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STATE OF MICHIGAN

IN THE SUPREME COURT

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

Plaintiff-Appellee,

v

BEAUMONT HEALTH,

Defendant-Appellant,

and

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

Defendants.

Supreme Court No. 167716

Court of Appeals No. 365062

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

DEFENDANT-APPELLANT BEAUMONT HEALTH'S
REPLY BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF QUESTION PRESENTED

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

Plaintiff- Appellee says "No."

Defendant-Appellant says "Yes."

The trial court says "Yes."

The Court of Appeals says "No."

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ARGUMENT

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

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

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

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

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violations of court rules and court orders against the harshness of dismissing a case or prejudicing a party as punishment for that violation. The focus is to ensure that the punishment fits the "crime," by asking whether the violation was "willful or accidental," whether the party has violated other court orders, and whether the violation appears to be part of a "deliberate delay." *Duray Dev, LLC v Perrin*, 288 Mich App 143, 165; 792 NW2d 749 (2010). Conversely, where no "crime" (i.e., violation of court rule or order) has been committed, it is both inappropriate and unnecessary to examine these issues. Instead, the party seeking relief (here, amendment of a timely-filed witness list) must satisfy the neutral legal standard for its request.

The Court of Appeals erred by overlaying the "good cause" analysis of MCR 2.401(I)(2) with the *Dean/Duray* sanctions analysis. Neither that Court nor this Court has ever "established a more rigorous analysis" when the denial of a motion to amend an expert witness list "would effectively result in a dismissal" (Opinion, pp 4-5, **AT_APPX 4-5**). The case cited for this proposition, *Dean v Tucker*, 182 Mich App 27; 451 NW2d 571 (1990), involved a plaintiff who inadvertently failed to file a witness list by the stated deadline, which of course violated the court's scheduling order. 182 Mich App at 32. The tardy witness list was struck "as a sanction for plaintiff's tardiness." *Id.* at 31. Therefore, it was appropriate and necessary to determine whether some lesser sanction would serve the purpose of deterring future violations of the court rule by plaintiff counsel without punishing his innocent client by dismissing the case. The same is true of the other cases cited by the panel, each 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

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appear at trial when she did not receive proper notice of date of trial, only notice of settlement conference)).

The *Dean/Duray* considerations of fairness and proportionality, which apply when a ruling is made purely for punitive purposes, do not apply when a ruling is made upon a neutral legal standard ("good cause") that does not punish the party for violating a court rule or court order. It is unnecessary to consider whether a "lesser sanction would serve the interests of justice" when the ruling is not a "sanction" at all. The fact that dismissal results from denial of the motion does not mean that the ruling is a "sanction," simply because it creates the same result as a sanction. If the opposite were true, as the Court of Appeals contends, then dismissal of an expert witness as unqualified under MCL 600.2169 would also require consideration of the *Dean/Duray* factors

Indeed, Defendant cited multiple unpublished cases from the Court of Appeals—including several decided this year—concluding that the *Dean/Duray* sanctions factors do not govern a court's decision to deny leave to amend a timely-filed expert witness list under MCR 2.401(I)(2), because that decision is not a "sanction" intended to punish the party seeking amendment. See Application, pp 2-3. This split of authority, albeit unpublished, demonstrates the need to clarify the circumstances under which a trial court is expected to apply the *Dean/Duray* factors. Failure to make this standard clear will result in a waste of judicial resources in cases where the factors are not applied, and then remanded back down for application of the factors by the trial court, as was the case here. Trial court judges and litigants deserve clarity on the appropriate legal standard for a motion to amend an expert witness list, which Defendant contends was accurately and completely stated in *Tisbury* and *Cox*'s discussion of the "good cause" standard.

Plaintiff does not address or distinguish these unpublished decisions, other than to critique them for distinguishing *Dean* in a footnote or for citing to *Duray* rather than *Dean* (Response, p

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29 fn 4). The Court of Appeals panels in those cases were not, as Plaintiff contends, "consider[ing the] circumstances of each case to determine if such a drastic sanction is appropriate" (Response, p 30, quoting *Dean*, 182 Mich App at 30). They were instead rejecting application of the *Dean/Duray* factors altogether because the denial of a motion to amend a timely-filed expert witness list is not a sanction. The Court of Appeals panel in this case found the factors applicable, contrary to the published authority in *Cox* and *Tisbury* and the unpublished cases previously cited, and this Court's intervention is therefore merited.

B. None of Plaintiff's arguments warrants denial of the application or supports the Court of Appeals' decision.

Several of the cases Plaintiff cites involve a trial court's decision to permit or prevent undisclosed rebuttal witnesses from testifying at trial. See Response, p 24, discussing *Pastrick v General Telephone Co*, 162 Mich App 243; 412 NW2d 279 (1987); and *Elmore v Ellis*, 115 Mich App 609; 321 NW2d 744 (1982) (stating that "[t]rial courts should not be reluctant to allow unlisted witnesses to testify where justice so requires, ***particularly with regard to rebuttal witnesses***") (emphasis supplied). Those rebuttal witnesses were "unlisted" because the need for their testimony did not arise until literally the middle of trial and could not have been anticipated by the parties. Here, Plaintiff knows and has always known she needed qualified expert testimony on the standard of care, and as the trial court noted, had well over a year to sort out any "issues" with her retained expert's qualifications. The "options" that must be considered by a trial court when faced with a mid-trial request for a rebuttal witness are different from the considerations that apply when a party makes a pre-trial request to substitute a witness based on lack of qualifications. Plaintiff's citation to these cases involving rebuttal expert witnesses do not impact the merit of Defendant's argument regarding regular expert witnesses identified before trial.

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Plaintiff's discussion of the factual circumstances which prompted the trial court to deny her request to substitute a new expert is likewise unavailing. First, the fact that Plaintiff reserved the right to amend her expert witness list "should discovery and/or subsequent testimony dictate same" did not allow Plaintiff to substitute a "suddenly unavailable" expert after Plaintiff realized that he was not qualified to give standard of care testimony, and refused to produce him for a court-ordered deposition (Response, p 5).

Second, the alleged "difficulty" with rescheduling Dr. Bal's deposition has never been substantiated with evidence of attempts to contact him or an affidavit of counsel. If Plaintiff counsel was telling the truth when he cancelled Dr. Bal's deposition based on an "emergency" of the witness (**AT_APPX 214-215**), he was necessarily in contact with Dr. Bal at that time, and has shown no evidence that he was subsequently unable to reach Dr. Bal to reschedule the deposition. Instead, the text messages showing that Plaintiff was attempting to secure a new expert only two days after the cancelled deposition suggest that Plaintiff made the conscious decision to switch experts upon realizing that Dr. Bal could not meet the expert qualification standards of MCL 600.2169 (**AT_APPX 228**). Absent proof to the contrary, the trial court was entitled to find that Plaintiff had failed to show "good cause" for substituting an expert at this late stage of the litigation.

Third, the fact that discovery remained open for another month at the time the trial court ruled on the motion to amend the witness list did not require the trial court to grant the motion. The parties were scheduled to facilitate the case at the discovery deadline, in December. Without deposing Plaintiff's standard of care expert, Defendants would have been at a significant disadvantage when facilitating the case. Nor did the trial court's statements that Plaintiff could and should file a motion to amend the witness list rather than simply filing the list mean that the

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trial court lacked the discretion to deny that motion once filed. The trial court gave Plaintiff ample opportunity to demonstrate the required good cause and diligence in securing the witness, and appropriately denied the motion when Plaintiff failed to make that showing to the trial court's satisfaction.

Defendant 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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& BEACH, PLLC

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