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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,

vs.

BEAUMONT HEALTH,

Defendant-Appellant.

and

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

Defendants.

Supreme Court No. 167720
Court of Appeals
Case No. 365062
Oakland C.C. No. 21-187353-NH
Hon. Nanci J. Grant

PLAINTIFF-APPELLEE'S
ANSWER TO DEFENDANT-APPELLANT'S
APPLICATION FOR LEAVE TO APPEAL

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Dated: November 21, 2024

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JURISDICTIONAL STATEMENT

Plaintiff-Appellee takes no issue with Defendant-Appellant's Statement of Jurisdiction, however, denies that Defendant-Appellant has established grounds under MCR 7.305(B).

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COUNTER STATEMENT OF QUESTIONS PRESENTED

I. WHERE THE COURT OF APPEALS CORRECTLY RULED THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFF-APPELLEE'S REQUEST TO AMEND HER WITNESS LIST, SHOULD THIS COURT DENY THE DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

Plaintiff-Appellee states: "Yes."

Defendant-Appellant would state: "No."

The trial court would state: "No."

II. WHERE THE COURT OF APPEALS CORRECTLY RULED THAT THE GRANT OF SUMMARY DISPOSITION WAS PREMATURE, SHOULD THIS COURT DENY THE DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL?

Plaintiff-Appellee states: "Yes."

Defendant-Appellant would state: "No."

The trial court would state: "No."

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INTRODUCTION AND REASON TO DENY LEAVE

In this tragic medical malpractice action, Plaintiff-Appellee Jacqueline Harris died of an acute pulmonary embolism a month after a total knee replacement because Defendant, Dr. Lennox failed to prescribe anticoagulant medication. Before the close of discovery and months before scheduled trial, Harris sought to amend her witness list to include a new standard of care expert. The trial court denied the motion. The trial court subsequently granted summary disposition because Plaintiff-Appellee did not have an expert to testify as to standard of care as a consequence of the trial court's earlier denial of her motion to amend the witness list.

Beaumont seeks leave to appeal the Court of Appeals' decision to vacate these orders and to remand to the trial court to consider the factors in *Dean v Tucker*. The Court of Appeals' decision was consistent with published authority and was based on the circumstances in this case. Beaumont's Application for Leave to Appeal is based on a strained interpretation of the law. Defendant-Appellant essentially seeks a rejection of the central holding of *Dean v Tucker*. This Court should reject this invitation and deny the Application for Leave to Appeal.

STATEMENT OF MATERIAL FACTS

I. UNDERLYING MEDICAL MALPRACTICE PLEADINGS

Prior to the medical treatment at issue, Jacqueline Harris had a history of diabetes mellitus, hypertension, osteoarthritis, and morbid obesity. AT_APPX Vol I,

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pg. 79 (Complaint, ¶ 8).1 Over the years, Harris developed severe osteoarthritis in her left knee and managed this condition conservatively through physical therapy and medications. AT_APPX, Vol I, pg. 79 (Complaint, ¶ 9). As of 2014, Harris' left knee pain began interfering with her activities of daily living and she sought an orthopedic consultation. AT_APPX, Vol I, pg. 79, (Complaint, ¶ 10).

On July 10, 2014, Jacqueline Harris consulted with Dr. Jack Lennox, D.O., an orthopedic surgeon, for her severe left knee pain and dysfunction. AT_APPX, Vol I, pg. 79, (Complaint, ¶ 11). A left total knee replacement was planned to be performed. AT_APPX, Vol I, pg. 79 (Complaint, ¶ 12). Presumably due to her comorbidities, her sedentary lifestyle, and other risk factors for developing thromboembolic phenomena, Harris was prescribed Coumadin for anti-coagulation to be taken perioperatively. AT_APPX, Vol I, pg. 79 (Complaint, ¶ 13). Subsequently, on July 28, 2014, Dr. Lennox performed a left total knee arthroplasty at Beaumont Health's Botsford Hospital in Farmington Hills. AT_APPX, Vol I, pg. 79 (Complaint, ¶ 14). Following her discharge on July 31, 2014, Harris continued to take her anticoagulation medication and underwent laboratory testing for coagulability on a regular basis for approximately one month after the procedure. AT_APPX, Vol I, pg. 79 (Complaint, ¶ 15).

Approximately four years later, sometime prior to May 18, 2018, Harris began to experience right knee pain, which became progressively worse and interfered with her ability to walk. AT_APPX, Vol I, pg. 80 (Complaint, ¶ 16). On May 7, 2019, she

1 Plaintiff-Appellee cite to Defendant-Appellant's Appendix where appropriate. Plaintiff-Appellee has filed her own Appendix to include exhibits not contained in Appellant's.

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returned to her primary care physician complaining of worsening right knee pain, difficulty walking, and right knee edema. AT_APPX, Vol I, pg. 80 (Complaint, ¶ 17). After providing Toradol for pain relief, her primary care physician referred her to Dr. Lennox for evaluation and treatment of her right knee pain. AT_APPX, Vol I, pg. 80 (Complaint, ¶ 18).

On May 14, 2019, Harris agreed to undergo a right total knee arthroplasty to be performed by Jack D Lennox, D.O. AT_APPX, Vol I, pg. 80 (Complaint, ¶ 19). At that time, Dr. Lennox knew or should have known that Harris had significant risk factors for development of post-operative thromboembolic events, specifically hypertension, morbid obesity, diabetes mellitus, and a sedentary lifestyle. AT_APPX, Vol I, pg. 80 (Complaint, ¶ 20). Despite these risk factors, Dr. Lennox failed to prescribe any anticoagulation perioperatively. AT_APPX, Vol I, pg. 80 (Complaint, ¶ 20). On May 29, 2019, Harris was admitted to Beaumont and underwent a right total knee arthroplasty performed by Jack D. Lennox, D.O. AT_APPX, Vol I, pg. 80 (Complaint, ¶ 21).

Although Harris was prescribed Lovenox while undergoing inpatient treatment, she was only prescribed a small dose of aspirin as her only anticoagulation medication. AT_APPX, Vol I, pg. 80 (Complaint, ¶ 22). Neither Coumadin nor any of the other oral anticoagulant medications were prescribed for Harris postoperatively. AT_APPX, Vol I, pg. 80 (Complaint, ¶ 23). Harris saw Dr. Lennox on June 20, 2019, for her first postoperative visit since she had undergone the right total knee arthroplasty in Botsford Hospital, twenty days prior. AT_APPX, Vol I, pg. 80

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(Complaint, ¶ 24).

At that time, Harris was complaining of right knee pain, muscle cramping, joint pain and stiffness, difficulty walking and allegedly only "mild" swelling. AT_APPX, Vol I, pg. 80 (Complaint, ¶ 25). At no time did Dr. Lennox inform Harris of the signs and symptoms of deep vein thrombosis, pulmonary embolism, or any other thromboembolic event, despite the fact that he had not prescribed any meaningful anticoagulation for her following surgery. AT_APPX, Vol I, pg. 80 (Complaint, ¶ 26).

Eight days after her appointment with Dr. Lennox, Jacqueline Harris suddenly collapsed while at home. AT_APPX, Vol I, pg. 81 (Complaint, ¶ 27). EMS transported her to Ascension Providence Hospital in Southfield where she was declared to be deceased. AT_APPX, Vol I, pg. 81 (Complaint, ¶ 28). An autopsy revealed that Harris' death was caused by an overwhelming thromboembolic event causing a cascade of emboli, occluding her pulmonary artery and vena cava and preventing outflow of blood from the heart. AT_APPX, Vol I, pg. 81 (Complaint, ¶ 29). It is alleged that if appropriate anticoagulation had been prescribed by Dr. Lennox to Jacqueline Harris, she would not have died on June 28, 2019, of a massive thromboembolic event. AT_APPX, Vol I, pg. 81 (Complaint, ¶ 30).

In addition to a claim for direct negligence against Dr. Lennox, the Complaint also asserted claims for vicarious liability for Beaumont (including an ostensible agency theory). AT_APPX, Vol I, pg. 84 (Complaint, ¶ 38). A claim for vicarious liability was also alleged against Tri-County Orthopedics for vicarious liability,

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alleging that Dr. Lennox was their agent. AT_APPX, Vol I, pg. 85 (Complaint, ¶ 42). Finally, the fourth count was for *res ipsa locquitur*. AT_APPX, Vol I, pg. 87-88 (Complaint, ¶ 45 – 51).

The Complaint was filed on April 9, 2021, well within the statute of limitations. AT_APPX, Vol I, pg. 78 (Complaint, pg. 1). The Affidavit of Merit was executed by Dr. B. Sonny Bal, M.D., who attested that "during the relevant time period at issue in this matter . . . [he] devot[ed] a majority of [his] professional time for the preceding year to the clinical practice of orthopedic surgery." AT_APPX, Vol I, pg. 57 (AOM Dr. Bal, pg. 1).

II. Relevant Procedural History

A. Plaintiff-Appellee's Amended Witness List and The Motion To Strike

Plaintiff-Appellee filed a timely witness list on April 25, 2022. AT_APPX, Vol II, pg. 121 (Plaintiff's Witness List, pg. 1). The witness list did "reserve the right to amend her witness list should discovery and/or subsequent testimony dictate same." AT_APPX, Vol II, pg. 130 (Plaintiff's Witness List, pg. 10). Dr. Sonny Bal was properly listed as the anticipated orthopedic surgery expert, matching Defendant Lennox's area of practice, at the time of the initial witness list filing. AT_APPX, Vol II, pg. 129 (Plaintiff's Witness List, pg. 9).

Although Dr. Bal had initially signed the Affidavit of Merit, Plaintiff-Appellee's trial counsel later had difficulty obtaining Dr. Bal's compliance in appearing for a

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deposition.[2] Plaintiff-Appellee's trial counsel notified opposing counsel: "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." AT_APPX, Vol II, pg. 215 (Emails Dated 9/16/22, pg. 1). Shortly thereafter, Plaintiff-Appellee's trial counsel also filed an amended witness list on September 16, 2022. AT_APPX, Vol III, pg. 225-227 (Amended Witness List, pg. 9-11). As a result of the unforeseen difficulties, Dr. Bal was substituted for a new orthopedic surgery expert, Dr. John H. Hall, M.D. AT_APPX, Vol III, pg. 225 (Amended Witness List, pg. 9). At that time, approximately three months of discovery remained until December 12, 2022. AT_APPX, Vol II, pg. 136 (Stipulated Order Adjourning Scheduling Order Dates, pg. 2).

On September 20, 2022, Plaintiff-Appellee's counsel provided dates for Dr. John Hall's deposition. Pl-Appellee APPX, pg. 3 (Emails 9/20/22 – 9/21/22, pg. 3). Defense counsel for Dr. Lennox and Tri-County responded that they would be filing a motion to strike, as no motion to amend had been sought and no stipulation had been requested. Pl-Appellee APPX, pg. 3 (Emails 9/20/22 – 9/21/22, pg. 3). Plaintiff-Appellee's trial counsel responded and indicated that based on prior practice between counsel, a motion to amend had not been sought in similar instances by defense counsel and plaintiff had also not made any objections to same. Pl-Appellee APPX, pg. 1-2 (Emails 9/20/22 – 9/21/22, pg. 1 - 2). Nevertheless, Plaintiff-Appellee's trial

[2] For the sake of keeping the flow of the procedural events while supporting all statements with citations to the record below, these representations are primarily contained in later filings. AT_APPX, Vol III, pg. 247 (Plaintiff's Response to Motion to Strike, ¶ 7).

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counsel requested stipulation in the proposed amendment and indicated that a motion to amend would be brought otherwise. Pl-Appellee APPX, pg. 2 (Emails 9/20/22 – 9/21/22, pg. 2). Defense counsel instead indicated that they wished to proceed with a motion to strike and if the motion to strike was denied, amendment would be allowed by the trial court. Pl-Appellee APPX, pg. 1 (Emails 9/20/22 – 9/21/22, pg. 1).

On September 21, 2022, Defendants Tri-County Orthopedics, P.C., and Jack D. Lennox, D.O. filed a motion to strike the amended witness list. AT_APPX, Vol III, pg. 229 (Def. Tri-County's Mot. to Strike Pl's Am. Witness List, pg. 1). Generally, the motion alleged that although certain deadlines had been adjourned and discovery remained open, the witness list deadline had passed. AT_APPX, Vol III, pg. 232 (Def. Tri-County's Mot. to Strike Pl's Am. Witness List, pg. 6). Defendants alleged reliance on the prior initial disclosures and interrogatories and further alleged that relitigation of issues would be required if a new expert was substituted. AT_APPX, Vol III, pg. 233-234 (Def. Tri-County's Mot. to Strike Pl's Am. Witness List, pg. 7 – 8).

On September 23, 2022, Plaintiff-Appellee responded to the motion to strike. AT_APPX, Vol III, pg. 245 (Pl's Resp. to Mot. to Strike, pg. 1). Plaintiff-Appellee noted that discovery was open and that they would supplement any disclosures or interrogatories as necessary if the amendment was granted. AT_APPX, Vol III, pg. 248 (Pl's Resp. to Mot. to Strike, pg. 2). Plaintiff-Appellee noted that the new witness list had only been necessitated due to Dr. Bal's failure to cooperate. AT_APPX, Vol III, pg. 247 (Plaintiff's Resp. to Mot to Strike, pg. 3).

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A hearing was held on October 12, 2022. AT_APPX, Vol III, pg. 254 (10/12/22 Transcript, pg. 3:2). Plaintiff-Appellee's trial counsel stated that "we have been unable to reestablish contact" with Dr. Bal. AT_APPX, Vol III, pg. 255 (10/12/22 Transcript, pg. 4:23 – 4:24). After some clarification, Plaintiff-Appellee's trial counsel proposed to "withdraw Dr. Bal as a listed expert witness." AT_APPX, Vol III, pg. 256 (10/12/22 Transcript, 5:18 – 5:19). The parties disputed whether Dr. Bal could be dismissed; Plaintiff-Appellee's trial counsel correctly pointed out that a challenge had not been brought to the affidavit of merit within the required 91 days. AT_APPX, Vol III, pg. 257 (10/22/22 Transcript, pg. 6:24). Defense counsel for Tri-County conceded that good cause would be required for a motion to strike outside the 91 days. AT_APPX, Vol III, pg. 259 (10/22/22 Transcript, pg. 8:5 – 8:6) ("[W]e can challenge the affidavit of merit with good cause."). Reviewing the arguments, the trial court indicated a motion to amend should have been filed, before filing the amended witness list. AT_APPX, Vol III, pg. 263 (10/22/22 Transcript, pg. 12:1 – 12:4). However, the trial court suggested on the record that once the proper procedure was followed, the motion to amend would be justified, as shown by this portion of the transcript:

> 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?

AT_APPX, Vol III, pg. 264 (10/12/22 Transcript, pg. 13:8 – 13:11) (emphasis added). That same afternoon, an order was submitted and signed which stated the "motion to strike . . . is granted for the reasons stated on the record" and "plaintiff may file a

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motion to amend their witness list to be heard on a later date and time." AT_APPX, Vol III, pg. 269 (10/12/22 Order Striking Plaintiff's Amended Witness List, pg. 2).

B. Plaintiff-Appellee's Motion for Second Amended Witness List

On October 19, 2022, Plaintiff-Appellee filed her motion for leave to file the second amended witness list. AT_APPX, Vol III, pg. 270 (Pl's Emergency Motion for Second Amended Witness List, pg. 1). Plaintiff-Appellee sought leave to substitute Dr. John Hall for Dr. B. Sonny Bal. AT_APPX, Vol III, pg. 271 (Pl's Emergency Motion for Second Amended Witness List, pg. 2). It was noted that "discovery remains open until December of this year" and that there was ample time to allow for this substitution, without prejudicing the other parties. AT_APPX, Vol III, pg. 271 (Pl's Emergency Motion for Second Amended Witness List, pg. 2). The motion relied on *Dean v Tucker*, 182 Mich App 27; 451 NW2d 571 (1990), and argued there would be no prejudice as the new deposition would be accommodated; there was no impending trial; and any delay in amending the witness list was not deliberate, but only necessitated due to Dr. Bal's failure to cooperate. AT_APPX, Vol III, pg. 273 (Pl's Emergency Motion for Second Amended Witness List, pg. 4).

Defendants each filed separate responses to this motion. On October 28, 2022, Defendants Tri-County and Dr. Lennox responded. AT_APPX, Vol III, pg. 277 (Def. Tri-County Resp. to Mot. to Am. Witness List, pg. 1). Defendants contended that Plaintiff-Appellee had not made further attempts to contact Dr. Bal following the August 15, 2022 deposition cancellation, and that the motion to amend was not supported by good cause. AT_APPX, Vol III, pg. 278-279 (Def. Tri-County Resp. to

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Mot. to Am. Witness List, pg. 2 - 3). Defendants Tri-County and Lennox alleged that the *Dean* factors supported their argument; however, they relied on a claim that the witness list was late and that "trial by surprise" would result as Dr. Bal had signed the original affidavit of merit. AT_APPX, Vol III, pg. 288 (Def. Tri-County Resp. to Mot. to Am. Witness List, pg. 12). It should be noted that discovery was not closed, and trial was not set until February 7, 2023. AT_APPX, Vol II, pg. 136 (Stipulated Order Adjourning Scheduling Order Dates, pg. 2). However, Defendants Tri-County and Lennox requested that the motion to amend be denied. AT_APPX, Vol III, pg. 289 (Def. Tri-County Resp. to Mot. to Am. Witness List, pg. 13).

On October 31, 2022, Defendant-Appellant Beaumont filed its response to the motion for leave to file amended witness list. AT_APPX, Vol III, pg. 290 (Def. Beaumont Resp. to Mot. to Am. Witness List, pg. 1). Defendant-Appellant Beaumont similarly alleged that there was a lack of good cause for seeking amendment. AT_APPX, Vol III, pg. 292 (Def. Beaumont Resp. to Mot. to Am. Witness List, pg. 3). Under the *Dean* factors, Beaumont relied on a claim that the initial scheduling order had not been complied with and argued that Plaintiff-Appellee should have known an amendment was necessary as of August 2020. AT_APPX, Vol III, pg. 293 (Def. Beaumont Resp. to Mot. to Am. Witness List, pg. 4). Similarly, they argued "severe prejudice" and "trial by surprise" as Dr. Bal had signed the original affidavit of merit. AT_APPX, Vol III, pg. 293 (Def. Beaumont Resp. to Mot. to Am. Witness List, pg. 4). However, it should be noted that trial was not scheduled to be held until February 7, 2023. AT_APPX, Vol II, pg. 136 (Stipulated Order Adjourning Scheduling Order

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Dates, pg. 2). Defendant-Appellant Beaumont also requested that the motion to amend witness list be denied. AT_APPX, Vol III, pg. 294 (Def. Beaumont Resp. to Mot. to Am. Witness List, pg. 5). The trial court later ruled on this motion for amendment of the witness list, which is summarized in the procedural history provided below, in an attempt to maintain the chronological sequence of filings as clearly as possible.

C. Plaintiff-Appellee's Motion for Voluntary Dismissal Without Prejudice

On November 1, 2022, Plaintiff-Appellee filed her motion for voluntary dismissal of the case. AT_APPX, Vol III, pg. 302 (Pl's Mot. for Vol. Dismissal, pg. 1). This motion was brought under MCR 2.504(A)(2) and noted that "Plaintiff has filed the appropriate order should the Court grant this motion." AT_APPX, Vol III, pg. 303 (Pl's Mot. for Vol. Dismissal, pg. 2). The motion further noted: "[s]ince the Statute of Limitations has not expired on this case as the Letters of Authority were issued January 13, 2021, making the Statute of Limitations run on this case on January 13, 2023, Plaintiff is seeking leave to voluntarily dismiss this action without prejudice." AT_APPX, Vol III, pg. 303 (Pl's Mot. for Vol. Dismissal, pg. 2). The brief cited the applicable court rule and further provided that "Defendants will not be prejudiced by this as any litigation work product that has been conducted on the case at this time can be carried over to the subsequent lawsuit." AT_APPX, Vol III, pg. 306 (Pl's Mot. for Vol. Dismissal, pg. 5). A proposed order was separately filed on this same date. AT_APPX, Vol III, pg. 297 (Order of Voluntary Dismissal of All Defendants 11/1/22, pg. 1).

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Defendants each filed separate responses to this motion as well. On November 4, 2022, Defendants Tri-County and Lennox filed their response to the motion. Pl-Appellee APPX, pg. 15 (Def. Tri-County Resp. to Mot. Vol. Dismissal, pg. 1). The motion admitted that the discovery cutoff was December 12, 2022. Pl-Appellee APPX, pg. 16 (Def. Tri-County Resp. to Mot. Vol. Dismissal, pg. 2). They objected to the voluntary dismissal as eight depositions had been taken, including economist Dr. Thomson, hematologist Dr. Baker, and forensic expert Dr. Dragovic, as well as "decedent's relatives" and Dr. Lennox. Pl-Appellee APPX, pg. 16 (Def. Tri-County Resp to Mot. Vol. Dismissal, pg. 2). Defendants also alleged that they would "potentially lo[se] limitations period defenses" and "expending yet more fees." Pl-Appellee APPX, pg. 16-17 (Def. Tri-County Resp. to Mot. Vol. Dismissal, pg. 2 - 3). The date of issuance for the letters of authority was not contested. Pl-Appellee APPX, pg. 19 (Def. Tri-County Resp. to Mot. Vol. Dismissal, pg. 5). Defendants Tri-County and Lennox requested that the trial court only enter a dismissal with prejudice. Pl-Appellee APPX, pg. 19 (Def. Tri-County Resp. to Mot. Vol. Dismissal, pg. 5).

On November 4, 2022, Defendant-Appellant Beaumont filed a motion for summary disposition challenging Dr. Bal's affidavit of merit. Pl-Appellee APPX, pg. 31 (Def Beaumont MSD, pg. 2). For the sake of chronology, this is briefly noted here as it explains the arguments raised in response to the motion for voluntary dismissal. On November 7, 2022, Defendant-Appellant Beaumont filed a separate response to the motion requesting voluntary dismissal. Pl-Appellee APPX, pg. 8 (Def. Beaumont Resp. to Mot. Vol. Dismissal, pg. 1). This motion alleged that Dr. Bal's attestation of

practice time in the affidavit of merit was inaccurate. Pl-Appellee APPX, pg. 9 (Def. Beaumont Resp. to Mot. Vol. Dismissal, pg. 2). The motion noted that the previous proposed order of dismissal on October 26, 2022, had been rejected and recited the filing of the motions for amended witness list, the motion for voluntary dismissal on November 1st, and the contemporaneous proposed order for voluntary dismissal on that same date. Pl-Appellee APPX, pg. 9 (Def. Beaumont Resp. to Mot. Vol. Dismissal, pg. 2). Defendant-Appellant Beaumont opposed the November 1st order as they had not stipulated to it. Pl-Appellee APPX, pg. 10 (Def. Beaumont Resp. to Mot. Vol. Dismissal, pg. 3). They further alleged the pending motion for summary disposition entitled them to have the trial court refuse the order of dismissal without prejudice under *McLean v McElhaney*, 269 Mich App 196; 711 NW2d 775 (2005). Pl-Appellee APPX, pg. 11 (Def. Beaumont Resp. to Mot. Vol. Dismissal, pg. 4). The motion alleged that "Defendants have expended considerable resources acquiring experts." Pl-Appellee APPX, pg. 11 (Def. Beaumont Resp. to Mot. Vol. Dismissal, pg. 4). The remainder of the voluntary dismissal motion response reincorporated the same arguments also raised in the motion for summary disposition challenging Dr. Bal's affidavit of merit. Pl-Appellee APPX, pg. 12-14 (Def. Beaumont Resp to Mot. Vol. Dismissal, pg. 5 – 7). The trial court also later ruled on this motion for voluntary dismissal.

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D. Defendant-Appellant Beaumont's MSD Regarding AOM & Trial Court's 11/14/22 Order Regarding Witness List/Voluntary Dismissal

Three days before its response to the motion for voluntary dismissal, on November 4, 2022, Defendant-Appellant Beaumont filed its motion for summary disposition challenging the affidavit of merit signed by Dr. Bal. Pl-Appellee APPX, pg. 31 (Def. Beaumont MSD, pg. 2). The motion alleged that Dr. Bal had been retired for more than a year prior to the events at issue and was not qualified due to lack of sufficient practice or instruction in the specialty area (i.e., orthopedic surgery) within the time frame required by MCL § 600.2169. Pl-Appellee APPX, pg. 32-33 (Def Beaumont MSD, pg. 3 - 4). Defendant-Appellant Beaumont primarily relied upon three sources of evidence: (1) a purported LinkedIn profile for Dr. Bal; (2) a September 23, 2020 deposition; and (3) trial testimony from 2019. Pl-Appellee APPX, pg. 40-42 (Def. Beaumont MSD, pg. 11-13). Defendant-Appellant Beaumont challenged Plaintiff-Appellee's prior attempts to amend the witness list or to voluntarily dismiss the case as improper. Pl-Appellee APPX, pg. 42 (Def. Beaumont MSD, pg. 13). Notably, Defendant-Appellant Beaumont conceded that the issue was whether there was a "reasonable believe [sic]" that "when he signed the Affidavit in this case," Plaintiff-Appellant's counsel believed Dr. Bal was qualified. Pl-Appellee APPX, pg. 43 (Def. Beaumont MSD, pg. 14). Defendant-Appellant Beaumont generally argued that Plaintiff-Appellee's trial counsel did not have a reasonable belief based on the above materials and the case should be dismissed with prejudice. Pl-Appellee APPX, pg. 43 (Def. Beaumont MSD, pg. 14).

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After Defendant-Appellant Beaumont's motion and before Plaintiff-Appellee filed her response, the trial court issued an order on November 14, 2022, regarding the previous motion to amend witness list and request for voluntary dismissal. AT_APPX, Vol III, pg. 308 (11/14/22 Order, pg. 1). The order indicates that oral argument was waived pursuant to MCR 2.119(E)(3). AT_APPX, Vol III, pg. 308 (11/14/22 Order, pg. 1).

> The Court finds a voluntary dismissal without prejudice at this stage of the litigation is highly prejudicial to Defendants. This matter was filed on April 9, 2021. Witness lists were due by May 6, 2022 with discovery closing on June 7, 2022 [sic]. Trial in this matter is currently set for February 7, 2023. Allowing an amended witness list at this late stage is also highly prejudicial.

AT_APPX, Vol III, pg. 308 (11/14/22 Order, pg. 1) (emphasis added). Again, discovery was not actually closed and was set to close later, on December 12, 2022. AT_APPX, Vol II, pg. 136 (Stipulated Order to Adjourn Scheduling Order Dates, pg. 2). This order was mistaken regarding this key date.

Following the issuance of this order, Plaintiff-Appellee filed her response to the motion to dismiss on December 7, 2022. Pl-Appellee APPX, pg. 44 (Pl's Resp. to Def. Beaumont MSD - AOM, pg. 1). The response cited *Grossman v Brown*, 470 Mich 593; 685 NW2d 198 (2004), as only requiring a reasonable belief of qualifications at the time of signature. Pl-Appellee APPX, pg. 46 (Pl's Resp. to Def. Beaumont MSD - AOM, pg. 3). The response indicated that counsel had relied upon Dr. Bal's sworn testimony in the affidavit itself in forming a reasonable belief that he was qualified. Pl-Appellee APPX, pg. 46 (Pl's Resp. to Def. Beaumont MSD - AOM, pg. 3). Counsel noted that the materials provided were inadmissible hearsay; had not been shown to have been

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considered by counsel at the time the affidavit was signed; and portions of the deposition testimony supported "retirement" simply meant when financial retirement benefits began being paid to Dr. Bal through the university. Pl-Appellee APPX, pg. 47 (Pl's Resp. to Def. Beaumont MSD – AOM, pg. 4). Plaintiff-Appellee submitted that because no hearsay exception had been set forth, the materials could not be considered and that even if the materials were admissible, Dr. Bal's credibility was for the jury. Pl-Appellee APPX, pg. 48 (Pl's Resp. to Def. Beaumont MSD – AOM, pg. 5). Plaintiff-Appellee's counsel further responded that the previous attempts to amend the witness list and seek voluntary dismissal had been necessitated by Dr. Bal's failure to cooperate with a deposition. Pl-Appellee APPX, pg. 52-53 (Pl's Resp. to Def. Beaumont MSD – AOM, pg. 9 - 10).

Plaintiff-Appellee also challenged the evidence submitted, including indicating that the supposed "LinkedIn" profile contained a link to LinkedIn itself; apparently, the materials submitted were a slideshow with no identification of how the materials had been sourced or dated. Pl-Appellee APPX, pg. 54-55 (Pl's Resp. to Def. Beaumont MSD - AOM, pg. 11 - 12). Plaintiff-Appellee further submitted that no hearsay exception for the deposition excerpts had been provided and moreover, the testimony could be interpreted as referring to financial payments deemed retirement benefits. Pl-Appellee APPX, pg. 55 (Pl's Resp. to Def. Beaumont MSD - AOM, pg. 12).

It should also be noted that a motion for reconsideration regarding the witness list and voluntary dismissal order was also filed and denied in the interim, before the summary disposition ruling was issued by the trial court. AT_APPX, Vol III, pg. 314

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(12/8/22 Opinion and Order, pg. 1). However, the trial court's order repeated the same incorrect timeline for the scheduling order:

> Plaintiff filed her Complaint, along with her Affidavit of Merit, on April 9, 2021. Discovery was open until June 7, 2022 [sic]. Plaintiff is now claiming that Dr. Bal is "uncooperative" despite having over one year to sort out any issues with her experts. Had Plaintiff diligently prosecuted her case, she would have realized Dr. Bal was uncooperative and/or unqualified to testify much sooner than November of 2022. At this stage of the litigation, a voluntary dismissal without prejudice or leave to file an amended witness list is simply inappropriate.

AT_APPX, Vol III, pg. 315 (12/8/22 Order Denying Reconsideration – Amended Witness List & Voluntary Dismissal Rulings, pg. 2) (emphasis added).

The final order ruling on the motion for summary disposition, dismissing all defendants, and closing the case was issued on December 15, 2022. AT_APPX, Vol III, pg. 310 (Final Order, pg. 1). The order reflects that "the Court waives oral argument pursuant to MCR 2.119(E)(3) and grants the motion." AT_APPX, Vol III, pg. 310 (Final Order, pg. 1). The order examined the statutory language of MCL § 600.2912d at first. AT_APPX, Vol III, pg. 312 (Final Order, pg. 3). The trial court's order did not examine any hearsay challenges and accepted the testimony cited by Defendant-Appellant Beaumont at face value according to their proposed interpretation. AT_APPX, Vol III, pg. 312 (Final Order, pg. 3). The trial court stated: "the Court agrees that Plaintiff's counsel may 'reasonably' rely upon the statements of experts, but discovery ended in June 2022 [sic];[3] over one year after the complaint

[3] Discovery was not closed, but actually remained open until December 2022. AT_APPX Vol II, Pg. 136 (Stipulated Order Adjourning Scheduling Order Dates, pg. 2) ("Discovery cut-off of 6/7/22 is adjourned until December 12, 2022, the facilitation date agreed upon by the parties.").

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was filed." AT_APPX, Vol III, pg. 312 (Final Order, pg. 3). The trial court concluded: "[t]he Court finds Plaintiff's Affidavit of Merit invalid. Absent a valid affidavit of merit, a complaint for medical malpractice fails as a matter of law. Therefore, this is a final order and closes the case." AT_APPX, Vol III, pg. 313 (Final Order, pg. 4). A motion for reconsideration was timely filed by Plaintiff-Appellant on January 4, 2023, and the order denying reconsideration on this order was issued on February 3, 2023. AT_APPX, Vol III, pg. 316 (Pl's Motion for Reconsideration of Final Order, pg. 1); Pl-Appellee APPX, pg. 5 (Order Denying Reconsideration of Final Order – MSD, pg. 1).

E. COURT OF APPEALS' OPINION

On February 23, 2023, Plaintiff-Appellee (as Plaintiff-Appellant) filed an appeal of right. The Court of Appeals issued its decision on September 12, 2024. AT_APPX Vol I, pg. 1 (Court of Appeals' Opinion, pg. 1). The Court of Appeals' opinion includes a detailed and accurate presentation of the alleged malpractice and the procedural history. The Court noted that discovery was originally set to end in June 2022, but was extended to December 12, 2022, in a signed, stipulated order. AT_APPX Vol I, pg. 2 (Court of Appeals' Opinion, pg. 2). In footnote one, the court noted that Beaumont's motion for summary disposition as it relates to vicarious liability for Dr. Lennox had never been decided. AT_APPX Vol I, pg. 2 (Court of Appeals' Opinion, pg. 2).

The Court continued by summarizing the procedural history that, after the Plaintiff-Appellee advised Defendants that their expert, Dr. Bal, was no longer communicative, they filed an amended witness list, replacing Dr. Bal with Dr. Hall.

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The trial court struck the amended witness list because it was filed without leave of the court, and then the trial court denied a subsequent motion for leave to file the amended witness list, citing the age of the litigation and prejudice to defendants. The trial court also denied Plaintiff-Appellee's motion to voluntarily dismiss without prejudice, again citing prejudice to the defendants. AT_APPX Vol I, pg. 2 (Court of Appeals' Opinion, pg. 2).

The Court of Appeals continued that Defendants discovered that Dr. Bal had previously testified that he retired from the practice of medicine in 2017, and accused plaintiff of gamesmanship. Defendants moved for summary disposition on grounds that Dr. Bal had not been qualified to prepare and submit the Affidavit of Merit with the Complaint. Plaintiff argued that they reasonably believed he was qualified when he signed the Affidavit of Merit. Defendants argued that the belief was not reasonable because the fact of his retirement was easily ascertained. AT_APPX Vol I, pg. 2-3 (Court of Appeals' Opinion, pg. 2-3).

The Court of Appeals summarized the trial court's rulings granting the summary disposition pursuant to MCR 2.116(C)(10), finding that Dr. Bal was not qualified to prepare the Affidavit of Merit and finding that Plaintiff's counsel should have cured the error sooner, and "commented that discovery had been closed since June 2022, seemingly ignoring the order that extended discovery." AT_APPX Vol I, pg. 3 (Court of Appeals' Opinion, pg. 3).

The Court of Appeals cited principles of law that relate to the analysis of this case. Notably, that "witness lists are an element of discovery" and that "[t]he ultimate

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objective of pretrial discovery is to make available to all parties, in advance of trial, all relevant facts which might be admitted into evidence at trial." *Grubor Enterprises, Inc v Kortidis*, 201 Mich App 625, 628; 506 NW2d 614 (1993). AT_APPX Vol I, pg. 4 (Court of Appeals' Opinion, pg. 4). The Court further acknowledged that because the motion for leave to amend the witness list to add Dr. Hall was after the deadline to file witness lists, "[i]t was [ ] plaintiff's burden to demonstrate good cause for the late addition of a new expert witness," citing *Cox v Hartman*, 322 Mich App 292, 315; 911 NW2d 219 (2017), and that the court should consider whether prejudice would result from granting the motion to add the expert. *Cox*, in turn, cited MCR 2.401(I)(2) related to the "good cause" standard. AT_APPX Vol I, pg. 4 (Court of Appeals' Opinion, pg. 4).

The Court of Appeals continued however to address the central issue that Defendant-Appellant asks this Honorable Court to review in its application for leave to appeal.

> 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. The parties disagree regarding whether the trial court's decision required the more rigorous analysis. 'Disallowing a party to call witnesses can be a severe punishment, equivalent to a dismissal.' *Duray Dev, LLC v Perrin*, 288 Mich App 143, 164; 792 NW749 (2010). 'But that proposition does not mean that disallowing witnesses is *always* tantamount to a dismissal. Nor does it mean that a trial court cannot impose such a sanction even if it is equivalent to a dismissal.' *Id*.

AT_APPX Vol I, pg. 4-5 (Court of Appeals' Opinion, pg. 4-5).

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The Court then discussed the specific facts related to this case and concluded that, in this case, "the trial court's order disallowing plaintiff from exchanging Dr. Bal for Dr. Hall was an effective dismissal because plaintiff could not possibly prove the claims brought in the complaint" without an expert. AT_APPX Vol I, pg. 5 (Court of Appeals' Opinion, pg. 5)

Hence, because the trial court's order denying leave to amend the witness list effectively resulted in a dismissal, the trial court was required to engage in the more rigorous consideration before precluding the amendment, citing *Dean v Tucker*, 182 Mich App at 32. Additionally, the Court of Appeals cited *Gueye v State Farm Mut Auto Ins Co*, 343 Mich App 473, 489; 997 NW2d 307 (2022), for the proposition that Michigan law favors the 'disposition [of] litigation on the merits[.]' AT_APPX Vol I, pg. 6 (Court of Appeals' Opinion, pg. 6). Thereafter, the Court set forth the *Dean* factors trial courts must consider before effectively dismissing a case.

The Court concluded that, although the trial court did not speak about sanctions for failure to timely file the corrected witness list, "the sanction was plain from the decision. That is, the trial court's order barred plaintiff from changing the expert witness needed to prove standard of care and breach related to the alleged medical malpractice of Dr. Lennox. As a matter of law, . . . this caused plaintiff's claim to fail, effectively resulting in a dismissal." AT_APPX Vol I, pg. 6 (Court of Appeals' Opinion, pg. 6). The Court of Appeals then quoted the trial court's basis for the denial noting that prejudice is but one of the *Dean* factors and that the trial court was required to consider other potential sanctions before entering an order that

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effectively amounted to a dismissal. Additionally, the Court noted that the trial court incorrectly cited June 7, 2022, as the close of discovery, when the deadline had been extended to December 12, 2022. "Thus, discovery was still open, which, at the very least, reduces any prejudice to the defense." AT_APPX Vol I, pg. 7 (Court of Appeals' Opinion, pg. 7).

> In sum, by denying plaintiff's motion for leave to file an amended witness list, the trial court effectively dismissed plaintiff's case for a failure to timely file a final witness list. Although the sanction is not named in the same order, the effect was preordained by the substance of the order. Briefly, without an expert witness in orthopedic surgery, plaintiff's case simply could not progress. Because the trial court's decision amounted to a dismissal, the trial court was required to consider the *Dean* factors, especially the possibility of sanctions other than an effective dismissal, such as a fine for the late amendment and the additional discovery needed to be undertaken by the defense. The trial court's failure to do so was an abuse of discretion, warranting reversal and a remand for further proceedings at which time the trial court can engage in the proper analysis with reference to the proper facts."

AT_APPX Vol I, pg. 7 (Court of Appeals' Opinion, pg. 7).

With regard to the summary disposition motion, the Court of Appeals held that the trial court's grant of the motion was premature in light of the previous analysis regarding the denial of the motion to amend. "Whether the trial court, after performing the appropriate analysis, will decide similarly on remand remains to be seen. But because there is a possibility plaintiff will be permitted to amend the witness list and have a qualified expert witness, the trial court's summary-disposition order was premature." AT_APPX Vol I, pg. 10 (Court of Appeals' Opinion, pg. 10). Accordingly, the order to grant summary disposition was vacated. AT_APPX Vol I, pg. 11 (Court of Appeals' Opinion, pg. 11).

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The Court of Appeals declined to consider Beaumont's cross appeal as to its motion for summary disposition based on vicarious liability because the trial court did not rule on the issue. AT_APPX Vol I, pg. 11 (Court of Appeals' Opinion, pg. 11).

Defendant-Appellant Beaumont's Application for Leave to Appeal followed.

STANDARD OF REVIEW

This Court considers grounds for granting an Application for Leave to Appeal under MCR 7.305(B). Defendant-Appellant relies on MCR 7.305(B)(3), and MCR 7.305(5)(b). Grounds under MCR 7.305(B)(3) are that "the issue involves a legal principle of major significance to the state's jurisprudence." Defendant-Appellant also relies on MCR 7.305(5)(b), which provides grounds for leave where "the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals."

LAW AND ARGUMENT

I. THERE ARE NO GROUNDS TO GRANT THE APPLICATION FOR LEAVE TO APPEAL WHERE THE COURT OF APPEALS' DECISION TO REMAND FOR CONSIDERATION ON *DEAN/DURAY* FACTORS WAS A SOUND DECISION SINCE THE TRIAL COURT'S DENIAL OF THE MOTION TO AMEND AMOUNTED TO A DISMISSAL FOR VIOLATION OF A DISCOVERY RULE.

A. THE COURT OF APPEALS CORRECTLY RULED THAT THE TRIAL COURT DECISION WAS AN ABUSE OF DISCRETION IN FAILING TO APPLY THE *DEAN V TUCKER* FACTORS.

The Court of Appeals vacated the order denying Plaintiff-Appellee's motion to file an amended witness list and granting summary disposition in favor of Beaumont as premature where the basis for granting the motion was the absence of an expert to testify as to standard of care. Additionally, the Court of Appeals declined to consider Beaumont's alternative grounds of vicarious liability because the trial court had not ruled on this issue in the first instance.

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Defendant-Appellant now challenges the basic premise of the *Dean/Duray* factors in the context of this case relying heavily on unpublished decisions. There is no basis for this Court to grant the application for leave to appeal where the Court of Appeals' decision was consistent with published authority and, as required by *Dean* and *Duray,* based on the unique circumstances of the case.

Severe sanctions are generally appropriate only when a party flagrantly and wantonly refuses to facilitate discovery, not when failure to comply with a discovery request is accidental or involuntary." *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 86; 618 NW2d 66 (2000) (citation omitted).

It is well established that "disallowing a party to call witnesses can be a severe sanction." *Duray Dev, LLC v Perrin,* 288 Mich App 164, 165; 792 NW2d 749 (2010). In such a context, the "record should reflect that the trial court gave careful consideration to the factors involved and considered all of its options." *Id.* (emphasis added). Simply put, there is no indication that the trial court considered *any* other options or recourse. AT_APPX Vol III, pg. 308 (11/14/22 Order, pg. 1). It simply incorrectly determined the discovery cutoff had run and refused to consider any other relief. Accordingly, the Court of Appeals correctly concluded, and *Duray* supports, that an abuse of discretion was committed below.

The substantive law of this state has long supported allowing amendments to allow for new witnesses for proper adjudication on the merits. "Trial courts should not be reluctant to allow unlisted witnesses to testify when the interest of justice so requires." *Elmore v Ellis*, 115 Mich App 609, 613; 321 NW2d 744 (1982). "[J]ustice is

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best served where an unlisted witness can be permitted to testify while the interests of the opposing party are adequately protected" and "the jury is afforded a fuller development of the facts surrounding the case." *Pastrick v General Tel Co of Michigan and Sub-Surface Constr Co*, 162 Mich App 243, 245; 412 NW2d 279 (1987). In particular, *Pastrick* notes that a trial court has options, such as allowing defendants to secure additional experts and requiring prompt depositions of the new expert. *Id.* at 246-47. Those options existed here as well.

In *Dean v Tucker,* under similar facts to those in the case at bar, the Court found an abuse of discretion. In *Dean,* the trial court ordered that discovery was closed and parties were to file witness lists within 30 days – August 6, 1987. *Id.* at 29. The plaintiff failed to comply and sought relief from the trial court in allowing a late witness list. *Id.* The late witness list was struck and summary disposition was granted "given plaintiff's inability to present expert testimony" on these grounds. *Id.* at 29-30. After summary disposition was granted, Plaintiff-Appellant filed an appeal by right from the summary disposition order and also contested the denial of their late witness list. *Id.* at 31 ("Accordingly, plaintiff having properly claimed an appeal from the order granting summary disposition, is now free to challenge the other rulings of the trial court, including its refusal to extend time for filing the witness list and the preclusion of plaintiff's witnesses as a sanction for failure to timely file the list.").

Although this Honorable Court stressed the significance of procedural rules, it emphasized fundamental justice above all else. "That is, while rules of practice give

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direction to the process of administering justice and must be followed, their application should not be a fetish to the extent that justice in a particular case is not done." *Dean,* 182 Mich App at 32. "[T]he record should reflect that the trial court gave careful consideration to the factors involved and considered all of its options in determining what sanction was just and proper in the context of the case before it." *Id.* This Honorable Court outlined the factors that should be considered in determining whether a party may call a new witness: (1) whether the failure to disclose the witness earlier was willful or accidental; (2) whether the party seeking to produce the witness complied with discovery requests; (3) whether there is prejudice to the non-moving party; (4) whether the opposing party had actual notice and the length of time before trial that the opposing party received notice; (5) whether the moving party has engaged in deliberate delay; (6) whether there is general compliance by the moving party with the court's other orders; (7) whether the moving party has timely attempted to cure the failure to disclose the witness and (8) whether a lesser sanction would better serve the interest of justice. *Id.* Through application of these factors to its case, this Honorable Court concluded: "the trial court in the instant case abused its discretion . . . where the trial court gave few reasons to justify its decision, merely stating that to grant the request would be unfair and that it would reopen discovery as to all of the witnesses." *Id.* at 32-33.

Even on a cursory review, the underlying *Dean* ruling that amending the witness list would be "unfair" and "reopen discovery" is substantially similar to our trial court's order improperly concluding that discovery had closed (when it was

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actually open) and that it was "too late a stage" in the proceedings to allow amendment of the witness list. AT_APPX Vol III, pg. 308 (11/14/22 Order, pg. 1). There is no substantial difference between the improper justification provided by the trial court in *Dean* and the improper justification provided by the trial court in the case at bar and the Court of Appeals correctly noted as much. Both orders gave only cursory consideration to the substantial injury at hand, the options available, and the substantial harm of dismissal. Instead, *Dean* supports the trial court must give "careful consideration" to "the factors" and "all of its options." *Id.* at 32.

That there are unpublished decisions that rejected application of the *Dean/Duray* factors to requests to amend witness lists, even where the denial resulted in dismissal, does not undermine the fundamental premise of *Dean* and *Duray* – that being that dismissal as a discovery sanction should not be employed without first engaging in a more rigorous consideration of the factors set forth. In this case, the Court correctly concluded that filing of witness lists is part of discovery. *Grubor,* 201 Mich App at 628. In this case, the trial court's denial of the motion was premised upon an incorrect understanding of the stage of the litigation, where discovery was still open and trial was not imminent. With discovery open, it was premature to conclude that plaintiff could not have established a prima facie case of malpractice with a new expert. As such, the denial of the motion to amend was an effective dismissal warranting the more rigorous review prior to dismissal.

B. *COX V HARTMAN* DOES NOT UNDERMINE THE *DEAN V TUCKER* FACTORS AND THE COURT OF APPEALS CORRECTLY APPLIED THEM TO THIS CASE.

Cox v Hartman, 322 Mich App 292; 911 NW2d 219 (2017), which forms the

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foundation for Defendant-Appellant's arguments on this Application for Leave to Appeal, involved an entirely different set of facts from those below. In *Cox*, plaintiff did not move to add a new expert until four days after summary disposition was granted and the evidence established they were on notice of the issue since the expert's deposition ten months earlier. Additionally, on the day of the hearing on plaintiff's motion to add a new expert witness, plaintiff's counsel had not retained a new expert witness and had not provided notice of the identity of any new expert witness to defendants. *Id*. at 316.

The Court in *Cox* did not discuss, let alone analyze, the *Dean v Tucker* case and further, the denial of the request to add a witness was not a discovery sanction where discovery had closed before the summary disposition motion was filed. *Cox*. 322 Mich App at 297. This is a significant, important distinction to the case at bar. The *Cox* decision in no way undermines nor is it inconsistent with *Dean v Tucker*.

As explained by the Court of Appeals in the case at bar, witness lists are an element of discovery. *Grubor*, 201 Mich App at 628. The trial court's denial of the motion to amend the witness list as untimely and prejudicial to defendants was an effective dismissal of the case. As such, prior to imposing this sanction, the trial court was required to engage in the more rigorous analysis set forth in *Dean* and *Duray*. Accordingly, the remand for that purpose is entirely proper and no grounds for leave to appeal exist.

Regardless of Defendant-Appellant's suggestion to the contrary, the principles in *Dean* and *Duray* have not been abandoned by any court and remain the law.

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Defendant-Appellant's interpretation of *Dean* and the reliance on unpublished authority is misplaced.

Defendant-Appellant argues that the panels of the unpublished opinions 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.' Defendant-Appellant Application for Leave to Appeal, p 16. Indeed, the Court of Appeals below quoted *Cox* in stating that "that proposition does not mean that disallowing witnesses is *always* tantamount to a dismissal." AT-APPX, Vol I, pg.4-5 (Court of Appeals' Opinion, pg. 4-5). In fact, in this case, as in the unpublished decisions cited, the courts considered the unique circumstances of each case to ascertain whether there was a sanction for a discovery violation, whether the sanction amounted to a dismissal, and whether it was warranted under the facts of the case.[4] In the case at bar, the Court of Appeals noted the trial court's repeated reference to close of discovery, which in fact was open for an additional three months, as a significant fact that is distinguishable from the facts in *Cox*.

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4 With regard to *Morris*, AT_APPX Vol I, pg. 36-42, the Court discussed *Dean* in a footnote, distinguishing it on grounds that the case did not involve a complete failure to file a witness list. The motion for reconsideration in *Morris* was denied on October 30, 2024, which means there is still time for filing an Application for Leave to Appeal to this Court. The Court of Appeals' suggestion in footnote two - that a court must be more cautious before dismissal for a complete failure to file a witness list than it might need to be where a witness list was filed but an amendment is sought – is both counter-intuitive and undermines the basic principles of justice that Michigan law favors "disposition [of] litigation on the merits" *Gueye v State Farm*, 343 Mich App at 489. As for *Howard-Reed*, AT_APPX Vol I, pg. 19-27, the Court did not even address *Dean v Tucker*.

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Additionally, Defendant-Appellant states that the panel failed to explain why it was appropriate to disregard the "good cause" standard for amending witness lists. Defendant-Appellant Application for Leave to Appeal, p 16. In fact, the Court of Appeals in this case noted that, while the "good cause" standard is typical for deciding a motion to amend a witness list [MCR 2.401(I)(2)], the Court of Appeals has "established a more rigorous analysis when the denial of such would effectively result in a dismissal." AT_APPX Vol I, pg. 4 (Court of Appeals' Opinion, pg. 4).

As such, the Court of Appeals in the case at bar clearly considered published applicable case law and the unique facts before it to arrive at its decision to remand this case for consideration of the *Dean* factors. There is nothing that requires further consideration by this Court. The unpublished cases cited by Defendant-Appellant simply reflect that the courts are employing the holding in *Dean v Tucker* – that prior to barring an expert witness or dismissing an action as a sanction for a discovery violation – it "necessitates a consideration of the circumstances of each case to determine if such a drastic sanction is appropriate." *Id*. at 32.

CONCLUSION & RELIEF REQUESTED

The Court of Appeals' decision to remand for consideration of the *Dean/Duray* factors is justified and no grounds exist for granting the Defendant-Appellant's Application for Leave to Appeal. There are no issues that involve a major issue of legal significance to this state's jurisprudence where the published authority is long-standing and consistent. Additionally, where the Court of Appeals relied on published authority and an analysis of the unique circumstances at issue, the decision to

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remand for purposes of considering the *Dean* factors is consistent with Michigan law and is in no need of review by this Court.

Accordingly, Plaintiff-Appellee respectfully requests that this Honorable Court DENY Defendant-Appellant's Application for Leave to Appeal.

Respectfully Submitted:

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/s/ Tali F. Wendrow

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Dated: November 21, 2024

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CERTIFICATE OF COMPLIANCE

I certify that ***Plaintiff-Appellee's Answer to Defendant-Appellant's Application for Leave to Appeal*** complies with the type-volume limitations set forth in MCR 7.212(B). I am relying on the word-processing system used to produce this document, Microsoft Word. This brief uses a 12-point proportional Century Schoolbook font and the word count for this brief under MCR 7.212(B)(2) is 8,520 words.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of ***Plaintiff-Appellee's Answer to Defendant-Appellant's Application for Leave to Appeal*** and the supporting appendix were electronically filed and served on the date indicated below via MiFile-TrueFiling, which will provide a copy to all parties.

/s/Tali F. Wendrow
Tali F. Wendrow

Dated: November 21, 2024