation that Dr. Bal was her only orthopedic surgery expert. And yet, more than a year after filing this lawsuit and 133 days after the expiration of expert witness disclosure and witness list filing deadlines issued by the trial court, Plaintiff-Appellee sought to replace Dr. Bal with a new, never previously disclosed orthopedic surgery expert, John H. Hall, M.D., in her September 16, 2022 First Amended Witness List. (*Plaintiff's First Amended Witness List*, p. 9). Plaintiff-Appellant-Cross-Appellee did not seek leave to amend from the trial court or provide Defendants-Appellees with any notice or opportunity to stipulate. Plaintiff-Appellant-Cross-Appellee concedes that she never disclosed the new potential orthopedic expert, Dr. Hall, until she filed her first amended witness list. (See *Plaintiff's Emergency Motion for Leave to File Plaintiff's Second Amended Witness List*).

In accordance with MCR 2.401(I)(2) and the Michigan courts' longstanding precedent of striking untimely named witnesses, this Honorable Court should not allow such gamesmanship by Plaintiff-Appellee's counsel. See *Duray*, 288 Mich App at 162-163; see also *Carmack*, 199 Mich App at 546; see also *Dean*, 182 Mich App at 32-34; Had the trial court permitted Plaintiff-Appellee to proceed with her First Amended Witness List and substitution of her orthopedic surgery standard of care expert, more than 133 days after the expert disclosure deadline closed, a mere five months from the set trial date, and without the newly-named expert's deposition scheduled (especially in light of the fact that it took months of diligent communication by Defendants-Appellants and a court order to schedule Dr. Bal's deposition) Defendants-Appellants would have been subject to a trial by surprise and severely impaired in defending this lawsuit at trial.

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Ultimately, 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, was an attempt to conduct a trial by surprise, and would have required lengthy re-litigation of this matter if permitted, thereby subjecting the parties to additional costs and expenses. The trial court appropriately disallowed this request, which was well within its discretion to make. Thus, the trial court did not abuse its discretion in striking Plaintiff-Appellee's First and Second Amended Witness Lists and disallowing Plaintiff-Appellee from calling a new orthopedic surgery expert witness. This Honorable Court should reverse the Court of Appeals and uphold the trial court's decision.

B. Plaintiff-Appellee failed to show good cause to amend her witness list.

Under MCR 2.401(I)(2), "[t]he trial 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*." *Duray*, 288 Mich App at 162-163 (emphasis added); see also *Dean v Tucker*, 182 Mich App 27, 32-34. Because "good cause" is not defined in MCR 2.401(I)(2), or any other Court Rule, we must consult a dictionary and case law to assist in ascertaining its meaning. *In re FG*, 264 Mich App 413, 417 (2004).

According to this Honorable Court, "[g]ood cause' simply means a 'satisfactory,' 'sound or valid' 'reason'…" *People v Buie*, 491 Mich 294, 319 (2012), quoting Random House Webster's College Dictionary (1997); see also *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 264 (2013); see also Black's Law Dictionary (8th ed.), which defines good cause as "[a] legally sufficient reason." In accordance with this Honorable Court's prior interpretation, Plaintiff-Appellee must show the courts that she had legally sufficient or substantial reason to amend her witness list. It is within the trial court's sound discretion

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to determine what may or may not constitute good cause under this definition. *Duray*, 288 Mich App at 162-163; see *Dean v Tucker*, 182 Mich App at 32-34 (1990); see generally *Hayes-Albion v Kuberski*, 421 Mich 170, 188 (1984) (affirming a trial court's refusal to admit an unlisted witness as it was an issue "for the trial court to decide in the exercise of discretion").

Here, Plaintiff-Appellee has failed to demonstrate "good cause" as required under MCR 2.401(I)(2), because she has not actually demonstrated that she had 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 depostion, or after cancelling his August 15, 2022 deposition, nor has she demonstrated any other discernable, legally sufficient reason for why Dr. Bal needed to be replaced. Noticeably absent from Plaintiff-Appellee's filings throughout this litigation, up to and including her appeal of dismissal, is evidence of any attempted communication with Dr. Bal following his cancelled deposition on August 15, 2022. Plaintiff-Appellee attached no affidavits, no text messages, no email communications, or any other evidence to demonstrate the alleged difficulties her counsel had contacting Dr. Bal. Plaintiff-Appellee's failure to provide such support merely suggests that such communications are non-existent because she did not try.

Plaintiff-Appellee claimed in her motion to amend that "[i]t was only after Plaintiff was having much difficulty contacting the current expert, Dr. Bal, that the need for a replacement expert witness became known." (*Plaintiff's Emergency Mtn for Leave to File Plaintiff's Second Amended Witness List*, p. 3). Yet, the trial court even noted that Plaintiff-Appellee's counsel was in contact with Dr. Hall at early as August 17, 2022, a mere two

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days after he cancelled Dr. Bal's deposition. (**Appx 329-330**). Further yet, Plaintiff-Appellee made no attempt to file a motion for leave to amend her witness list then and did not attempt to do so until one month later, on September 16, 2022, after Defendants-Appellants filed a motion to compel Dr. Bal's deposition.

Curiously, at the hearing of these Defendants-Appellants' motions to compel Dr. Bal's deposition and to strike Plaintiff-Appellee's first amended witness list, Plaintiff-Appellee's counsel attempted to withdraw Dr. Bal as her standard of care expert even though Dr. Bal signed the AOM. (**Appx 324-325**). The trial court acknowledged the issue with Plaintiff-Appellee's counsel's attempt to withdraw Dr. Bal as an expert, noting that by "doing that you're basically saying you don't have a case…" and, as a result, Dr. Bal was ordered to appear for a deposition by November 2, 2022 to testify as to his qualifications to execute an AOM. (**Appx 326; 330**). Dr. Bal was not offered or produced for his deposition, in violation of the trial court's order. (**Appx 338**). In fact, it appears that Plaintiff-Appellee's counsel did not even make an attempt to contact Dr. Bal, much less procure him for his deposition, despite the court's unequivocal order.

Plaintiff-Appellee's repeated attempts to amend her witness lists and replace Dr. Bal with Dr. Hall was simply an attempt to avoid the inevitable: the dismissal of Plaintiff-Appellee's action for an invalid AOM (to be further discussed below). Moreover, the text messages between Plaintiff-Appellee's counsel and Dr. Hall beginning on August 17, 2022 show that Plaintiff-Appellee was not having issues contacting Dr. Bal at all, but instead was attempting to shield Dr. Bal from being deposed, so that Defendants-Appellants could not confirm that Dr. Bal actually retired from the practice and instruction of medicine in 2017 and, thus, was not qualified to sign the AOM on March 11, 2021.

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Not only did Plaintiff-Appellee fail to show good cause, as required by MCR 2.401(I)(2), or address how amendment of her witness lists would rectify the issue of her invalid AOM, but Plaintiff-Appellee improperly attempted to shield Dr. Bal from being deposed, which would inevitably reveal the failure of the invalid AOM. This simply does not suffice as "good cause" under MCR 2.401(I)(2) and the trial court did not abuse its discretion when it struck Plaintiff-Appellee's amended witness lists and denied Plaintiff's Emergency Motion for Leave to File Plaintiff's Second Amended Witness List. This Honorable Court should reverse the Court of Appeals and uphold the trial court's decision.

C. Plaintiff-Appellee had a duty to supplement discovery answers under the Michigan Court Rules.

The Michigan Court Rules provide that parties have a duty to disclose and supplement discovery responses, and the answers and supplementations must include information as is available to the responding party. MCR 2.302(A); MCR 2.302(E); MCR 2.309(B). The party must supplement or correct its disclosures and responses in a timely manner as new material information becomes known to that party. MCR 2.302(E). Under Michigan law, parties have a duty to seasonably supplement their responses and, should they fail to do so, sanctions under MCR 2.313 may be appropriate. Under MCR 2.313(C)(1), "if a party fails to provide information or identify a witness as required by MCR 2.302(A) or (E), the party is *not allowed to use that information or witness* to supply evidence…[up to and including] trial." (Emphasis added). Additional sanctions may include payment of fines and fees and/or the court informing the jury of the party's failure, among others. MCR 2.313(C)(1).

Under the Court Rules, Plaintiff-Appellee had a clear and incontrovertible duty to supplement her answers to Defendants' discovery requests as the case progressed and

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new information regarding potential necessary experts arose, especially with respect to her orthopedic surgery standard of care expert. It is clear to these Defendants-Appellants that Plaintiff-Appellee's counsel either knew Dr. Bal did not meet the statutory requirements for expert witnesses under MCL 600.2169 or, in the unlikely but alleged alternative, realized Dr. Bal had gone AWOL and would not appear for his scheduled (or court-ordered) deposition. In either event, Plaintiff-Appellee failed to supply this important information to these Defendants-Appellants regarding her standard of care expert in her initial discovery responses and supplemental responses, over the course of months, in a deliberate attempt to frustrate the discovery process and conduct a trial by surprise. Plaintiff-Appellee did not fulfill her duty to timely supplement her discovery responses in violation of the Michigan Court Rules and sanctions may be appropriate.

D. Application of the *Dean* factors weigh in Defendant-Appellants' favor and support Defendants-Appellants' position that the trial court did not abuse its discretion in denying Plaintiff-Appellee's Motion for Leave to Amend her Witness List and striking Plaintiff's Amended Witness Lists.

Under *Dean v Tucker*, a trial court's determination in whether a party may call a new witness should carefully consider a number of factors to justify its determination and, where it does not, an abuse of discretion has occurred. 182 Mich App 27, 32-33 (1990). The factors for the court's review are as follows:

> (1) Whether the violation was willful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice.

Id. at 32-33; see also *Vicencio v Ramirez*, 211 Mich App 501, 507 (1995) (citing *Dean*).

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On appeal to the Court of Appeals, Plaintiff-Appellee alleged that the trial court did not even attempt to apply the *Dean* factors, and, if it had, the result would weigh in her favor. Defendants-Appellants contend that the factors, as applied to the facts of this case, weigh in Defendants-Appellants' favor as follows:

First, Plaintiff-Appellee's violation of the initial scheduling order was willful. This is demonstrated by the text messages to Dr. Hall on August 17, 2022, and her failure to request leave to amend from the trial court in August 2022, when Plaintiff-Appellee's counsel allegedly began having issues getting into contact with Dr. Bal. Plaintiff-Appellee's counsel had been in contact with Dr. Bal just two days before when he cancelled Dr. Bal's deposition on its eve, so Plaintiff-Appellee's claim that she could not re-establish contact Dr. Bal is nonsensical.

Second, Plaintiff-Appellee has a history of refusing to comply with the initial scheduling order, evidenced by her failure to identify Dr. Hall in any of her discovery responses until September 16, 2022—more than 30 days after she abruptly cancelled Dr. Bal's deposition and 133 days after witness lists were due and experts were required to be disclosed, and her failure to even attempt to contact Dr. Bal regarding his court-ordered deposition by November 2, 2022. Further, Plaintiff-Appellee made no attempt to supplement her discovery responses as required by the Court Rules.

Third, Defendants-Appellants would have been severely prejudiced if Plaintiff-Appellee was allowed to replace her standard of care expert who signed the AOM, Dr. Bal, with Dr. Hall, who had not previously been disclosed until September 16, 2022, as noted above. This would be akin to a trial by surprise, something that has been disapproved of by the Michigan Court of Appeals. *Stepp,* 157 Mich App at 779.

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Fourth, as demonstrated above, Plaintiff-Appellee's attempt to replace Dr. Bal with Dr. Hall on September 16, 2022, 133 days after witness lists were due and experts were required to be disclosed, and more than 30 days after Dr. Bal's cancelled deposition and alleged communication desertion, without notice or previously seeking leave of the trial court, is indicative of deliberate delay.

Fifth, as this involved the late naming of an expert, Plaintiff-Appellee did not comply with the trial court's initial scheduling order pertaining to this issue. Adjacently, it also involved Plaintiff-Appellee failure to comply with the Michigan Court Rules and supplement her disclosures and discovery responses as information became known.

Sixth, Plaintiff-Appellee knowingly failed to attempt to cure the defect until these Defendants-Appellants filed a motion to compel Dr. Bal's deposition on September 9, 2022. Instead, Plaintiff-Appellee filed an amended witness list and offered dates for Dr. Hall's deposition, even though the trial court never permitted her to amend her witness list and Defendants never agreed to the same.

Lastly, a lesser sanction would not serve the interests of justice, as Plaintiff-Appellee's attempts to amend her witness list do not rectify the issue of the Complaint being filed with an invalid AOM, signed by Dr. Bal on March 11, 2021. The trial court gave her the opportunity to produce him to demonstrate qualifications to execute the affidavit. (*See* **Appx 320-333**). Plaintiff-Appellee ignored the witness list disclosure deadline, and more importantly, the trial court's order to produce Dr. Bal for deposition by November 2, 2022, and thus, ignored her opportunity to demonstrate Dr. Bal's qualifications. Critically, Plaintiff-Appellee also fails to recognize that her attempts to amend (and any argument in

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support of amendment) are ultimately rendered moot because amending her standard of care expert does not address the fatal issue of her deficient AOM.

Nevertheless, as applied, the *Dean* factors support Defendants-Appellants' position that the trial court was correct to deny Plaintiff-Appellee's motion to amend her witness list and strike the amended witness lists, and in fact highlights Plaintiff-Appellee's unabashed and bad-faith attempts to deceive the trial court and the parties regarding the true status—that is, the invalidity—of her standard of care expert witnesses. The trial court decided correctly on this matter and did not abuse its discretion in doing so, as application of the *Dean* factors supports this conclusion. Accordingly, this Honorable Court should reverse the Court of Appeals and uphold the trial court's decision.

III. THE TRIAL COURT CORRECTLY DENIED PLAINTIFF-APPELLEE'S MOTION FOR VOLUNTARY DISMISSAL WITHOUT PREJUDICE BECAUSE PLAINTIFF-AFFIDAVIT OF MERIT IS INVALID AND PLAINTIFF-APPELLEE DELIBERATELY VIOLATED TWO SEPARATE COURT ORDERS AND, AS A RESULT, HER LAWSUIT SHOULD REMAIN DISMISSED WITH PREJUDICE.

In any action for medical malpractice, the plaintiff bears the burden of proving: (1) the applicable standard of care; (2) breach of the standard; (3) causation; and (4) damages. *Locke v Pachtman*, 446 Mich 216; 521 NW2d 786 (1994); see also *Cox v Bd of Hospital Managers*, 467 Mich 1, 44; 651 NW2d 356 (2002). Under MCL 600.2912d, "the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169."

While the *Dean* factors are an element of this appeal, the dispositive issue is Plaintiff-Appellee's failure to produce an expert for deposition to verify his credentials and ensure that they meet MCL 600.2169 as required by MCL 600.2912d. Dr. Bal attested

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on his AOM that for the year prior to the alleged malpractice (May 29, 2018 to May 29, 2019), he devoted a majority of his professional time to the clinical practice of orthopedic surgery. (*Dr. Bal's AOM*, p. 1). What we know now from other sworn testimony is that he retired from clinical practice and instruction of orthopedic surgery in November 2017. (See Dr. Bal's Deposition Transcript in an Unrelated Lawsuit, p. 16-19); see also *Dr. Bal's Trial Testimony in an Unrelated Lawsuit*, p. 60). The trial court fully took into consideration, as was proper, that Dr. Bal attested to different things in different cases. The court gave Plaintiff-Appellee the opportunity to produce Dr. Bal to attest to his qualifications, and she never produced him, in violation of the Order to compel that deposition. (See **Appx 334-339**).

A. <u>Plaintiff-Appellee's Affidavit of Merit is invalid because Plaintiff-Appellee's orthopedic surgery standard of care expert, Sonny Bal, M.D., retired from practice and instruction of medicine in November 2017 and is not qualified to serve as a standard of care expert under Michigan law</u>.

It is well-established Michigan law that in order to file a medical malpractice action, plaintiffs are required to produce expert testimony to support all elements of a medical malpractice action. When plaintiffs have no such expert support or improper expert support, dismissal is required. *Locke*, 446 Mich at 231. Critically, valid affidavits from corresponding specialists are required to be filed along with the complaint to properly initiate a claim for medical malpractice pursuant to MCL 600.2912d, MCL 600.2169, and MCR 2.112(L). With respect to medical malpractice actions, MCL 600.2912d provides that "the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169."

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To constitute a valid AOM, a plaintiff must demonstrate that their expert "during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:

> (i) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.
>
> (ii) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

MCL 600.2169(1)(b)(i)-(ii).

Expert witness requirements are further governed by MCL 600.2169. MCL 600.2169(1)(b) is unambiguous, and judicial construction is neither required nor permitted. See, e.g., *Brown v Detroit Mayor*, 478 Mich 589, 598 (2007) ("If the statutory language is unambiguous, the Legislature is presumed to have intended the meaning expressed in the statute and judicial construction is not permissible."); *Grossman v Brown*, 470 Mich 593, 598 (2004) ("If the statute's language is plain and unambiguous, we assume the Legislature intended its plain meaning; therefore, we enforce the statute as written and follow the plain meaning of the statutory language."). To be qualified to testify as an expert witness in a medical malpractice case, a proposed expert physician must have spent greater than 50 percent of his or her professional time practicing the relevant specialty the year before the alleged malpractice. *Kiefer v Markley*, 283 Mich App at 559 (2009).

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Specifically, MCL 600.2169 provides:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.
>
> (b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:
>
> (i) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.
>
> (ii) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

MCL 600.2169(1)(a)-(b).

In this case, Plaintiff-Appellee's AOM is invalid because Dr. Bal, contrary to what he attested in the affidavit, did not "devote[] a majority of his or her professional time" to either the active clinical practice or instruction of orthopedic surgery from May 2018 through May 2019 because *Dr. Bal retired from the practice of medicine in November 2017*. Dr. Bal testified as to his retirement in 2017 at a 2019 trial in Mississippi (*Dr. Bal's Trial Transcript in an Unrelated Lawsuit*, p. 60) and again at a discovery deposition in

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2020 (*Dr. Bal's Deposition Transcript in an Unrelated Lawsuit*, p. 16-19). This information is further confirmed by personal website profiles for Dr. Bal, including his LinkedIn page and https://hipandknee.com/about-dr-bal/.

Based upon the above, Plaintiff-Appellee's counsel could not "reasonably believe" Dr. Bal met the requirements of MCL 600.2169 at the time the Complaint was filed because a simple phone call, review of his curriculum vitae, or review of Dr. Bal's LinkedIn profile would have revealed he retired from the practice and instruction of medicine in November 2017 and, thus, was not qualified to execute an AOM on Plaintiff-Appellee's behalf under MCL 600.2169.

Therefore, at the time of the at-issue occurrence, Dr. Bal was not qualified to execute an AOM on Plaintiff-Appellee's behalf. Since the Complaint was not accompanied by a valid AOM relative to Defendant-Appellant Lennox, et. al, dismissal of Plaintiff-Appellee's lawsuit is required. The trial court properly recognized that and appropriately followed the medical malpractice statutes.

B. Plaintiff-Appellee deliberately violated two separate court orders and, as a result, her lawsuit should remain dismissed with prejudice.

It stands to be noted that Plaintiff-Appellee violated the trial court's October 12, 2022 Order compelling Plaintiff's orthopedic surgery standard of care expert, Dr. Bal, to appear for a deposition by November 2, 2022. (**Appx 338**). Plaintiff-Appellee failed to produce Dr. Bal for a deposition and instead attempted to voluntarily dismiss this lawsuit without prejudice even though her lawsuit is subject to dismissal with prejudice on numerous bases. Plaintiff-Appellee also violated the court's initial scheduling order by unilaterally attempting to file an amended witness list 133 days after the initial scheduling order required disclosure of all expert witnesses and witness lists.

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Under MCR 2.504(B)(1), "[i]f a party fails to comply with these rules or a court order, upon motion by an opposing party, or sua sponte, the court may enter a default against the noncomplying party or a dismissal or the noncomplying party's action or claims." Due to the above violation of the Court's October 12, 2022 Order and initial scheduling order, Plaintiff-Appellant-Cross-Appellee's lawsuit is subject to a dismissal with prejudice under MCR 2.504(B)(1). This lawsuit should remain dismissed with prejudice because the Court's decision was proper and well-grounded in medical malpractice statutes and case law.

IV. THE TRIAL COURT CORRECTLY GRANTED SUMMARY DISPOSITION DUE TO PLAINTIFF-APPELLEE'S INVALID AFFIDAVIT OF MERIT BECAUSE PLAINTIFF-APPELLEE'S STANDARD OF CARE WITNESS, SONNY BAL, M.D., DID NOT MEET EXPERT WITNESS REQUIREMENTS, AND PLAINTIFF-APPELLEE COULD NOT REASONABLY BELIEVE THAT DR. BAL DID MEET THE SAME, UNDER MCL 600.2169 AND MICHIGAN CASE LAW.

In Michigan, a motion for summary judgment brought under MCR 2.116(C)(10) tests the factual support for a plaintiff's claims. The plaintiff may not rest upon the mere allegations or denials of his complaint, "but must, by affidavits or as otherwise provided in [MCR 2.116], set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4). As previously noted, MCL 600.2169 mandates that in order to properly initiate a claim for medical malpractice, a plaintiff must include an affidavit of merit executed by an expert witness who intends to give expert testimony on the appropriate standard of care. The expert witness shall be a corresponding specialist to the healthcare provider who is alleged to have breached the standard of care, and the affidavit of merit must attest to the proposed expert's qualifications, as well as the alleged violations of the standard of care. *See* MCL 600.2169.

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Pursuant to MCR 2.116(G)(5), the accompanying "affidavits, together with the [other]…evidence then filed in the action or submitted by the parties, must be considered by the court when the motion is based on subrule (C)…(10)." If the plaintiff doesn't respond with appropriate evidence of a material issue of fact, including appropriate affidavit(s), the court must enter judgment against him. *Maiden*, 461 Mich at 120-121; MCR 2.116(G)(4).

A. Dr. Bal was not qualified to execute an Affidavit of Merit due to his failure to meet expert witness requirements under MCL 600.2169 and Michigan case law.

The purpose of MCL 600.2169 is to provide a guideline for the parties and courts to follow to help ensure that an expert witness, pursuant to Michigan Rule of Evidence 702, is properly qualified by knowledge, skill, experience, training, or education to competently testify regarding the standard of care in the defendant doctor's area of specialty or subspecialty. *See generally* MCL 600.2169; *see also* MRE 702. MCL 600.2912d sets forth a reasonable belief standard by which an attorney may assess an expert's qualifications under MCL 600.2169.

MCL 600.2169(1)(b) is unambiguous, and judicial construction is neither required nor permitted. See, e.g., *Brown*, 478 Mich at 598 ("If the statutory language is unambiguous, the Legislature is presumed to have intended the meaning expressed in the statute and judicial construction is not permissible."); *Grossman*, 470 Mich at 598 ("If the statute's language is plain and unambiguous, we assume the Legislature intended its plain meaning; therefore, we enforce the statute as written and follow the plain meaning of the statutory language."). To be qualified to testify as an expert witness in a medical malpractice case, a proposed expert physician must have spent greater than 50 percent

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of his or her professional time practicing the relevant specialty the year before the alleged malpractice. *Kiefer v Markley*, 283 Mich. App. at 559.

MCL 600.2912d is also unambiguous in its provision that a plaintiff attorney in a medical malpractice action "shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169."

It can be shown that Dr. Bal did not "devote[] a majority of his professional time" to either the active clinical practice or instruction of orthopedic surgery in May 2018—the month and year immediately preceding the at-issue May 29, 2019 care, which is the basis for Plaintiff-Appellee's claim—because Dr. Bal *retired from the clinical practice and instruction of medicine in November 2017*. This fact was easily discovered by counsel for Defendants-Appellants and Defendant Beaumont, who each conducted brief internet searches via Google and/or commonly used legal databases. These searches revealed Dr. Bal testified as to his retirement in 2017 at a 2019 trial in Mississippi (*Dr. Bal's Trial Transcript in an Unrelated Lawsuit*, p. 60) and again at a discovery deposition in 2020 (*Dr. Bal's Deposition Transcript in an Unrelated Lawsuit*, p. 16-19). This information is further confirmed by personal website profiles for Dr. Bal, including his LinkedIn page and https://hipandknee.com/about-dr-bal/. An exact percentage of Dr. Bal's dedication of his professional time need not be established for the year preceding the basis for Plaintiff-Appellee's claim, May 2018, because Dr. Bal had completely retired from the practice and instruction of medicine more than six months before in November 2017.

With a wealth of information as to Dr. Bal's retirement date available online, as well as communication with Dr. Bal himself, Plaintiff-Appellee's counsel could not have

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reasonably believed that Dr. Bal met MCL 600.2169 practice requirements unless he simply did not look and did not ask. Conducting a brief internet or database search on your potential standard of care expert witness and asking the potential expert to confirm their credentials is the bare minimum of due diligence in medical malpractice litigation.

Dr. Bal does not qualify as an expert witness under MCL 600.2169, which rendered the AOM filed in this matter invalid. Without a valid AOM, Plaintiff-Appellee's claim is insufficient to initiate a medical malpractice action. Moreover, Plaintiff-Appellee's counsel could not have reasonably believed that Dr. Bal met the expert witness requirements of MCL 600.2169, specifically with respect to Dr. Bal's professional time, unless he made zero effort to confirm Dr. Bal's credentials.

Accordingly, summary disposition was appropriate. Dr. Bal did not meet the statute's plain language requirement of a greater than 50 percent dedication of his professional time to the practice or instruction of medicine in May 2018 because his practice dedication was zero percent at that time. Due to his failure to meet the statutory requirements, Dr. Bal was unable to properly execute an AOM under Michigan law. This Honorable Court should reverse the Court of Appeals and affirm the trial court's decision that Dr. Bal failed meet the unambiguous statutory language, thereby executing an invalid AOM without the requisite qualifications, and should hold that the trial court did not abuse its discretion when it granted summary disposition on these grounds. This lawsuit should remain dismissed with prejudice because the trial court's decision was proper and well-grounded in Michigan medical malpractice statutes and case law.

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B. Plaintiff-Appellee could not reasonably believe that Dr. Bal met expert witness requirements under MCL 600.2169 and Michigan case law.

As noted above, MCL 600.2912d provides that "the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney *reasonably believes* meets the requirements for an expert witness under section 2169." *Grossman*, 470 Mich at 598 (emphasis in original). This Honorable Court has opined the Legislature's rationale for the reasonable belief standard "is, without a doubt, traceable to the fact that until a civil action is underway, no discovery is available." *Id.* at 599. This Court further interpreted the Legislature to state, "when a lawsuit is *about to be filed*, the plaintiff's attorney only has available *publicly accessible resources*" to determine the requisite expert qualifications and upon which to rest their reasonable belief that a potential expert meets those qualifications. *Id.* (emphasis added).

Even considering the general and/or limited resources available at the time of an initial filing, Plaintiff-Appellee's counsel is believed to have access to the internet. Thus, Plaintiff-Appellee's counsel is believed to have access to free, public websites like LinkedIn, Dr. Bal's former website which is published on his resume, https://hipandknee.com/about-dr-bal/, and legal search engines like LexisNexis.

Each of these websites provide, in clear and indisputable statements, that Dr. Bal ceased practicing medicine at University of Missouri Health Care and ceased instruction of medicine at University of Missouri and Missouri Science & Technology University in November 2017, and he did not appear to take up the practice or instruction of medicine anywhere else afterwards. LexisNexis also provides a wealth of expert materials, including CVs and deposition transcripts, which could have provided this information. In the veritable age of the internet, it is simply implausible that Plaintiff-Appellee's counsel

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could not conduct a simple internet search regarding her proposed expert and glean this same information. In light of such a discovery, it was Plaintiff-Appellee's duty to confirm whether or not Dr. Bal continued to practice medicine, and in the requisite capacity, through May 2018 in order to file a valid AOM.

Plaintiff-Appellee's counsel is also believed to have had continuous access to his proposed expert's CV, dated August 14, 2019, which was produced by Plaintiff-Appellee's counsel to these Defendants-Appellees on September 19, 2021. Dr. Bal's CV also indicates that Dr. Bal ceased practicing medicine at University of Missouri Health Care, including its health system, hospitals, and clinics, and ceased instruction of medicine at University of Missouri and Missouri Science & Technology University on November 6, 2017, and he did not appear to take up the practice or instruction of medicine anywhere else afterwards. Plaintiff-Appellee had ample time and opportunity to review Dr. Bal's CV for his professional and academic appointments upon receipt of the CV from Dr. Bal on or around August 14, 2019, and through the date of his August 15, 2022 deposition.

Plaintiff-Appellee's sole reliance on only the affidavit provided by Dr. Bal on March 11, 2021 should not be considered a "reasonable belief" when even *de minimis* research and file review to confirm Dr. Bal's recent work history over a period of 19 months would reveal a question of qualification. Additionally, it is unreasonable for Plaintiff-Appellee to be held only to the standard of knowledge of that which was known at the time of initial pleading on April 9, 2021, even after 19 months of discovery and multiple sources confirming Dr. Bal's insufficiency as an expert witness over that lengthy period, *and* Plaintiff-Appellee's own admission of same by repeatedly trying to substitute Dr. Bal with

Dr. Hall, in the trial court's review of Plaintiff-Appellee's AOM and any Motion for Summary Disposition regarding same.

It bears repeating that Plaintiff-Appellee's attempts to replace Dr. Bal with Dr. Hall through improper means under the Michigan Court Rules and in violation of two court orders were simply an attempt to avoid the inevitable: dismissal of Plaintiff-Appellee's action for an invalid AOM. Dr. Bal, not Dr. Hall, signed the AOM, which allowed Plaintiff-Appellee to file this lawsuit. If Dr. Bal was not qualified to sign the AOM, Plaintiff-Appellant-Cross-Appellee's lawsuit must be invalidated and dismissed. Simply replacing Dr. Bal with Dr. Hall does not rectify the issue with Plaintiff-Appellee's Complaint and AOM and, thus, is wholly unwarranted. Moreover, as demonstrated above, the evidence produced—and not produced—strongly shows that Plaintiff-Appellee did not have difficulty reestablishing contact with Dr. Bal, but rather was attempting to shield Dr. Bal from being deposed so these Defendants-Appellants could not confirm that Dr. Bal actually retired from the practice and instruction of medicine in 2017, and thus, was not qualified to sign the AOM on March 11, 2021. This Honorable Court should should reverse the Court of Appeals and affirm the trial court's dismissal of Plaintiff-Appellee's insufficient Complaint. Further, this lawsuit should remain dismissed with prejudice because the trial court's decision was proper and well-grounded in Michigan medical malpractice statutes and case law.

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CONCLUSION AND RELIEF REQUESTED

The conflicting decisions issued by the Court of Appeals in the instant case and *Morris v St. Clair Orthopaedics & Sports Medicine, P.C. and Glenn Minster, M.D.*, No. 367109 (Mich. Ct. App. Sept. 19, 2024) pose questions of law as to the extent of a trial court's (1) authority to direct the time for filing and serving witness lists; (2) discretion in allowing additions or amendments to witness lists; and (3) application of Michigan law with respect to awarding summary disposition where a plaintiff's Affidavit of Merit is invalid. Parties on either side of these conflicting decisions will face material injustice until this Honorable Court decides the above-listed issues. Accordingly, Defendants-Appellants respectfully request that this Honorable Court grant leave to appeal so these issues can be fully briefed for this Court's consideration, and further, that this Court affirm the *Minter* panel's decision and apply in kind to the instant case, such that the trial court's dismissal with prejudice is upheld.

If this Honorable Court declines to grant leave for appeal, these Defendants-Appellants alternatively request that this Honorable Court peremptorily reverse or, at a minimum, remand to the Court of Appeals as on leave granted. The Court of Appeals committed clear error in issuing the conflicting opinions 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 v St. Clair Orthopaedics & Sports Medicine, P.C. and Glenn Minster, M.D.*, No. 367109 (Mich. Ct. App. Sept. 19, 2024).

The *Minster* 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 and Plaintiff-Appellee established no error or abuse

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of discretion; the trial court properly denied Plaintiff-Appellee's various evidentiary motions regarding her expert witnesses and properly struck her untimely amended witness lists; the trial court properly denied Plaintiff-Appellee's Motion for Voluntary Dismissal; and the trial court properly granted summary disposition in favor of Defendants, dismissing Plaintiff-Appellee's Complaint for lack of a valid Affidavit of Merit. The trial court's rulings are solidly based in medical malpractice law, the Court Rules, and case precedent. The trial court's dismissal of Plaintiff-Appellee's Complaint must be upheld by this Honorable Court.

Respectfully submitted,

FOLEY, BARON, METZGER & JUIP, PLLC

/s/ Enrico G. Tucciarone
By: */s/ Lauren T. Rhoads*
ENRICO G. TUCCIARONE (P52767)
LAUREN T. RHOADS (P86427)
Attorney for Defendants-Appellants
Tri County Orthopedics, P.C.
and Jack D. Lennox, D.O.
38777 Six Mile Road, Suite 300
Livonia, MI 48152
(734) 742-1800/(734) 521-2379
etucciarone@fbmjlaw.com
lrhoads@fbmjlaw.com

Dated: October 24, 2024

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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 Application for Leave to 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 11,241.

Respectfully submitted,

FOLEY, BARON, METZGER & JUIP, PLLC

By: */s/ Lauren T. Rhoads*

ENRICO G. TUCCIARONE (P52767)
LAUREN T. RHOADS (P86427)
Attorney for Defendants-Appellants
Tri County Orthopedics, P.C.
and Jack D. Lennox, D.O.
38777 Six Mile Road, Suite 300
Livonia, MI 48152
(734) 742-1800/(734) 521-2379
etucciarone@fbmjlaw.com
lrhoads@fbmjlaw.com

Dated: October 24, 2024

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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 _October 24, 2024_, 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:

BRIAN J. McKEEN (P34123)
VICTOR BALTA (P77805)
STEVEN C. HURBIS (P80993)
Attorneys for Plaintiff-Appellee
645 Griswold Street, Suite 4200
Detroit, Michigan 48226
(313) 961-4400
vbalta@mckeenassociates.com
shurbis@mckeenassociates.com

MARK GRANZOTTO (P31492)
BETH A. WITTMANN (P63233)
Co-Counsel for Plaintiff
2684 Eleven Mile Road, Suite 100
Berkley, Michigan 48072
(248) 546-4649

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

/s/ Laura J. Pilarski
lpilarski@fbmjlaw.com
(734) 742-1800