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STATE OF MICHIGAN

IN THE SUPREME COURT

LAWANNA SMITH AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JACQUELINE HARRIS, DECEASED,

Plaintiff-Appellee,

v

BEAUMONT HEALTH,

Defendant-Appellant,

and

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

Defendants.

Supreme Court No. _____

Court of Appeals No. 365062

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

DEFENDANT-APPELLANT BEAUMONT HEALTH'S APPLICATION FOR LEAVE TO APPEAL

APPENDIX FOR DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL (Attached Separately)

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RECEIVED by MSC 10/24/2024 3:31:03 PM

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES iii

ORDER APPEALED FROM v

STATEMENT OF JURISDICTION vi

STATEMENT OF QUESTION PRESENTED vii

INTRODUCTION AND REASONS FOR SUPREME COURT REVIEW 1

STATEMENT OF FACTS 5

A Plaintiff files suit with an affidavit of merit signed by Dr. Sonny Bal, who retired from practicing medicine several years before the alleged malpractice. 5

B. Plaintiff fails to produce Dr. Bal for deposition and instead files an amended witness list without leave of court. 5

C. The trial court denies Plaintiff's motion to amend witness list and motion for voluntary dismissal, based on the pending dispositive motions filed by the defense. 9

D. The Court of Appeals rules that the trial court abused its discretion by failing to consider the *Dean/Duray* factors, and remands for consideration of those factors. 11

STANDARD OF REVIEW 13

ARGUMENT 14

The Court of Appeals erred by requiring the trial court consider the *Dean/Duray* factors before denying Plaintiff's notion to amend her witness list. 14

CONCLUSION AND RELIEF REQUESTED 18

RECEIVED by MSC 10/24/2024 3:31:03 PM

INDEX OF AUTHORITIES

CASES **Page**

Cox v Hartman,
322 Mich App 292; 911 NW2d 219 (2017).....2, 14, 15

Dean v Tucker,
182 Mich App 27; 451 NW2d 571 (1990)..... *passim*

Duray Dev, LLC v Perrin,
288 Mich App 143; 792 NW2d 749 (2010)..... *passim*

Gueye v State Farm Automobile Ins Co,
343 Mich App 473; 997 NW2d 307 (2022) 15

Howard-Reed v Braver,
unpublished opinion per curiam of Court of Appeals,
issued May 19, 2022; WL 1593795 (Docket No. 356200).....3, 16

Levinson v Sklar,
181 Mich App 693; 449 NW2d 682 (1989).....2, 14

Morris v St Clair Orthopaedics & Sports Medicine, PC,
unpublished opinion per curiam of Court of Appeals,
issued September 19, 2024; 2024 WL 4249304 .....3, 16

Pawlowski v Kosar,
unpublished opinion per curiam of Court of Appeals,
issued May 30, 2024; 2024 WL 2795604 (Docket No. 365803) 2, 3, 16

Red Fit, LLC v Red Effect International Franchise, LLC,
unpublished opinion per curiam of Court of Appeals,
issued May 30, 2024; 2024 WL 2790504 (Docket No. 363686) 16

Tisbury v Armstrong,
194 Mich App 19; 486 NW2d 51 (1991).....13, 14, 15

Vicencio v Ramirez,
211 Mich App 501; 536 NW2d 280 (1995) 15

Witt v Glazer,
unpublished opinion per curiam of Court of Appeals,
issued January 20, 2011; 2011 WL 192391 (Docket No. 294057).....3, 16

Woodard v Custer,
476 Mich 545; 719 NW2d 842 (2006).....13

STATUTES AND COURT RULES

MCL 600.2169.....4

MCL 600.2912d.....5

MCR 2.313(B).....14

MCR 2.401(I)(1).....14

MCR 2.401(I)(2).....3, 14, 15

MCR 2.401(B)(2)(a).....14

MCR 2.504(A).....9

MCR 7.305(B)(3).....4

MCR 7.305(B)(5)(b).....4

MCR 7.305(C)(2)(a).....v

RECEIVED by MSC 10/24/2024 3:31:03 PM

RECEIVED by MSC 10/24/2024 3:31:03 PM

ORDER APPEALED FROM

Defendant-Appellant seeks leave to appeal from the September 12, 2024 opinion of the Court of Appeals (**AT_APPX 1-12**).

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STATEMENT OF JURISDICTION

The Court of Appeals issued its opinion on September 12, 2024 (**AT_APPX 1-12**). Defendant's application for leave to appeal was timely filed 42 days later on October 24, 2024. This Court therefore has jurisdiction to consider the application under MCR 7.305(C)(2)(a).

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STATEMENT OF QUESTION PRESENTED

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

Plaintiff- Appellee says "No."

Defendant-Appellant says "Yes."

The trial court says "Yes."

The Court of Appeals says "No."

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INTRODUCTION AND REASONS FOR SUPREME COURT REVIEW

In this medical malpractice action, Plaintiff-Appellee Lawanna Smith, as Personal Representative of the Estate of Jacqueline Harris, alleges that Ms. Harris died as a result of the surgical and post-operative negligence of Defendant Dr. Jack Lennox. Plaintiff alleges that Defendant-Appellant Beaumont Health is vicariously liable for the negligence of Dr. Lennox, because Ms. Harris' knee replacement was performed by Dr. Lennox at Beaumont Health – Botsford. Plaintiff's claim was dismissed based on her failure to file an affidavit of merit from a qualified expert. The trial court also denied Plaintiff's motion to amend her witness list to add a new expert after the expert suddenly became "unavailable" only months before trial. The trial court doubted Plaintiff's explanation that her listed standard of care expert, Dr. Bal, was suddenly "unavailable" to serve as an expert, just at the time that Defendants had discovered he was not qualified to be an expert in this case. Plaintiff refused to produce Dr. Bal (even after an order was entered requiring her to do so) and instead sought to add a new expert, Dr. Hall. Plaintiff made matters worse when she filed an amended witness list without leave of court, and then filed an improper notice of voluntary dismissal after her motion to amend the witness list was denied.

On appeal, the Court of Appeals reversed the dismissal, finding that summary disposition was premature because the trial court should not have denied Plaintiff's motion to amend her witness list to add a new standard of care expert without considering the factors set forth in *Dean v Tucker*, 182 Mich App 27; 451 NW2d 571 (1990) and *Duray Dev, LLC v Perrin*, 288 Mich App 143, 162; 792 NW2d 749 (2010).[1]

[1] The *Dean/Duray* factors include, but are not limited to: (1) whether the violation was willful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the defendant; (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice; (5)

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Beaumont seeks leave to appeal from the portion of the Court of Appeals opinion finding that the trial court abused its discretion by failing to apply the *Dean/Duray* factors in adjudicating Plaintiff's motion to amend her witness list. Under MCR 2.401(I)(2), a party seeking to amend a witness list after the deadline for filing witness lists must demonstrate "good cause," including an adequate explanation for the delay and a showing that diligent efforts were made to secure the presence of the witness. *Cox v Hartman*, 322 Mich App 292, 315; 911 NW2d 219 (2017); *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1991). The Court of Appeals recognized that "[a] court should consider whether prejudice would result from ***granting*** a motion to add an expert witness." *Cox*, 322 Mich App at 315 (Opinion, p 4, **AT_APPX 4**). However, the Court then flipped that prejudice analysis on its head by finding instead that the trial court must assess whether ***denying*** the motion would prejudice the moving party, because it would result in dismissal of Plaintiff's claim for lack of a standard of care expert. The Court of Appeals cited several cases involving application of the *Dean/Duray* factors when a party is ***sanctioned*** by barring an expert witness, resulting in the dismissal of the case (Opinion, pp 5-6, **AT_APPX 5-6**). But these cases all involve barring an expert witness as a sanction for discovery abuses (including the failure to ***file*** a witness list), not the denial of a motion to ***amend*** a timely-filed witness list for failure to show good cause.

In prior unpublished decisions, other panels of the Court of Appeals have rejected attempts to apply the *Dean/Duray* factors to requests to amend witness lists, even where denial of the request would result in dismissal of the case. See *Pawlowski v Kosar*, unpublished opinion per

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whether there exists a history of plaintiff's engaging in deliberate delay; (6) the degree of compliance by the plaintiff with other provisions of the court's order; (7) an attempt by the plaintiff to timely cure the defect[;] and (8) whether a lesser sanction would better serve the interests of justice.

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curiam of Court of Appeals, issued May 30, 2024; 2024 WL 2795604, at *8 (Docket No. 365803) (**AT_APPX 34**) (finding reliance on *Duray* factors "misplaced" where case did not involve discovery sanctions, but rather a trial court's decision whether to allow for the replacement of a disqualified expert); *Howard-Reed v Braver*, unpublished opinion per curiam of Court of Appeals, issued May 19, 2022; 2022 WL 1593795 at *5 (Docket No. 356200) (**AT_APPX 22**) (same); *Witt v Glazer*, unpublished opinion per curiam of Court of Appeals, issued January 20, 2011; 2011 WL 192391 at *6 (Docket No. 294057) (**AT_APPX 17**) (same). The Court of Appeals decision in this case finding the trial court abused its discretion in failing to apply the *Dean/Duray* factors contradicts these decisions, as well as another decision issued ***the very next week*** by another panel of the Court of Appeals, in another medical malpractice case involving a motion to amend the witness list. *Morris v St Clair Orthopaedics & Sports Medicine, PC*, unpublished opinion per curiam of Court of Appeals, issued September 19, 2024; 2024 WL 4249304 at *6 n 2 (**AT_APPX 41**) (finding *Dean/Duray* factors inapplicable because "[t]his case does not involve the complete failure to file a witness list," and "the plain language of MCR 2.401(I)(2) does not contain a degree of sanction contingent on the violation at issue," but instead "requires an analysis of whether the party met their burden of showing good cause").

Defendant is mindful that all of these opinions are unpublished. However, the failure of the very experienced Court of Appeals panel in this case to reach the same interpretation of MCR 2.401(I)(2) as other panels deciding the same issue strongly suggests that this Court's intervention is needed to clarify whether the *Dean/Duray* factors must be considered when denying a motion for leave to amend a witness list under MCR 2.401(I)(2). This Court's review is warranted because the proper interpretation of a court rule is an issue of major significance to the State's jurisprudence, and the opinion in this case conflicts with other published and unpublished

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decisions of the Court of Appeals. MCR 7.305(B)(3), (5)(b). More fundamentally, trial courts should have clear guidance on whether they are required to evaluate the *Dean/Duray* factors when denying a motion for leave to amend a witness list. The *Dean/Duray* factors and the requirement to apply them are extratextual, having no basis in the plain language of the court rule. They should not be expanded beyond the narrow sanctions context in which they have traditionally been applied. This Court does not require trial courts to apply the *Dean/Duray* factors for other rulings which result in dismissal of a case for lack of expert testimony, such as a motion to strike an expert as unqualified under MCL 600.2169. The same should be true for a trial court's decision that a party has not adequately shown good cause and diligence for the late addition of a new expert.

For these reasons, Beaumont Health asks this Court to grant leave to appeal, or alternatively, issue an order peremptorily reversing the Court of Appeals' decision reversing the denial of leave to amend the witness list.

RECEIVED by MSC 10/24/2024 3:31:03 PM

STATEMENT OF FACTS

The medical facts are not relevant to the witness list amendment issue raised in this application, but they can be found at pages 1-2 of the Court of Appeals opinion (**AT_APPX 1-2**). Additional facts regarding the motion for summary disposition and the motion for voluntary dismissal are also provided herein for context.

A. Plaintiff files suit with an affidavit of merit signed by Dr. Sonny Bal, who retired from practicing medicine several years before the alleged malpractice.

Plaintiff filed her complaint on April 9, 2021, accompanied by an affidavit of merit signed by orthopedic surgeon Dr. Sonny Bal. In the affidavit, Dr. Bal attests that "[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" (AOM, **AT_APPX 57**). Under MCL 600.2912d, the "relevant time period at issue" was May 2018 – May 2019, which is one year prior to the alleged malpractice that occurred in May 2019. However, Dr. Bal had actually retired from the practice of medicine in November 2017, and had been wrapping up his practice since approximately 2015 (Bal deposition testimony, p 16, **AT_APPX 64**) (Bal 2019 trial testimony, **AT_APPX 67**). His LinkedIn profile shows a November 2017 retirement date from his position as an adjunct professor of orthopedic surgery at the University of Missouri Health Care (Bal LinkedIn profile, p 2, **AT_APPX 69**).

B. Plaintiff fails to produce Dr. Bal for deposition and instead files an amended witness list without leave of court.

Defendants sought to take Dr. Bal's deposition as early as August 2021, given that he was Plaintiff's sole standard of care expert (Dep notice, **AT_APPX 91-93**). The deposition did not proceed as scheduled.

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On April 25, 2022, Plaintiff filed her witness list naming Dr. Bal as her orthopedic surgery expert (**AT_APPX 129**). Dr. Bal was also identified as Plaintiff's standard of care expert in Plaintiff's May 9, 2022 answers to interrogatories (**AT_APPX 132-133**). Discovery was open until June 7, 2022, but the parties were required to disclose their expert witnesses by May 6, 2022 (Initial Scheduling Order, **AT_APPX 134**).

In late May 2022, counsel for all parties began corresponding regarding a stipulation to extend discovery so that experts could be deposed prior to case evaluation (Emails, **AT_APPX 108**). Counsel for Dr. Lennox requested that plaintiff counsel provide additional dates for Dr. Bal's deposition, and the dates of June 15 and July 25 were provided (**AT_APPX 103-104**). When counsel for Beaumont was not available on those dates, Dr. Bal provided five dates in August for his deposition (**AT_APPX 99-101**). The parties settled on August 15, 2022, with Dr. Bal suggesting a particular deposition location. All of this was done by June 6, 2022, one day before the close of discovery. Discovery was subsequently extended to December 12, 2022, the date of a scheduled facilitation (June 23, 2023 order, **AT_APPX 135-136**). Trial was scheduled to begin February 7, 2023. The amended scheduling order did not extend the date for filing witness lists or disclosing expert witnesses. On June 23, 2022, Plaintiff filed supplemental responses to expert witness discovery again naming Dr. Bal as her sole standard of care expert (**AT_APPX 138-140**).

On August 15, 2022, plaintiff counsel expressed that Dr. Bal had an "emergency" and asked that the deposition set for that day be canceled, with new dates to be provided (August 15 email, **AT_APPX 214-215**). Counsel for Dr. Lennox reached out regarding September dates two weeks later, after Plaintiff did not provide any new dates (August 28 email, **AT_APPX 119**). When no new dates were provided, Dr. Lennox filed a motion to compel Dr. Bal's deposition on September 9, 2022 (**AT_APPX 71-76**). Plaintiff counsel reached out to defense counsel on

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September 16, stating that "we have been attempting to reconnect with Dr. Bal and get new dates. Unfortunately we are having an extremely difficult time doing so without success" (September 16 email, **AT_APPX 206**). A mere ten minutes later, Plaintiff filed a "First Amended Witness List" naming a new standard of care expert, Dr. John Hall, without leave of court (**AT_APPX 217-227**). Text messages show that Plaintiff counsel was in touch with Dr. Hall regarding his services only two days after Dr. Bal's cancelled deposition in August (**AT_APPX 228**).

Dr. Lennox then filed a motion to strike the amended witness list on the basis that it was untimely filed 133 days after the expert disclosure and witness list deadlines set forth in the original scheduling order, which were not modified in the amended scheduling order (**AT_APPX 229-244**). In response, Plaintiff represented that Dr. Bal "has not been cooperative, and he needs to be replaced" (Response, p 2, **AT_APPX 246**). Plaintiff asserted that Dr. Bal was an "unreliable" expert because of his lack of responsiveness and unavailability, not because of his qualifications (Id. at 3, **AT_APPX 247**). Plaintiff accused Dr. Lennox of being "shortsighted" by relying on Plaintiff's expert witness disclosure (Id. at 4, **AT_APPX 248**). Nothing was provided to show Plaintiff's unsuccessful efforts to reschedule Dr. Bal's deposition.

The trial court heard arguments on both defense motions on October 12, 2022 (**AT_APPX 252-265**). Plaintiff counsel stated that the motion to compel Dr. Bal's deposition was moot because they were withdrawing Dr. Bal as an expert (October 12 transcript, pp 3-5, **254-256**). Defense counsel objected, asserting that they were nevertheless entitled to depose Dr. Bal regarding the assertions made in his affidavit of merit regarding his qualifications (Id. at 5-6, **AT_APPX 256-257**). The trial court ordered Plaintiff to produce Dr. Bal for a deposition in the next three weeks (Id. at 10, **AT_APPX 261**). Turning to the motion to strike Plaintiff's amended

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witness list, the trial court chastised counsel for simply filing the amended witness list rather than filing a motion for leave to do so:

> THE COURT: You had a certain date to name witnesses. You failed to name these witnesses at that date. So instead of doing the slam dunk motion, which is asking permission to file a new witness list or an additional witness list, you just went ahead and filed it.
>
> So were you working under the theory of it's better to ask for forgiveness than seek permission? Because it's a court ordered date and if you know you have blown the date—and it happens, I understand that. But why would you just simply file it without doing the easiest thing in the world, which is asking permission to file it?
>
> MR. HURBIS: Your Honor, it was a stupid mistake and—
>
> THE COURT: No, (audio cut out) work word act. I mean, I say that to you when—frankly, when criminals say to me it was a mistake, I get—that is a button for me to push. You made a deliberate decision as an attorney to go ahead, knowing you were filing something late, instead of asking permission.
>
> So it now puts everyone in the position of, well, you have violated a court order without seeking permission for violating that court order.
>
> MR. HURBIS: I should not have done it, your Honor, and I recognize that when they filed—when Mr. Tucciarone contacted us and I immediately offered to strike our amended witness list and take the appropriate steps to file a motion to amend.
>
> THE COURT: I think you should do that.
>
> So I am—I'm granting the motion only in terms of, I want to see the appropriate motion seeking permission for these witnesses and add it into the list. All right?
>
> MR. HURBIS: Understood, your Honor. [Id. at 11-13, **AT_APPX 262-264**].

Two corresponding orders were entered that day, one granting the motion to compel and ordering that Dr. Bal be deposed by November 2, 2022 (**AT_APPX 266-267**), and the other granting the motion to strike the amended witness list and ordering that "plaintiff may file a motion to amend their witness list to be heard on a later date and time" (**AT_APPX 268-269**).

RECEIVED by MSC 10/24/2024 3:31:03 PM

C. The trial court denies Plaintiff's motion to amend witness list and motion for voluntary dismissal, based on the pending dispositive motions filed by the defense.

One week later, Plaintiff filed an emergency motion to amend her witness list, asserting that none of the factors articulated in *Dean v Tucker* warranted barring Plaintiff from amending her witness list as a discovery sanction (**AT_APPX 270-276**). Both sets of defendants filed responses to the motion to amend, addressing the *Dean* factors and highlighting the prejudice that would result if Plaintiff were allowed to either voluntarily dismiss the case without prejudice or substitute a new expert, when dismissal was warranted based on Dr. Bal's lack of qualifications to sign the affidavit of merit (**AT_APPX 277-289, 290-295**). Plaintiff's proffered "good cause" for substituting Dr. Bal—his failure to communicate—was shown to be false by the fact that Plaintiff counsel communicated with Dr. Bal on the date of his scheduled deposition (August 15), and then reached out to Dr. Hall only two days later. Plaintiff never submitted any evidence of attempts to contact Dr. Bal that went unanswered, nor did Plaintiff respond to Defendants' request for new deposition dates for Dr. Bal until the day she named Dr. Hall as her new expert. Defendants surmised that the real reason Plaintiff wanted to substitute her experts was because Dr. Bal was not qualified to sign the affidavit of merit, not because he was an uncooperative witness.

On October 26, 2022, Plaintiff filed an "Order of Voluntary Dismissal of All Defendants" purporting to dismiss all defendants without prejudice (**AT_APPX 297-297**). This was not filed in compliance with the court rules, which require a voluntary dismissal to be filed either before the defendant answers the complaint, or pursuant to a stipulation of dismissal signed by all the parties. See MCR 2.504(A). Instead of seeking concurrence, Plaintiff sent an email to defense counsel notifying them that because the action was voluntarily dismissed, she would not be proceeding with additional depositions scheduled by the parties (October 26 email, **AT_APPX**

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298-301). The trial court rejected Plaintiff's attempt to dismiss, and Plaintiff responded by filing a motion for voluntary dismissal on November 1, one day before the court-ordered deadline to take Dr. Bal's deposition (and three days before the dispositive motion deadline of November 4) (**AT_APPX 302-307**). Defendants filed responses to this second attempt at voluntary dismissal, and the motion was noticed for hearing the same day as Plaintiff's emergency motion to amend the witness list.

Several days before the emergency motion was scheduled to be heard, both sets of Defendants filed motions for summary disposition to dismiss the complaint due to the invalid affidavit of merit. The motions referenced Defendants' recent discovery of trial and deposition transcripts wherein Dr. Bal testified that he had retired from practicing and teaching medicine in 2017, and a copy of Dr. Bal's LinkedIn profile confirming the same.

On November 14, 2022, the trial court issued a written opinion and order denying Plaintiff's motions to amend and for voluntary dismissal, finding that a voluntary dismissal without prejudice and an amended witness list at this stage of the litigation would both be "highly prejudicial" to Defendants (**AT_APPX 308-309**). Recall that a facilitation was scheduled for December 12, and trial was scheduled to begin February 7.

On December 15, 2022, the trial court issued its order granting the motions for summary disposition filed by Defendants challenging Dr. Bal's qualifications to sign the affidavit of merit (**AT_APPX 310-313**). The trial court noted that "Plaintiff has not produced Dr. Bal for deposition, violating the Court's Order to produce him" (Id. at 3, **AT_APPX 312**). Noting Plaintiff's argument that the court should only rely on Dr. Bal's sworn statement regarding his qualifications in the affidavit of merit rather than his sworn testimony in two other cases, the trial court found it "troubling that Plaintiff cautions the Court in relying upon deposition and trial testimony from

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other cases when Plaintiff cannot produce any evidence from her own witness to refute what Defendant is arguing," and that "Plaintiff had over one year to work out any issues with her experts" (Id.). The court concluded that Plaintiff had failed to set forth any specific facts showing a genuine issue of fact as to Dr. Bal's lack of qualifications or the validity of his affidavit of merit (Id. at 4, **AT_APPX 313**).

Plaintiff's motions for reconsideration of the November 14 and December 15 orders were denied on December 8, 2022 and February 3, 2023, respectively (**AT_APPX 314-315, 316-319**). The trial court concluded 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" (December 8 order, p 2, **AT_APPX 315**). Plaintiff's timely appeal and Beaumont Health's timely cross appeal on the issue of ostensible agency followed.

D. The Court of Appeals rules that the trial court abused its discretion by failing to consider the *Dean/Duray* factors, and remands for consideration of those factors.

In its September 12, 2024 opinion, the Court of Appeals reversed the trial court's ruling denying leave to amend the witness list, finding that the trial court was required to apply the *Dean/Duray* factors because the denial of leave to amend would result in the dismissal of Plaintiff's lawsuit. See Opinion, p 4 (**AT_APPX 4**) ("While a showing of good cause is the typical standard when deciding a motion to amend a witness list to add an expert after the deadline, this Court has established a more rigorous analysis when the denial of such would effectively result in a dismissal"). It remanded for application of those factors and reconsideration of whether denial the motion for leave to amend was appropriate (Id. at 7, **AT_APPX 7**).

The panel then found that the trial court's grant of summary disposition based on Dr. Bal's lack of qualifications was "premature," in light of the possibility that the trial court on remand could grant Plaintiff leave to amend her witness list to name a new, qualified expert, who could

then submit an amended affidavit of merit (Id. at 10-11, **AT_APPX 10-11**). It further found that Beaumont's cross appeal on ostensible agency was likewise premature because the trial court had not made a ruling on Beaumont's motion for summary disposition on that basis (Id. at 11, **AT_APPX 11**). It finally found that Plaintiff's appeal from the denial of the motion for voluntary dismissal was moot because the Court had vacated the orders dismissing Plaintiff's case (Id. at 11 fn 6).

RECEIVED by MSC 10/24/2024 3:31:03 PM

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STANDARD OF REVIEW

The decision whether to allow a party to add an expert witness is within the discretion of the trial court. *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1991). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

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ARGUMENT

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

MCR 2.401(B)(2)(a) requires a trial court to issue a scheduling order setting a deadline for, *inter alia*, the exchange of witness lists. MCR 2.401(I)(1) directs that the parties "shall file and serve" witness lists no later than the time directed by that order. The failure to timely file a witness list at all is therefore governed by MCR 2.401(I)(1) as a violation of the court's scheduling order. Sanctions, including striking a party's experts and dismissing the case, are available when a party violates a court order. MCR 2.313(B).

When a party has complied with the scheduling order by timely filing a witness list, but later seeks to amend the list to include a new witness, MCR 2.401(I)(2) plainly provides that "[t]he court may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except on good cause shown." Thus, "good cause" is the guiding principle and requirement for deciding requests to amend a timely-filed witness list. The rule does not contemplate that the amending party has violated any court orders, and therefore does not implicate sanctions.

Published authority from the Court of Appeals provides a clear standard for showing "good cause" to amend a witness list. "The denial of a late motion to add a witness 'is proper where the movant fails to provide an adequate explanation and show that diligent efforts were made to secure the presence of the witness.'" *Cox v Hartman*, 322 Mich App 292, 315; 911 NW2d 219 (2017), quoting *Tisbury*, 194 Mich App at 20. "A court should consider whether prejudice would result from granting a motion to add an expert witness." *Id.*, quoting *Tisbury*, 194 Mich App at 21; *Levinson v Sklar*, 181 Mich App 693, 698-699; 449 NW2d 682 (1989).

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Conversely, the *Dean/Duray* factors govern a trial court's decision to bar witnesses as a discovery sanction, not the denial of a request to substitute an expert witness. The plaintiff in *Dean* inadvertently failed to file a witness list by the stated deadline, and his request to extend the deadline to file the witness list was denied. 182 Mich App at 32. The court concurrently struck the witness list the plaintiff had attempted to file ***"as a sanction for plaintiff's tardiness***." *Id*. at 31 (emphasis supplied). The Court of Appeals ruled that "the mere fact that ***a witness list was not timely filed*** does not, in and of itself, justify the imposition of such a sanction." *Id.* at 32 (emphasis supplied). The Court's analysis is replete with references to the decision barring the experts as a "sanction." *Id.* at 31-32. Similarly, in *Duray Dev*, the Court of Appeals ruled that "[o]nce a party has ***failed to file a witness list*** in accordance with the scheduling order, it is within the trial court's discretion to ***impose sanctions*** against that party. These ***sanctions*** may preclude the party from calling witnesses." 288 Mich App at 164 (emphasis supplied). In addition to *Dean* and *Duray Dev*, the Court of Appeals cited to other cases involving discovery sanctions or violations of court orders in its analysis of why the *Dean/Duray* factors were applicable. See Opinion, p 6 (**AT_APPX 6**) (citing to *Gueye v State Farm Automobile Ins Co*, 343 Mich App 473, 489-490; 997 NW2d 307 (2022) (action dismissed as discovery sanction for failure to attend scheduled IME); and *Vicencio v Ramirez*, 211 Mich App 501; 536 NW2d 280 (1995) (case dismissed for plaintiff's failure to appear at trial when she did not receive proper notice of date of trial, only notice of settlement conference).

The Court of Appeals erred by relying on these sanctions cases as applicable to the instant case involving a motion to amend a timely-filed witness list. None of those cases interpret or apply MCR 2.401(I)(2) or the "good cause" standard for amending a witness list articulated in *Cox* and *Tisbury*. Other panels of the Court of Appeals have had no trouble appreciating the distinction

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between discovery sanction cases applying the *Dean/Duray* factors and cases like this one involving a request to amend a timely-filed witness list. See *Howard-Reed*, *supra*; *Witt*, *supra*; *Pawlowski*, *supra*; *Morris*, *supra*. Those panels have continually found that "a trial court's decision to allow for the replacement of a disqualified expert—or, in this case, one whose disqualification was imminent—is not equivalent to precluding a witness from testifying as a sanction for untimely discovery." *Pawlowski*, 2024 WL 2795604 at *8 (**AT_APPX 34**). The Court of Appeals decision in this case reaches the opposite result, without accounting for this persuasive albeit unpublished prior authority.

Nor does the panel in this case explain why it is appropriate to disregard the "good cause" standard for amending a witness list in favor of the *Dean/Duray* standard for barring witnesses as a discovery sanction, simply because the effect of denying the amendment is the same as issuing a sanction. This Court should grant leave to affirm that these are separate inquiries, with separate standards, and communicate clearly that trial courts are not required to apply the *Dean/Duray* factors to denial of a motion for leave to amend a witness list. See also *Red Fit, LLC v Red Effect International Franchise, LLC*, unpublished opinion per curiam of Court of Appeals, issued May 30, 2024; 2024 WL 2790504, at *13 (Docket No. 363686) (**AT_APPX 53-54**) (finding that "[t]he *Dean* factors are considered when deciding on a sanction, such as dismissal, for failing to timely file a witness list, not as a consideration for accepting a late-filed witness list," and concluding that "the trial court's decision to not accept the late-filed witness list was not a *sanction* for their failure to timely file a witness list; it was a decision to adhere to the court's scheduling order") (emphasis original).

Once the correct "good cause" standard is applied, the trial court's decision denying amendment is properly affirmed. Defendants and the trial court were clearly skeptical of Plaintiff's

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proffered explanation of why she was seeking to replace Dr. Bal as a standard of care expert. There was no evidence provided of Dr. Bal's purported "lack of cooperation" other than the *ipse dixit* of trial counsel. Instead, the evidence indicated that Plaintiff made "diligent efforts to secure the presence" of a ***new*** standard of care expert, Dr. Hall, only two days after counsel had been in touch with Dr. Bal, with the expectation that his deposition would proceed. Plaintiff also asked the trial court to rely on her counsel's own interpretation of Dr. Bal's testimony in multiple cases regarding the date of his retirement, and that it was not a "real" retirement. As the trial court aptly noted, Plaintiff could simply produce Dr. Bal to testify to that effect, if in fact that interpretation of his testimony were true.

Even after the trial court ordered Plaintiff to produce Dr. Bal for a deposition, Plaintiff still failed to do so or provide any evidence why he could not be produced. Instead, Plaintiff sought to voluntarily dismiss the case and/or replace Dr. Bal as an expert, absent any showing that his replacement was strictly necessary. Defendants would have been prejudiced by the substitution after agreeing to extend discovery for the purpose of taking Dr. Bal's deposition, uncovering a valid basis for dismissing the case, and otherwise litigating the case in accordance with the court rules. These circumstances validate the trial court's discretionary decision to deny Plaintiff leave to amend her witness list to add a substitute expert. The Court of Appeals should not second-guess the trial court's assessment, based on personal observation, that Plaintiff was giving both the trial court and Defendants the run-around with respect to Plaintiff's standard of care expert, who is a crucial witness in any medical malpractice case.

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CONCLUSION AND RELIEF REQUESTED

Nothing—including the *Dean/Duray* factors—required the trial court to save Plaintiff from her counsel's lack of diligence and candor in failing to secure a qualified expert, preventing Defendants from confirming the expert's lack of qualifications, and then attempting to swap out that expert with a new one before the case could be dismissed. The Court of Appeals somehow reached a result contrary to the published authority governing a motion for leave to amend a witness list, and the unpublished authority holding that a trial court need not consider the *Dean/Duray* factors before denying such a motion. This Court's intervention is needed to clarify this area of the law and remedy the Court of Appeals' erroneous reversal of the trial court's decision in this case. Beaumont Health asks this Court to grant leave to appeal, or alternatively, issue an order peremptorily reversing the Court of Appeals' decision reversing the denial of leave to amend the witness list.

Respectfully submitted,

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