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STATE OF MICHIGAN
IN THE SUPREME COURT

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

Plaintiff-Appellee,

v

BEAUMONT HEALTH,

Defendant-Appellant,

and

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

Defendants.

Supreme Court No. 167716

Court of Appeals No. 365062

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

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DEFENDANT-APPELLANT BEAUMONT HEALTH'S SUPPLEMENTAL BRIEF

APPENDIX FOR DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF (Attached Separately)

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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

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 challenges 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, **4a**). 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, **5a-6a**). 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, multiple 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 *Snead v Ascension Providence Hosp*, unpublished opinion per curiam of Court of Appeals, issued December 14, 2023; 2023 WL

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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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8669033, at *4 (Docket No. 362008) (**323a**) (holding that "plaintiff's reliance on *Dean* is misplaced" because "the legal question in *Dean* arose in the context of a discovery sanction"); *Pawlowski v Kosar*, unpublished opinion per curiam of Court of Appeals, issued May 30, 2024; 2024 WL 2795604, at *8 (Docket No. 365803) (**34a**) (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) (**22a**) (same); *Witt v Glazer*, unpublished opinion per curiam of Court of Appeals, issued January 20, 2011; 2011 WL 192391 at *6 (Docket No. 294057) (**17a**) (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 (**41a**) (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").

The diligent plaintiff who has good cause to amend his or her witness list easily satisfies the burden of MCR 2.401(I)(2). There is no need to add additional protections for plaintiffs who cannot satisfy this standard because they have not been diligent or do not have a good reason to amend the witness list. Yet that is exactly what the *Dean/Duray* factors do, by requiring a trial

court to impose a lesser sanction short of denying leave to amend if it would serve the interests of justice. The factors shift the focus from the moving party's diligence to its compliance with the court rules and the court's scheduling order. These are separate inquiries, and the latter consideration is only relevant when the trial court seeks to bar a witness or dismiss a case as a sanction for wrongful conduct. A non-punitive ruling that results in dismissal of the plaintiff's case should not be scrutinized as too "harsh" simply because it has the same effect as a sanction imposed to punish.

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

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STATEMENT OF FACTS

The medical facts are not relevant to the witness list amendment issue addressed in this supplemental brief, but they can be found at pages 1-2 of the Court of Appeals opinion (**1a-2a**). 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, **57a**). 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, **64a**) (Bal 2019 trial testimony, **67a**). 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, **69a**).

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, **91a-93a**). 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 (**129a**). Dr. Bal was also identified as Plaintiff's standard of care expert in Plaintiff's May 9, 2022 answers to interrogatories (**132a-133a**). Discovery was open until June 7, 2022, but the parties were required to disclose their expert witnesses by May 6, 2022 (Initial Scheduling Order, **134a**).

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, **108a**). 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 (**103a-104a**). When counsel for Beaumont was not available on those dates, Dr. Bal provided five dates in August for his deposition (**99a-101a**). 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, **135a-136a**). 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 (**138a-140a**).

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, **214a-215a**). Counsel for Dr. Lennox reached out regarding September dates two weeks later, after Plaintiff did not provide any new dates (August 28 email, **119a**). When no new dates were provided, Dr. Lennox filed a motion to compel Dr. Bal's deposition on September 9, 2022

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(**71a-76a**). Plaintiff counsel reached out to defense counsel on 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, **206a**). 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 (**217a-227a**). 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 (**228a**).

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 (**229a-244a**). In response, Plaintiff represented that Dr. Bal "has not been cooperative, and he needs to be replaced" (Response, p 2, **246a**). 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, **247a**). Plaintiff accused Dr. Lennox of being "shortsighted" by relying on Plaintiff's expert witness disclosure (Id. at 4, **248a**). 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 (**252a-265a**). 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, **254a-256a**). 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, **256a-257a**). The trial court ordered Plaintiff to produce Dr. Bal for a deposition in the next three weeks (Id. at 10, **261a**).

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Turning to the motion to strike Plaintiff's amended 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, **262a-264a**].

Two corresponding orders were entered that day, one granting the motion to compel and ordering that Dr. Bal be deposed by November 2, 2022 (**266a-267a**), 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" (**268a-269a**).

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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 (**270a-276a**). 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 (**277a-289a, 290a-295a**). 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 (**296a-297a**). 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

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notifying them that because the action was voluntarily dismissed, she would not be proceeding with additional depositions scheduled by the parties (October 26 email, **298a-301a**). 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) (**302a-307a**). 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 (**308a-309a**). 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 (**310a-313a**). The trial court noted that "Plaintiff has not produced Dr. Bal for deposition, violating the Court's Order to produce him" (Id. at 3, **312a**). Noting Plaintiff's argument that the court should only rely on Dr. Bal's sworn statement regarding his qualifications in the affidavit of merit

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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 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, **313a**).

Plaintiff's motions for reconsideration of the November 14 and December 15 orders were denied on December 8, 2022 and February 3, 2023, respectively (**314a-315a, 316a-319a**). 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, **315a**). 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 (**4a**) ("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, **7a**).

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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, **10a-11a**). 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, **11a**). 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).

Timely applications for leave to appeal followed, and this Court granted oral argument on the question of whether the Court of Appeals correctly held that the trial court abused its discretion when it failed to consider the *Dean/Duray* factors.

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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.

A. The court rules apply a "good cause" standard to a motion to amend a timely-filed witness list, and multiple panels of the Court of Appeals have correctly declined to instead apply the *Dean/Duray* factors.

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

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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).

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 (**6a**) (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

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MCR 2.401(I)(2) or the "good cause" standard for amending a witness list articulated in *Cox* and *Tisbury*. 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, **4a-5a**). Other panels of the Court of Appeals have had no trouble appreciating the distinction 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 *Snead*, *supra*; *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 (**34a**); 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) (**53a-54a**) (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). 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 confirm that these are separate inquiries, with separate standards,

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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.

B. Requiring trial courts to apply the *Dean/Duray* factors to motions to amend witness lists would unnecessarily burden trial courts' ability to manage their dockets, and would introduce extratextual considerations of justice and proportionality.

This Court should not expand the *Dean/Duray* factors beyond the narrow context of sanctions. The factors are an extratextual gloss on MCR 2.313 and other court rules authorizing sanctions for failure to comply with court orders, including MCR 2.401(G) and MCR 2.504(B)(1). MCR 2.401(I)(2) imposes a different standard for amending timely-filed witness lists: "good cause." Recent opinions from this Court have emphasized the importance of resisting the judicial temptation to add additional terms and requirements to statutes and court rules. See, e.g., *Ottgen v Katranji*, 511 Mich 223; 999 NW2d 359 (2023) (reversing extratextual requirement that medical malpractice file affidavit of merit with complaint in order to toll limitations period under MCL 600.5805); *Progress Michigan v Attorney General*, 506 Mich 74; 954 NW2d 475 (2020) (same ruling regarding Court of Claims complaint that did not comply with requirements of MCL 600.6431(1)); *Stokes v Swofford*, 514 Mich 423; 22 NW3d 97 (2024) (reversing extratextual requirement that physician subspecialties must also "match" for purposes of MCL 600.2169(1)); *Daher v Prime Healthcare Services-Garden City, LLC*, --- Mich ---; --- NW3d --- (July 30, 2024) (Docket No. 165377) (reversing lower court decisions adding "lost earning capacity" into list of recoverable damages in wrongful death cases); *Cramer v Transitional Health Services of Wayne*, 512 Mich 23; 1 NW3d 9 (2023) (rejecting Michigan Compensation Appellate Commission-fashioned test for determining whether an employee's work has significantly contributed to, aggravated, or accelerated a mental disability, when the test does not reflect the statutory language

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in MCL 418.301(2)). This Court has similarly rejected recent invitations to read statutes and court rules loosely to keep lawsuits alive. See *Hairston v LKU*, --- Mich ---; --- NW3d --- (April 4, 2025) (Docket No. 166473) (rejecting plaintiff's invitation to read court rule governing garnishment loosely to allow for writ of garnishment based on unliquidated claim of bad-faith refusal to settle); *Sixarp, LLC v Township of Byron*, --- Mich ---; --- NW3d --- (March 26, 2025) (Docket No. 166190) (enforcing MTT jurisdictional requirement that taxpayer first protest assessment to board of review before appealing to MTT). Applying the *Dean/Duray* factors would replace the stated "good cause" standard with a more rigorous extratextual standard that was developed for decisions that do not involve "good cause." That would render the "good cause" language in MCR 2.401(I)(2) nugatory or surplusage, which this Court is loathe to do. *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 502 Mich 349, 361; 917 NW2d 603 (2018).[2]

Treating the decision to amend a witness list like a sanction would improperly insert considerations of justice and proportionality into the "good cause" standard that governs such requests. Five of the eight *Dean/Duray* factors focus on the egregiousness of the moving party's misconduct and history of past misconduct during the litigation. "The sanctioning court is in a position to determine what sanction would be appropriate for curbing the sanctioned behavior, restoring order to the proceeding, and chastising the abuser for the improper conduct. In other words, because discovery sanctions are to be proportionate and just, it would be imprudent to attempt to delineate a bright-line rule." *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 87-88; 618 NW2d 66 (2000). A sanction that results in dismissal of the case is, of course, the harshest

[2] This Court uses the same principles that govern statutory interpretation when interpreting court rules. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014).

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and most extreme sanction possible against a plaintiff. The *Dean/Duray* factors are designed to ensure that the punishment fits whatever "crime" the sanctioned party has committed, with default (or default judgment) reserved for the most egregious conduct. See *Hanks v SLB Management, Inc*, 188 Mich App 656, 658; 471 NW2d 621 (1991) ("Although the trial court has the authority to take this most drastic step, the court's discretion should be exercised cautiously," and "[t]he trial court is required to first carefully evaluate all available options on the record before concluding that the drastic sanction of dismissal is just and proper"). If denying leave to amend results in dismissal of the plaintiff's case, then a court applying the *Dean/Duray* factors will almost always have to grant leave to amend, because denying leave would result in the harshest possible outcome. Because a majority of the *Dean/Duray* factors focus on the fault of the moving party, rather than its diligence, applying those factors to a moving party who has not violated any court order "puts a thumb on the scale in favor of [amendment] in a way that [MCR 2.401(I)(2)] does not require or permit." *Cramer*, 512 Mich at 53. Diligence, not innocence, is the touchstone of "good cause."

Forcing trial courts to consider the *Dean/Duray* factors when deciding whether to allow a party to amend a timely-filed witness list—especially the requirement to consider a "lesser sanction"—would improperly impede the trial court's authority over its own docket. The court rules and Michigan's appellate courts protect a trial court's authority and discretion to control proceedings through scheduling orders. MCR 2.401(B)(1)(c); *Kemerko Clawson, LLC v RxIV, Inc*, 269 Mich App 347, 349; 711 NW2d 801 (2005); *People v Grove*, 455 Mich 439, 470; 566 NW2d 547 (1997). Requiring the trial court to conduct a "careful evaluation" into the effects of a routine matter of docket management would impose undue burden upon the courts; moreover, there is no clear line for where this inquiry would end. Must the court consider alternative, lesser

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"sanctions" for every ruling that would result in dismissal of a plaintiff's case? Surely, the answer is "no." But that would be the practical effect of applying the *Dean/Duray* factors to all kinds of rulings that are not designed to sanction a party for violating a court order or other misconduct. The distinction between rulings that are sanctions and rulings that are not sanctions should be upheld, lest the extratextual sanctions standard swallow the general "good cause" rule.

C. The trial court correctly denied Plaintiff's motion based on lack of good cause.

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 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 "good cause" standard is designed to protect 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. Requiring the trial court to apply the *Dean/Duray* factors would improperly divert the focus from whether Plaintiff counsel's actions were justified, and instead ask whether they are so egregious that they merit dismissing Plaintiff's lawsuit.

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CONCLUSION AND RELIEF REQUESTED

Litigants seeking to amend a timely-filed witness list must show "good cause," i.e., an adequate explanation and diligent efforts to secure the presence of the witness. MCR 2.401(I)(2); *Cox*, 322 Mich App at 315; *Tisbury*, 194 Mich App at 20. Multiple panels of the Court of Appeals have agreed that it is unnecessary and inappropriate to supplement or replace this showing with the *Dean/Duray* factors, which examine whether a litigant should be sanctioned for violating a court rule or court order. Requiring trial courts to apply the *Dean/Duray* factors to rulings that are not sanctions would disregard the "good cause" standard explicit in the court rule, burden trial courts with unnecessary checks on their authority to manage their own dockets, and excuse a lack of diligence simply because the litigant has not violated any court rule. There are many evidentiary and procedural rulings that can indirectly cause a plaintiff's case to be dismissed. Forcing trial courts to apply the *Dean/Duray* factors to ensure that such rulings are not unduly "harsh" focuses on the result of the ruling rather than its merits. Beaumont Health asks this Court to reverse the Court of Appeals ruling requiring application of the *Dean/Duray* factors and affirm the trial court's decision denying leave to amend the witness list.

Respectfully submitted,

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