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

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STATE OF MICHIGAN

COURT OF APPEALS

LAWANNA SMITH, Personal Representative of the ESTATE OF JACQUELINE HARRIS,

Plaintiff-Appellant/Cross-Appellee,

v

BEAUMONT HEALTH,

Defendant-Appellee/Cross-Appellant,

and

TRI COUNTY ORTHOPEDICS, PC, and JACK D. LENNOX, D.O.,

Defendants-Appellees.

UNPUBLISHED
September 12, 2024

No. 365062
Oakland Circuit Court
LC No. 2021-187353-NH

Before: K. F. KELLY, P.J., and CAVANAGH and M. J. KELLY, JJ.

PER CURIAM.

In this medical-malpractice action, plaintiff, Lawanna Smith, as the personal representative of the Estate of Jacqueline Harris (the decedent), appeals as of right the trial court's opinion and order granting summary disposition in favor of defendant, Beaumont Health, on the basis of an allegedly insufficient affidavit of merit, which also resulted in dismissal of the claims against defendants, Jack D. Lennox, D.O. and Tri County Orthopedics, PC (TCO). Beaumont cross-appeals as of right from the same order. Plaintiff also challenges the trial court's order denying a motion for leave to amend her witness list. We vacate the trial court's orders (1) denying plaintiff's motion for leave to file an amended witness list, and (2) granting summary disposition in favor of Beaumont, and remand for further proceedings consistent with this opinion.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

Dr. Lennox, a board-certified orthopedic surgeon, was an employee and owner of TCO. He was not an employee of Beaumont. In 2014, the decedent sought care from Dr. Lennox at TCO

for pain in her knee. Dr. Lennox performed a total knee arthroplasty (TKA), which was successful. He prescribed the decedent Coumadin, a prescription-strength anticoagulant, to prevent blood clots after the surgery. The decedent recovered well from the surgery.

In 2019, the decedent began suffering from pain in her other knee. She again sought treatment from Dr. Lennox at TCO. He once again informed the decedent the best course of treatment was another TKA. She agreed, and the surgery was performed by Dr. Lennox at Beaumont's hospital in Farmington Hills, Michigan. Instead of prescribing a prescription-strength anticoagulant like he did before, Dr. Lennox instructed the decedent to take aspirin instead. About 30 days after the surgery, the decedent suffered an acute pulmonary embolism and died.

Plaintiff sued Dr. Lennox, claiming his failure to prescribe Coumadin after the 2019 surgery was medical malpractice that caused the decedent's death from a blood clot. Plaintiff asserted Beaumont and TCO were vicariously liable for Dr. Lennox's negligence. Attached to the complaint was an affidavit of merit (AOM) signed by B. Sonny Bal, M.D. In it, Dr. Bal averred he was a board-certified orthopedic surgeon who had dedicated a majority of his professional time in the required field during the relevant time period. Dr. Bal also asserted the standard of care required that Dr. Lennox prescribe a prescription-strength anticoagulant medication and he breached the standard of care by not doing so which caused the decedent's death.

Litigation progressed through discovery, which was originally set to end in June 2022, before the date was extended in a signed, stipulated order to December 12, 2022.[1] In a timely-filed witness list, plaintiff identified Dr. Bal as her only expert in orthopedic surgery. Eventually, defendants began having issues with scheduling a deposition for Dr. Bal. When he backed out of a deposition in August 2022, defendants moved the trial court to compel his deposition. In response, plaintiff informed defendants that Dr. Bal had unexpectedly cut off communication with plaintiff, which was why his deposition could not be rescheduled. Plaintiff had already begun the process of finding a new expert in orthopedic surgery, John H. Hall, M.D. On September 16, 2022, without seeking leave of the trial court to do so, plaintiff filed an amended witness list that removed Dr. Bal and added Dr. Hall.

The trial court struck the amended witness list because of the procedural error. Plaintiff then moved for leave to file the amended witness list, which would provide plaintiff with a new expert in orthopedic surgery. The trial court denied the motion, citing the age of the litigation and the prejudice to defendants. Plaintiff then moved the trial court to voluntarily dismiss the case without prejudice, which would allow plaintiff to refile with a new expert witness. The trial court denied the motion, once again citing prejudice to defendants, who had spent time and money preparing for the present case.

While these issues with Dr. Bal continued to arise, defendants discovered Dr. Bal had previously testified that he retired from the practice of medicine in November 2017. Defendants contended plaintiff was engaged in gamesmanship by trying to shield the truth about Dr. Bal's

[1] During this time period, Beaumont moved for summary disposition under MCR 2.116(C)(10), arguing there was no genuine issue of material fact that it could not be held vicariously liable for the alleged negligence of Dr. Lennox. The trial court never decided the motion.

qualifications to be an expert witness. Defendants then moved for summary disposition under MCR 2.116(C)(8) and (C)(10) on the ground that Dr. Bal had not been qualified to prepare and submit the AOM with plaintiff's complaint. Plaintiff asserted that the challenge did not warrant summary disposition because, with respect to the AOM, the only relevant fact was whether plaintiff's attorney reasonably believed Dr. Bal had been qualified at the time the lawsuit was filed. Plaintiff insisted it was reasonable for an attorney to believe an affidavit signed by a doctor under oath. Defendants argued that plaintiff's attorney's alleged belief was not reasonable because a simple search of the Internet or review of Dr. Bal's curriculum vitae showed he was retired during the relevant time period.

The trial court granted defendants' motions for summary disposition under MCR 2.116(C)(10). The trial court determined that Dr. Bal had not been qualified to prepare the AOM because of his retirement from the practice and teaching of medicine. Further, while the trial court determined it was reasonable for plaintiff's attorney to believe Dr. Bal's averments about his qualifications, it concluded the reasonableness of the belief expired after more than a year of litigation. The trial court stated plaintiff's attorney should have determined Dr. Bal was not qualified in a timely manner and cured the error. The trial court commented that discovery had been closed since June 2022, seemingly ignoring the order that extended discovery. In any event, the trial court concluded that summary disposition was warranted because the AOM attached to plaintiff's complaint was insufficient. The trial court also decided the ruling required a dismissal of the complaint with prejudice.

Plaintiff moved the trial court to reconsider its decision, asserting it had misapplied relevant law regarding AOMs and the correct remedies when errors with them arose. The trial court denied the motion. This appeal and cross-appeal followed.

II. AMENDED WITNESS LIST

Plaintiff argues that the trial court abused its discretion by denying the motion to amend the witness list without first considering the factors in *Dean v Tucker*, 182 Mich App 27; 451 NW2d 571 (1990).[2] We agree.

A. STANDARD OF REVIEW

A trial court's decision regarding whether to allow a party to amend a witness list is reviewed for an abuse of discretion. *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1991). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *Danhoff v Fahim*, ___ Mich ___, ___; ___ NW3d ___ (2024) (Docket No. 163120); slip op at 11. "A trial court necessarily abuses its discretion when it makes an error of law." *Id*. (quotation marks and citation omitted).

[2] Although *Dean* "is not strictly binding pursuant to MCR 7.215(J)(1) because it was issued before November 1, 1990, as a published opinion, it nevertheless 'has precedential effect under the rule of stare decisis' pursuant to MCR 7.215(C)(2)." *Legacy Custom Builders, Inc v Rogers*, 345 Mich App 514, 525 n 1; 8 NW3d 207 (2023).

B. LAW AND ANALYSIS

The trial court abused its discretion when it denied plaintiff's motion for leave to file an amended witness list because it resulted in an effective dismissal of the case and the trial court did not consider the *Dean* factors.

"Witness lists are an element of discovery," and "[t]he ultimate 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). "The purpose of witness lists is to avoid 'trial by surprise.' " *Id*., quoting *Stepp v Dep't of Natural Resources*, 157 Mich App 774, 778; 404 NW2d 665 (1987). "MCR 2.401(I)(1) provides that all parties must file and serve witness lists within the time allotted by the trial court." *Duray Dev, LLC v Perrin*, 288 Mich App 143, 162; 792 NW2d 749 (2010). " 'The court may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown.' " *Cox v Hartman*, 322 Mich App 292, 315; 911 NW2d 219 (2017), quoting MCR 2.401(I)(2).

It is undisputed in this case that the trial court ordered the parties to file their witness lists, including proposed expert witnesses, by May 6, 2022. Plaintiff filed a timely witness list on April 25, 2022, naming Dr. Bal as the only expert in orthopedic surgery. Plaintiff attempted to amend the list without leave of the trial court to exchange out Dr. Bal for Dr. Hall in October 2022. The trial court struck the amended witness list because plaintiff had not moved for leave to file it.[3] Plaintiff then sought such leave, which the trial court denied.

Because plaintiff's motion for leave to amend the witness list to add Dr. Hall as an expert in orthopedic surgery was filed after the deadline set by the trial court, "[i]t was [] plaintiff's burden to demonstrate good cause for the late addition of a new expert witness." *Cox*, 322 Mich App at 315. "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.' " *Id*., quoting *Tisbury*, 194 Mich App at 20. "A court should consider whether prejudice would result from granting a motion to add an expert witness." *Cox*, 322 Mich App at 315.

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*, 288 Mich App at 164. "But that proposition does not mean that disallowing witnesses is *always* tantamount to a

[3] In part, plaintiff contends the trial court abused its discretion because it promised to grant the motion for leave to amend the witness list during the October 12, 2022 hearing regarding the motion to strike plaintiff's amended witness list. But the trial court never made such a promise. The court only indicated at the hearing that such a motion must be filed for the trial court to consider it. And the trial court's written order entered after the hearing states "that plaintiff may file a motion to amend their witness list to be heard on a later date and time." Thus, the court indicated it would consider such a motion, if filed. The court did not promise to grant it.

dismissal. Nor does it mean that a trial court cannot impose such a sanction even if it is equivalent to a dismissal." *Id*.

"A plaintiff in a medical malpractice action bears the burden of establishing (1) the applicable standard of care, (2) breach of that standard of care by the defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury." *Danhoff*, ___ Mich at ___; slip op at 11 (quotation marks and citations omitted). Except for in circumstances undisputedly not present in this case, "[e]xpert testimony is required to establish the applicable standard of care and demonstrate a breach of that standard." *Zehel v Nugent*, 344 Mich App 490, 510; 1 NW3d 387 (2022). "Failure to prove any one of the [above] elements is fatal" to a medical-malpractice action. *Id*. (quotation marks and citation omitted).

In the present case, as noted, plaintiff originally listed Dr. Bal as an expert witness regarding orthopedic surgery. Importantly, this was the same specialty as Dr. Lennox, which meant Dr. Bal would be able to testify regarding the standard of care Dr. Lennox should have used when treating the decedent and whether that standard was breached. Establishing the applicable standard of care and whether it was breached are necessary elements of a medical-malpractice claim. *Danhoff*, ___ Mich at ___; slip op at 11. In his AOM, Dr. Bal explained that he believed the applicable standard of care required Dr. Lennox to prescribe the decedent a stronger anticoagulant medication than aspirin. Further, Dr. Bal opined that the failure to do so violated the standard of care and resulted in the decedent's death. Plaintiff's original witness list did not contain any other experts in orthopedic surgery.

When plaintiff moved for leave to amend the witness list, the explanation for the motion was that Dr. Bal had unexpectedly become uncommunicative while trying to schedule his deposition. Plaintiff expressed that Dr. Bal's refusal to participate in litigation required a new expert witness to be found. Plaintiff had already found another expert, Dr. Hall, who was also board-certified in orthopedic surgery. Therefore, plaintiff sought to exchange those two expert witnesses. Defendants argued that the record did not support plaintiff's contention that Dr. Bal became uncommunicative during the litigation. Nevertheless, defendants agreed that Dr. Bal was not capable of testifying as an expert witness regarding the applicable standard of care for Dr. Lennox and whether he breached it. Despite the parties' disagreement regarding why Dr. Bal was no longer available to testify as an expert, they all agreed he was not available. Because Dr. Bal undisputedly was unable to testify as an expert witness in this case, the denial of plaintiff's motion to amend the witness list left plaintiff without an expert witness regarding standard of care and breach of it.

The trial court's denial of the motion effectively was a dismissal. See *Duray Dev*, 288 Mich App at 164. As just discussed, the trial court's order made it so plaintiff did not have an expert witness regarding standard of care and breach. Further, as the caselaw cited above establishes, plaintiff had to prove the standard of care and whether it was breached by using an expert witness in the same specialty as Dr. Lennox. See *Zehel*, 344 Mich App at 510. Because plaintiff no longer had an expert witness, plaintiff could not prove two necessary elements. This was fatal to plaintiff's claims in this case. See *id*. As a result, 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. See *id*.; *Duray Dev*, 288 Mich App at 164. Indeed, the effect of the order was clear when, just one month later, the trial court ordered the case

dismissed because Dr. Bal was not qualified to be an expert witness in the case, which meant he had not been qualified to provide the AOM.

As noted, when an order that precludes a witness from testifying would effectively result in a dismissal, the trial court must engage in more rigorous considerations before doing so. See *Dean*, 182 Mich App at 32 ("Where the sanction is the barring of an expert witness resulting in the dismissal of the plaintiff's action, the sanction should be exercised cautiously."). Trial courts have "the broad inherent power . . . to address misconduct and sanction the parties and lawyers who appear before the court." *Tolas Oil & Gas Exploration Co v Bach Servs & Mfg*, ___ Mich App ___, ___; ___ NW3d ___ (2023) (Docket No. 359090); slip op at 10-11. While dismissal is a potential sanction, Michigan law favors the "disposition [of] litigation on the merits[.]" *Gueye v State Farm Mut Auto Ins Co*, 343 Mich App 473, 489; 997 NW2d 307 (2022) (quotation marks and citation omitted; alterations in original). "Dismissal is a drastic step that should be taken cautiously." *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 506; 536 NW2d 280 (1995). "Before imposing such a sanction, the trial court is required to carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper." *Id*. When a trial court fails to consider other options on the record, it abuses its discretion. *Id*. at 506-507.

In addition to requiring the trial court to consider other viable options before effectively dismissing a case by barring the testimony of a necessary expert witness, Michigan caselaw requires the consideration of a number of factors, generally referred to as the *Dean* factors. *Dean*, 182 Mich App at 32. This Court stated the factors in the following manner:

> Among the factors that should be considered in determining the appropriate sanction are: (1) whether the violation was wilful 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) whether there exists a history of plaintiff 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. This list should not be considered exhaustive. [*Id*. at 32-33 (citations omitted).]

In the present case, the trial court denied plaintiff's motion to file an amended witness list. Though the trial court did not speak about sanctions for plaintiff's 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, and as discussed above, this caused plaintiff's claims to fail, effectively resulting in a dismissal. The trial court did not hold a hearing regarding plaintiff's motion to file an amended witness list. In the trial court's opinion and order denying the motion, it commented solely on whether granting the motion would be prejudicial to defendants:

> This matter was filed on April 9, 2021. Witness lists in this matter were due by May 6, 2022, with discovery closing on June 7, 2022. Trial in this matter is

> currently set for February 7, 2023. Allowing an amended witness list at this late stage is also highly prejudicial.

The above quotation is the sum total of the trial court's reasoning with respect to its denial of the motion for leave to amend the witness list. While prejudice to the defense is one of the *Dean* factors, it is not the only one. Moreover, as this Court has stated, the trial court *must* consider other potential sanctions on the record before entering an order that effectively amounts to a dismissal. *Vicencio*, 211 Mich App at 506. In the simplest terms, and as is evident from the above quotation, the trial court did not do that; and, as a result, abused its discretion as a matter of law. See *id*. Additionally, even the trial court's analysis of prejudice seems to be on the basis of a misunderstanding of the procedural status of the case. Pertinently, the trial court stated discovery closed about five months before the order was entered. However, the record shows the June 7, 2022 discovery deadline was extended to December 12, 2022. Thus, discovery was still open, which, at the very least, reduces any prejudice to the defense.

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. See *Vicencio*, 211 Mich App at 506.[4]

III. SUMMARY DISPOSITION

Plaintiff argues that the trial court erred when it granted Beaumont's motion for summary disposition and dismissed the case. We agree.

[4] The parties urge us to consider whether, if the trial court *had* considered the *Dean* factors, it still would have chosen to deny the motion and leave plaintiff without an expert witness. However, as an error-correcting court, we generally will not decide issues not ruled upon originally by the trial court. *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 210; 920 NW2d 148 (2018). This is especially true when the trial court's decision failed to apply the appropriate legal framework, which is the case here. See *id*. (holding that because "it is apparent that the trial court's ruling in the instant case was based on an erroneous application of the pertinent legal principles . . . it would be better for any additional matters . . . to be addressed in the first instance by the trial court under the proper legal framework"). To address this issue as suggested by the parties, we would have to invent reasoning by the trial court, and then analyze whether the imaginary analysis of the trial court was an abuse of discretion. We decline to do so for the same reasons stated in *Jawad A Shah, MD, PC*, 324 Mich App at 210.

A. STANDARD OF REVIEW

"This Court [] reviews de novo decisions on motions for summary disposition brought under MCR 2.116(C)(10)." *Pace v Edel-Harrelson*, 499 Mich 1, 5; 878 NW2d 784 (2016). A motion for summary disposition under MCR 2.116(C)(10) "tests the factual sufficiency of the complaint . . . ." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). "In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition is proper where there is no "genuine issue regarding any material fact." *Id*. "A genuine issue of material fact exists when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Auto-Owners Ins Co v Campbell-Durocher Group Painting & Gen Contracting, LLC*, 322 Mich App 218, 224; 911 NW2d 493 (2017) (quotation marks and citation omitted). "A trial court's rulings concerning the qualifications of proposed expert witnesses are reviewed for an abuse of discretion." *Rock v Crocker*, 499 Mich 247, 260; 884 NW2d 227 (2016). "A trial court does not abuse its discretion when its decision falls within the range of principled outcomes." *Id*.

B. LAW AND ANALYSIS

In light of the analysis above, the trial court's summary-disposition decision was premature, warranting reversal.

Plaintiff argues that the trial court's order granting summary disposition in favor of Beaumont and dismissing the case was erroneous for a number of reasons. The primary disagreement relates to Dr. Bal's qualifications to provide the AOM in this case. Our Supreme Court provided the following guidance on this issue:

> Under Michigan's statutory medical malpractice procedure, plaintiff must obtain a medical expert at two different stages of the litigation—at the time the complaint is filed and at the time of trial. With regard to the first stage, under MCL 600.2912d(1), a plaintiff is required to file with the complaint an affidavit of merit signed by an expert who the plaintiff's attorney reasonably believes meets the requirements of MCL 600.2169. With regard to the second stage, the trial, MCL 600.2169(1) states that "a person shall not give expert testimony . . . unless the person" meets enumerated qualifications (emphasis added). Thus, while at the affidavit-of-merit stage a plaintiff's attorney need only "reasonably believe" the expert is qualified, at trial the standard is more demanding because the statute states that a witness "shall not give expert testimony" unless the expert "meets the [listed] criteria" in MCL 600.2169(1).
>
> The Legislature's rationale for this disparity is, without doubt, traceable to the fact that until a civil action is underway, no discovery is available. See MCR 2.302(A)(1). Thus, the Legislature apparently chose to recognize that at the first stage, in which the lawsuit is about to be filed, the plaintiff's attorney only has available publicly accessible resources to determine the defendant's board certifications and specialization. At this stage, the plaintiff's attorney need only

> have a reasonable belief that the expert satisfies the requirements of MCL 600.2169. See MCL 600.2912d(1). However, by the time the plaintiff's expert witness testifies at trial, the plaintiff's attorney has had the benefit of discovery to better ascertain the qualifications of the defendant physician, and, thus, the plaintiff's attorney's reasonable belief regarding the requirements of MCL 600.2169 does not control whether the expert may testify. [*Grossman v Brown*, 470 Mich 593, 598-599; 685 NW2d 198 (2004).]

The required qualifications mentioned above are listed in MCL 600.2169(1), which states as follows:

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

> for the claim or action, devoted a majority of his or her professional time to either or both of the following:
>
> > (*i*) Active clinical practice as a general practitioner.
> >
> > (*ii*) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed.

Before considering whether the trial court properly concluded summary disposition was warranted on the basis of Dr. Bal's lack of qualifications, we must first determine whether, as argued by plaintiff, the trial court's order granting summary disposition was premature. "Generally, a grant of summary disposition is premature before discovery on a disputed issue is complete." *Doe v Gen Motors, LCC*, 511 Mich 1038, 1038-1039 (2023). "However, a party may not simply allege that summary disposition is premature. The party must clearly identify the disputed issue for which it asserts discovery must be conducted and support the issue with independent evidence." *Powell-Murphy v Revitalizing Auto Communities Environmental Response Trust*, 333 Mich App 234, 253; 964 NW2d 50 (2020). "The dispositive inquiry is whether 'further discovery presents a fair likelihood of uncovering factual support for the party's position.' " *Id*., quoting *Mazzola v Deeplands Dev Co, LLC*, 329 Mich App 216, 230; 942 NW2d 107 (2019).

Despite the parties' treatment of this issue as separate from the issue above, they are undeniably intertwined. The trial court's order granting summary disposition was on the basis of a determination Dr. Bal had not been qualified to provide an AOM in this case. While plaintiff disputed whether this was true, plaintiff had effectively agreed Dr. Bal could not be plaintiff's expert when it came to standard of care and breach. Plaintiff explained that Dr. Bal had unexpectedly become unresponsive during discovery. In an attempt to remedy that problem, plaintiff sought to obtain a new expert in orthopedic surgery, Dr. Hall. The litigation regarding plaintiff's attempt to do so was discussed in greater depth above. It is enough to say the trial court abused its discretion when it denied plaintiff's motion for leave to amend the witness list to add Dr. Hall as an expert. 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. See *Powell-Murphy*, 333 Mich App at 253.

More specifically, Beaumont's motion for summary disposition on the basis of plaintiff's failure to file a sufficient AOM with the complaint was filed on November 4, 2022. Notably, this was filed after the trial court struck plaintiff's amended witness list but before the trial court decided plaintiff's motion for leave to file the amended witness list. Despite the trial court's apparent confusion, discovery was still open when the motion was filed. On the basis of a stipulated order signed by the parties and the trial court, discovery did not close until December 12, 2022. Moreover, absent the trial court's order precluding plaintiff from replacing Dr. Bal with Dr. Hall, discovery could have continued with a deposition of Dr. Hall and the filing of an amended AOM by Dr. Hall. See *Legion-London v Surgical Institute of Mich Ambulatory Surgery Ctr, LLC*,

331 Mich App 364, 376; 951 NW2d 687 (2020) ("In sum, we hold that under MCR 2.112(L)(2)(b), an AOM may be amended by submitting an affidavit signed by a different expert when there has been a challenge to the 'qualifications of the signer.' Such an amendment relates back to the original filing. MCR 2.118(D)."). In other words, because discovery was still open and plaintiff had found and proposed a new expert witness in the appropriate specialty, " 'further discovery present[ed] a fair likelihood of uncovering factual support for the party's position.' " *Powell-Murphy*, 333 Mich App at 253, quoting *Mazzola*, 329 Mich App at 230. Because summary disposition was premature, we vacate the order.[5] The trial court should consider the motion after employing the appropriate framework to determine whether plaintiff should be permitted to amend the witness list to add a new expert.[6]

IV. CROSS-APPEAL

Beaumont argues that the trial court could have granted summary disposition on the basis of there being no question of fact regarding whether Beaumont could be held vicariously liable for Dr. Lennox's alleged medical malpractice, which is an alternative ground for affirmance. As this Court has noted, "[a]s an error-correcting court, this Court's review is generally limited to matters actually decided by the lower court." *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 210; 920 NW2d 148 (2018) (citations omitted). Even so, "this Court may affirm the grant of summary disposition on an alternate ground that was not decided by the trial court when the issue was presented to the trial court." *Id*. Nevertheless, when the circumstances demand such, this Court is free to "conclude that it would be better for any additional matters relating to [plaintiff's] complaint to be addressed in the first instance by the trial court . . . ." *Id*. Because it would be beneficial for the trial court to consider this argument in the first instance, we decline to consider it.

V. CONCLUSION

For the reasons stated above, we vacate the trial court's orders (1) denying plaintiff's motion to file an amended witness list and (2) granting summary disposition in favor of Beaumont

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[5] While we decline to consider and decide the issue on the merits, we caution the trial court that precedent of our Supreme Court requires challenges to an AOM to be limited to whether a plaintiff's attorney reasonably believed the expert was qualified. *Grossman*, 470 Mich at 598-599, citing MCL 600.2912d(1).

[6] Plaintiff also challenges the trial court's order denying the motion for voluntary dismissal without prejudice. However, plaintiff only requested reversal of that order if we affirmed the trial court's orders denying the motion to amend the witness list and for summary disposition. Because we have vacated those orders, plaintiff's challenge to the trial court's decision regarding dismissal without prejudice is now moot, and we decline to consider it. See *TM v MZ*, 501 Mich 312, 317; 916 NW2d 473 (2018) (quotation marks and citation omitted) (holding that a case is moot when "[i]t involves a case in which a judgment cannot have any practical legal effect upon a then existing controversy," and that, "[a]s a general rule, this Court will not entertain moot issues or decide moot cases").

and dismissing the case. We remand to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Michael J. Kelly

2011 WL 192391
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Judy K. WITT, Plaintiff–Appellant,
v.
Louis C. GLAZER, M.D., and Vitreoretinal Associates, P.C., Defendants–Appellees.

Docket No. 294057.
|
Jan. 20, 2011.

Kent Circuit Court; LC No. 07–013196–NO.

Before: SAWYER, P.J., and WHITBECK and WILDER, JJ.

Opinion

PER CURIAM.

***1** Plaintiff Judy Witt appeals as of right from a circuit court order granting defendants, Louis Glazer, M.D. and Vitreo–Retinal Associates, P.C.'s, motion to strike Witt's expert witness, denying her motion to amend her expert witness list and to adjourn trial, and dismissing the action. On appeal, Witt argues that defendants' motion was untimely, that defendants were estopped from challenging the credentials of Witt's standard of care expert, that defendants were required to first challenge Witt's affidavit of merit, and that the trial court should have permitted Witt to amend her witness list. We affirm.

I. FACTS

This medical malpractice action arises from Dr. Glazer's treatment of Witt's right eye. On August 19, 2006, Witt presented at Sheridan Hospital complaining of loss of vision in her right eye. She was referred to an ophthalmologist at Metropolitan Hospital and went there the same day. She was diagnosed with a "macula-off retinal detachment OD-tractional" and was directed to follow up with Dr. Glazer the following day for evaluation and possible surgery. The next day, Dr. Glazer diagnosed Witt with a "dense vitreous hemorrhage OD of unknown etiology" but did not diagnose her with a retinal detachment. On September 22, 2006, Witt again treated with Dr. Glazer, who at that time diagnosed her with a "dense vitreous hemorrhage OD with new onset of detached retina." Thereafter, Dr. Glazer performed surgery on Witt's right eye.

On December 18, 2007, Witt filed this medical malpractice action against Dr. Glazer and his practice, Vitreo–Retinal Associates, alleging that Dr. Glazer failed to timely diagnose her detached retina. Witt attached to her complaint the amended affidavit of merit of Dr. John M. Williams, Sr., M.D., a board certified ophthalmologist, who stated that he had devoted a majority of his professional time to the practice of ophthalmology and occupational medicine during the year immediately preceding Dr. Glazer's treatment of Witt.

On December 19, 2008, defendants moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10), arguing that Witt's notice of intent to file suit was defective. On the same day, defendants moved for partial summary disposition under MCR 2.116(C)(8) and (10), arguing, in relevant part, that they were entitled to summary disposition on Witt's claims alleging negligence on or after September 11, 2006, because Witt was unable to establish that she would have had a better outcome if surgery had been performed sooner. Defendants relied on Dr. Williams's deposition testimony stating that he was unable to quantify Witt's chances for a better outcome if surgery had been performed on September 12, 2006, or thereafter. Dr. Williams stated that by that date any percentage increase in the chance of a better outcome was speculative.

On February 20, 2009, the trial court denied defendants' motion for summary disposition on the basis of the alleged defective notice of intent. On the same day, the trial court entered an order dismissing by stipulation Witt's claims of negligence on or after September 11, 2006.

***2** The trial court scheduled trial for July 27, 2009. On July 23, 2009, defendants moved to strike Dr. Williams's testimony and dismiss Witt's claims. They argued that Dr. Williams was not qualified to testify regarding the appropriate standard of care under MCL 600.2169(1)(b) because he did not devote a majority of his professional time to the active clinical practice or instruction of ophthalmology during the year immediately preceding Dr. Glazer's treatment of Witt. Defendants relied on Dr. Williams's deposition testimony stating that since July 2003, he had been employed as

the medical director of the occupational health service at Aspirus Medical Group. In that capacity in 2005 and 2006, he spent approximately 60 percent of his time performing administrative duties, 15 percent performing expert witness work, and 25 percent treating patients. Dr. Williams further testified that he treated patients at Aspirus Medical Group in his capacity as an occupational physician rather than as an ophthalmologist. Between September 1997 and March 2000, Dr. Williams transitioned his practice from full-time ophthalmology to full-time occupational health. He admitted that he last held himself out as an ophthalmologist in March 2000 and last performed retinal detachment surgery in 1998. Defendants contended that without Dr. Williams's testimony, Witt had no standard of care expert. They also asserted that their motion was timely.

In response, Witt conceded that Dr. Williams did not "technically meet the requirements of MCL 600.2169(1)," but argued that defendants' motion was essentially a motion for summary disposition that was untimely pursuant to the trial court's scheduling order. Witt asserted that defendants had established a pattern of violating the scheduling order because they also untimely filed their expert witness list and their two previous summary disposition motions. Witt further argued that defendants waived the requirements of MCL 600.2169(1) by relying on Dr. Williams's testimony in support of their motion for partial summary disposition. Witt contended that the underlying premise of that motion was that Dr. Williams had the requisite credentials to offer opinion testimony. She argued that she stipulated to the relief requested in the motion based on Dr. Williams's testimony and the assumption that defendants had conceded that Dr. Williams was qualified to render his opinion. Thus, Witt asserted, defendants waived any argument regarding Dr. Williams's qualifications. Witt further argued that defendants were equitably estopped from asserting the requirements of MCL 600.2169(1) on the same basis.

Along with her response brief, Witt moved for leave to amend her witness list and to adjourn trial if the trial court decided to grant defendants' motion. She argued that, unlike defendants, she had strictly complied with the scheduling order. She further contended that she should be permitted to amend her expert witness list because barring expert testimony would result in a dismissal of her action, a harsh sanction that was not warranted.

***3** In response, defendants argued that Witt had been familiar with Dr. Williams's qualifications for nearly two years and failed to obtain a qualified expert. They argued that Dr. Williams's September 29, 2008 deposition testimony clearly demonstrated that he was not qualified to testify as an expert and that Witt was aware at least by that date that he failed to satisfy the statute. Defendants further contended that the scheduling order required a showing of good cause for an expert witness not identified on a party's expert witness list to testify at trial. Defendants argued that the scheduling order also required that motions for adjournment strictly comply with MCR 2.503 and stated that such motions would rarely be granted.

At a July 27, 2009 hearing, Witt's counsel argued:

> I was aware of the potential issue. No question. My expectation was, it would be addressed by way of a motion for summary disposition. That deadline came and went. They—they chose not to challenge it under (C)(10) or (C)(8).
>
> And so what happened after the motion deadline was—was over? They filed two subsequent motions: One on the alleged defective notice of intent; the other, based upon Dr. Williams' testimony on the issue of lost opportunity.
>
> * * *
>
> And what makes this case different—what I really need to brief further, quite honestly, Judge, is they relied upon the opinion testimony of Dr. Williams in their motion for partial summary disposition....
>
> * * *
>
> I think I had reason to believe, hey, they're—they're not challenging Williams. They're relying upon his opinions. They're—underlying all of that, had to be an assumption that Williams is credentialed. He's offering these opinions regarding lost opportunity. And as a result, granted us a motion for partial summary disposition. It was based on that, that I stipulated to the relief requested in that particular motion.

The trial court determined that defendants' motion was not a summary disposition motion and that it was timely filed. The trial court recognized that instead of granting the motion, it could wait until trial and grant defendants a directed verdict on

the ground that Dr. Williams was not qualified to offer expert testimony. The trial court further determined that defendants did not waive their challenge to Dr. Williams's qualifications and that it was not defendants' responsibility to instruct Witt regarding the law. Addressing Witt's motion to file an amended witness list, the trial court ruled:

> [B]ack when that first deposition was taken, back on September 29th, of 2008. That's almost a year ago. For whatever reasons, Mr. Schrotenboer [Witt's counsel], you made the decision to proceed with this expert, based on your testimony today, with the clear basis that he was unqualified by the statute.
>
> * * *
>
> I do not see any good cause at this point in time, based upon all the arguments, everything that I have read, to say that this case should be adjourned.
>
> ***4** Accordingly, I am not going to adjourn this case. I'll enter an order dismissing this action, as [Witt] has no expert and cannot, pursuant to the applicable case law, establish a standard of care.

On August 10, 2009, the trial court entered an order striking Dr. Williams's testimony, denying Witt's motion to adjourn trial and amend her expert witness list, and dismissing Witt's claims. Witt moved for reconsideration, which the trial court denied for failure to "demonstrate a palpable error by which the court has been misled ." Witt now appeals.

II. DEFENDANTS' MOTION TO STRIKE WITNESS AND DISMISS CLAIMS

A. STANDARD OF REVIEW

Witt argues that the trial court erred by striking her expert witness's testimony and dismissing her claims. We review for an abuse of discretion a trial court's decision to strike a witness's testimony.[1] We also review for an abuse of discretion a trial court's decision to dismiss an action.[2] "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes."[3]

B. TIMELINESS

In a medical malpractice action, expert testimony is generally required to establish the applicable standard of care and breach of that standard.[4] MCL 600.2169 provides, in relevant part:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> * * *
>
> (b) Subject to subdivision (c),[5] during the year immediately preceding the date of the occurrence that is the basis for the claim or action, *devoted a majority of his or her professional time* to either or both of the following:
>
> (i) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.
>
> (ii) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.[6]

In *Kiefer v. Markley,*[7] this Court determined that the phrase "devoted a majority of his or her professional time," requires that an expert "spend greater than 50 percent of his or her professional time practicing the relevant specialty the year before the alleged malpractice."

Here, it is undisputed that Witt's expert, Dr. Williams, was not qualified to offer expert testimony because he did not spend more than 50 percent of his professional time practicing or teaching in the field of ophthalmology during the year immediately preceding Dr. Glazer's treatment of Witt. Witt argues that defendants' motion to dismiss was, in effect, a motion for summary disposition under MCR 2 .116 that was untimely filed and should not have been considered. But,

pursuant to *Greathouse v. Rhodes,* [8] Witt's argument lacks merit.

***5** In *Greathouse,* the plaintiff moved to strike the defendant's expert testimony less than one month before trial on the basis that the experts were not qualified to offer opinion testimony regarding the appropriate standard of care. [9] The trial court initially granted the plaintiff's motion but thereafter determined that MCL 600.2169 was unconstitutional and admitted the testimony. [10] On appeal, this Court noted that after the trial court's ruling, the Michigan Supreme Court determined in a different action that MCL 600 .2169 was not unconstitutional. [11] This Court nevertheless concluded that the trial court properly allowed the testimony because the plaintiff forfeited her ability to challenge it by failing to timely invoke MCL 600.2169. [12] This Court held that a party's failure to challenge an expert's qualifications under the statute within a reasonable time results in forfeiture of the challenge. [13] In lieu of granting leave to appeal, the Supreme Court summarily reversed that portion of this Court's decision, stating "[t]here is no statutory or case law basis for ruling that a medical malpractice expert must be challenged within a 'reasonable time.' " [14]

Witt erroneously argues that defendants' motion was in essence a motion for summary disposition. Rather, defendants moved to strike Dr. Williams's testimony and dismiss the action as a result of Witt's failure to proffer admissible expert testimony regarding the standard of care. As in *Greathouse,* the motion was timely.

Witt contends that this case is distinguishable from *Greathouse* because defendants previously relied on Dr. Williams's testimony in their motion for partial summary disposition. However, defendants' mere reliance on Dr. Williams's testimony in support of their argument regarding Witt's loss of opportunity claim did not waive their objection to Dr. Williams's qualifications. Although Witt contends that she stipulated to the dismissal of her loss of opportunity claim on the assumption that defendants had conceded Dr. Williams's qualifications, nothing in the record, the stipulation, or the order to dismiss supports her argument. If defendants' concession regarding Dr. Williams's credentials was a condition of the stipulation, then that should have been made part of the record.

C. ESTOPPEL

Witt also contends that defendants were equitably estopped from asserting the requirements of MCL 600.2169. "Equitable estoppel may arise where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts." [15] Witt argues that defendants induced her to believe that they did not intend to challenge Dr. Williams's credentials and that she justifiably relied on her belief. As previously discussed, defendants' actions did not indicate that they conceded Dr. Williams's qualifications to offer standard of care testimony. Further, any reliance on defendants' actions as indicating such a concession was not justifiable in light of the fact that Witt's counsel was aware that Dr. Williams was not qualified under MCL 600.2169.

D. CHALLENGE TO AFFIDAVIT OF MERIT

***6** Witt argues that defendants were required to challenge Dr. Williams's affidavit of merit if they opposed his qualifications to offer standard of care testimony. Witt relies on *Kirkaldy v. Rim,* [16] in which our Supreme Court stated that "if the defendant believes that an affidavit is deficient, the defendant must challenge the affidavit." Witt's reliance on *Kirkaldy* is misplaced because that case involved a challenge to the plaintiff's affidavit of merit and its effect on the tolling of the limitations period. That situation is not presented in this case. In any event, MCL 600.2912d(1) requires a plaintiff "to file with the complaint an affidavit of merit signed by an expert who the plaintiff's attorney *reasonably believes* meets the requirements of MCL 600.2169." [17] That standard is different from the trial standard that precludes an expert's testimony unless the expert meets the criteria listed in MCL 600.2169(1). [18] In *Grossman,* the Supreme Court opined that the rationale for the differing standards stems from the fact that no discovery is available until a civil action has been commenced and discovery assists a plaintiff's attorney to better ascertain a physician's qualifications. [19] Thus, the standards for challenging an affidavit of merit and seeking to exclude expert testimony during trial are different and nothing

requires that a defendant first challenge the affidavit of merit in order to seek the exclusion of trial testimony.

III. WITT'S MOTION TO AMEND WITNESS LIST AND ADJOURN TRIAL

A. STANDARD OF REVIEW

Witt argues that the trial court erred by denying her motion to amend her expert witness list and to adjourn trial. We review these issues for an abuse of discretion. [20]

B. ANALYSIS

Witt argues that the trial court abused its discretion by failing to consider the factors articulated in *Dean v. Tucker,* [21] such as whether the violation was wilful or accidental, and whether the plaintiff's history indicates a pattern of deliberate delay. Witt's reliance on *Dean* is misplaced, however, because that case involves discovery sanctions rather than the failure to produce a witness qualified to testify under MCL 600.2169. [22] Thus, the factors articulated in *Dean* are inapplicable.

The trial court's scheduling order required that Witt disclose all expert witnesses by April 25, 2008, and stated, "*Absent a showing of good cause, expert witnesses not identified as required hereby will not be allowed to testify at trial.*" The scheduling order also provided that motions for adjournment of trial must strictly comply with MCR 2.503(B) and (C)(1), and would rarely be granted. MCR 2.503(B)(1) requires that motions for adjournment be based on good cause, [23] and MCR 2.503(C)(1) provides that motions to adjourn a proceeding based on the unavailability of a witness must be made as soon as possible. [24] Thus, the question is whether Witt's motion to amend her expert witness list and adjourn trial was based on good cause.

***7** The trial court did not abuse its discretion by determining that Witt failed to establish good cause to adjourn trial and to amend her expert witness list. Witt's counsel conceded in the trial court, as he does in this Court, that he was aware that Dr. Williams was not qualified to offer expert testimony. Counsel was aware of this fact at least by the time of Dr. Williams's September 29, 2008 deposition. Yet counsel chose not to obtain a witness who was qualified to offer relevant and necessary standard of care testimony. Although Witt argues that she relied on defendants' actions indicating that they did not intend to challenge Dr. Williams's qualifications, her reliance on such actions, to the extent that it existed, was not reasonable considering the requirements of MCL 600.2169.

Witt further contends that, while she complied with all scheduling order deadlines, defendants were permitted to file untimely motions for summary disposition and an untimely witness list. The record shows that Witt stipulated to the relief requested in one motion, the trial court denied the other motion, and the trial court granted defendants' motion to allow the belated filing of their witness list. Those motions did not seek to adjourn trial on the day of trial for reasons known many months before trial. Accordingly, Witt's argument is unpersuasive.

We affirm.

All Citations

Not Reported in N.W.2d, 2011 WL 192391

Footnotes

1 *Tobin v. Providence Hosp,* 244 Mich.App 626, 654; 624 NW2d 548 (2001); *Greathouse v. Rhodes,* 242 Mich.App 221, 227; 618 NW2d 106 (2000), rev'd on other grounds 465 Mich. 885 (2001).

2 *Vicencio v. Ramirez,* 211 Mich.App 501, 506; 536 NW2d 280 (1995).

3 *Moore v. Secura Ins,* 482 Mich. 507, 516; 759 NW2d 833 (2008).

4 *Birmingham v. Vance,* 204 Mich.App 418, 421; 516 NW2d 95 (1994).

5 It is undisputed that subdivision (c) is not applicable.

6 Emphasis added.

7 *Kiefer v. Markley,* 283 Mich.App 555, 559; 769 NW2d 271 (2009).

8 *Greathouse v. Rhodes,* 465 Mich. 885; 636 NW2d 138 (2001).

9 *Greathouse,* 242 Mich.App at 224.

10 *Id.* at 226.

11 *Id.* at 228, citing *McDougall v. Schanz,* 461 Mich. 15; 597 NW2d 148 (1999).

12 *Id.*

13 *Id.* at 231.

14 *Greathouse,* 465 Mich. at 885.

15 *AFSCME Int'l Union v. Bank One,* 267 Mich.App 281, 293; 705 NW2d 355 (2005) (quotations and citations omitted).

16 *Kirkaldy v. Rim,* 478 Mich. 581, 586; 734 NW2d 201 (2007).

17 *Grossman v. Brown,* 470 Mich. 593, 598; 685 NW2d 198 (2004) (emphasis in original).

18 *Id.* at 599.

19 *Id.*

20 *Tisbury v. Armstrong,* 194 Mich.App 19, 20; 486 NW2d 51 (1991).

21 *Dean v. Tucker,* 182 Mich.App 27, 32–33; 451 NW2d 571 (1990).

22 *Id.* at 31–33.

23 MCR 2.503(B)(1) states: "Unless the court allows otherwise, a request for an adjournment must be by motion or stipulation made in writing or orally in open court and is based on good cause."

24 MCR 2.503(C)(1) states: "A motion to adjourn a proceeding because of the unavailability of a witness or evidence must be made as soon as possible after ascertaining the facts."

2022 WL 1593795
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Katie M. HOWARD-REED,
Plaintiff-Appellant/Cross-Appellee,
v.
Barry BRAVER, D.O., Barry Braver, D.O., PC, and Morang Chester Clinic, PC,
Defendants-Appellees/Cross-Appellants.

No. 356200
|
May 19, 2022

Wayne Circuit Court, LC No. 18-006367-NH

Before: Jansen, P.J., and Cavanagh and Riordan, JJ.

Opinion

Per Curiam.

***1** In this medical malpractice action, plaintiff appeals as of right the trial court's order dismissing all claims against defendants after, first, the court granted defendants' motion to strike plaintiff's standard-of-care expert, Dr. Lily Lam, D.O., next, ruled that the testimony of plaintiff's causation expert, Dr. Paul Bader, was inadmissible because it was not based on sufficient facts or data and was not the product of reliable principles and methods, and then, accordingly, granted defendants' motion for summary disposition under MCR 2.116(C)(10). Defendants cross-appeal the trial court's denial in part of its motion for summary disposition on other grounds. We affirm the trial court in all respects.

I. FACTS AND PROCEEDINGS

Defendant Dr. Barry Braver, D.O., is a specialist in family practice medicine and was plaintiff's primary care physician. Plaintiff developed renal cancer in 2006 resulting in the removal of her left kidney. After the surgery, she regularly visited Dr. Braver. In September 2015, Dr. Braver ordered a routine abdominal CT scan without contrast to check for recurrence or spread of the renal cancer. The CT scan was performed on December 9, 2015. The CT scan showed a mass forming in plaintiff's pancreas. Between December 2015 and June 2017, plaintiff had nine office visits with Dr. Braver, but he failed to inform her of the results of the December 2015 CT scan and failed to follow up with additional diagnostic tests and treatment.

In June 2017, Dr. Braver ordered another routine abdominal CT scan, which was performed on June 2, 2017. It showed a small increase in the size of the pancreatic mass and lesions in the liver. Plaintiff was treated with the drug Votrient then with Whipple procedure surgery to remove the head of her pancreas. She underwent liver ablations to treat the cancer in the liver.

On June 6, 2018, plaintiff brought this malpractice action alleging that Dr. Braver's failure to follow up with the December 2015 CT scan cost her the opportunity to timely treat the metastasis of her cancer. She alleged that there was a greater than 50 percent likelihood of a more favorable outcome if the cancer recurrence had been timely diagnosed and treated.

Plaintiff chose Dr. Lily Lam, D.O., as her expert witness on the standard of care for family practice specialists, and Dr. Paul Bader, M.D., as her causation expert. Defendants moved to strike Dr. Lam on the ground that the majority of her professional time was not devoted to the instruction or practice of family medicine in the year before Dr. Braver's alleged malpractice. The trial court granted the motion and denied plaintiff's request to amend her witness list to add a new standard-of-care expert. Defendants also moved for summary disposition under MCR 2.116(C)(10) on the ground that Dr. Bader's opinions regarding a causal connection between Dr. Braver's alleged malpractice and plaintiff's alleged loss of an opportunity for a more favorable outcome was not based on reliable science.

***2** Dr. Bader opined that the progression of metastasis from a solitary site to two or more sites diminished the five-year survival rate by more than 50 percent. Defendants argued that this opinion was not supported by the medical literature. The trial court agreed with defendants that Dr. Bader's opinion was not the product of reliable principles and methods. However, the trial court did not agree with defendants' argument that the factual issue whether cancer spread to plaintiff's liver before or after December 2015 was speculative, and thus not a jury-triable issue. Regardless, because the trial court's

rulings precluded plaintiff from establishing her malpractice claim through expert testimony, the court granted defendants summary disposition under MCR 2.116(C)(10).

II. DISQUALIFICATION OF DR. LAM

Plaintiff first argues that the trial court erred by disqualifying Dr. Lam as a standard-of-care expert. We disagree.

"This Court reviews for an abuse of discretion the 'qualification of a witness as an expert and the admissibility of the testimony of the witness ....' " *Lenawee Co v Wagley*, 301 Mich App 134, 161; 836 NW2d 193 (2013), quoting *Surman v Surman*, 277 Mich App 287, 304-305; 745 NW2d 802 (2007). "An abuse of discretion occurs when a circuit court chooses a result that falls outside the range of reasonable and principled outcomes." *Lenawee Co*, 301 Mich App at 162. Any preliminary questions of law, including the interpretation and application of statutes, are reviewed de novo. *Mueller v Brannigan Bros Restaurants & Taverns, LLC*, 323 Mich App 566, 571; 918 NW2d 545 (2018). "Although trial courts have considerable discretion in determining whether a witness is qualified to testify as an expert, trial courts must nevertheless accurately apply the law in exercising their discretion." *Gay v Select Specialty Hosp*, 295 Mich App 284, 291; 813 NW2d 354 (2012). "[T]his Court reviews de novo whether the trial court correctly selected, interpreted, and applied the law." *Id.* "[W]hen a trial court admits or excludes evidence on the basis of an erroneous interpretation or application of law, it *necessarily* abuses its discretion." *Id.* at 292.

"In a medical malpractice case, plaintiff bears the burden of proving: (1) the applicable standard of care, (2) breach of that standard by defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury. Failure to prove any one of these elements is fatal." *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995) (citations omitted).

With respect to the standard of care for a specialist, "the plaintiff has the burden of proving that in light of the state of the art. existing at the time of the alleged malpractice" that the defendant "failed to provide the recognized standard of practice or care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances ...." MCL 600.2912a(1)(b). The standard of care applicable to a specialist in a medical malpractice action is "that of a reasonable specialist practicing medicine in the light of present day scientific knowledge." *Naccarato v Grob*, 384 Mich 248, 254; 180 NW2d 788 (1970).

The admissibility of expert testimony on the standard of care in a medical malpractice case is also subject to MCL 600.2169(1), which provides, in pertinent part:

> In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.
>
> ***3** (b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:
>
> (*i*) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.
>
> (*ii*) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

Defendant Dr. Braver is a specialist in family practice medicine. Therefore, only another specialist in family practice medicine is qualified to provide testimony regarding the standard of care that he required in treating plaintiff. MCL 600.2169(1)(a). It is undisputed that Dr. Lam did not

practice medicine for the one-year period before the alleged malpractice in December 2015. Therefore, the admissibility of Dr. Lam's testimony depended on whether plaintiff could satisfy the requirements of MCL 600.2169(1)(b)(*ii*) by demonstrating that during the year immediately preceding the alleged malpractice, Dr. Lam devoted a majority of her professional time to the instruction of students in family practice medicine. Plaintiff fails to do this.

At her deposition, Dr. Lam testified that she was an assistant professor in the Department of Primary Care at the Touro College of Osteopathic Medicine ("Touro") from July 2014 to December 2016. When asked if she taught a family medicine course, she replied, "At Touro, no." Dr. Lam testified that she taught a physical diagnosis course for first-year students and a primary care skills class for second-year students. She stated "that courses for first-and second-year medical students are core curriculum general studies," which she described as "preclinical studies" covering the "basic sciences." In the third and fourth years, the students had "general rotations throughout internal medicine, pediatrics, ambulatory medicine, general surgery, OB/GYN and psychiatry." The fourth year had more elective courses for students to study the subjects in which they were interested.

Plaintiff argues that Dr. Lam's courses at Touro came within the purview of family practice medicine. She suggests that defendants' argument is based on the unreasonable assumption that Dr. Lam's courses did not involve family practice medicine merely because the term "family practice" did not appear in the course title. Plaintiff attempted to establish that Dr. Lam's courses constituted instruction of family practice medicine with an affidavit in which Dr. Lam averred that "the physical diagnosis course and the primary care skills course are within the practice of family medicine." She stated that she "consider[ed] then, and I consider now, the classes I taught at Touro to be critical within the purview of the practice of family medicine."

***4** "[A] witness is bound by his or her deposition testimony, and that testimony cannot be contradicted by affidavit in an attempt to defeat a motion for summary disposition." *Casey v Auto Owners Ins Co*, 273 Mich App 388, 396; 729 NW2d 277 (2006). Dr. Lam's attempt to characterize her 2015 courses at Touro as falling "within the purview of the practice of family medicine" contradicted her deposition testimony that first- and second-year classes are "basic sciences" and "core curriculum" before students have "general rotations throughout internal medicine, pediatrics, ambulatory medicine, general surgery, OB/GYN and psychiatry" in the third and fourth years, and elective specialty courses in the fourth year. The courses Dr. Lam taught were generally applicable to all osteopathic practitioners, and therefore, were not courses in the specialty of family practice. Indeed, when directly asked if she taught any family medicine course at Touro, Dr. Lam unequivocally answered "no."

Accordingly, the trial court did not err by ruling that Dr. Lam was not qualified to testify as a standard-of-care expert in the specialty of family practice medicine.

III. REQUEST TO SUBSTITUTE STANDARD-OF-CARE WITNESS

Plaintiff also argues that the trial court erred by denying her request to amend her witness list to add a new standard-of-care witness after Dr. Lam was disqualified. We disagree with plaintiff.

The trial court's decision whether to grant a party's request to add an expert witness is reviewed for an abuse of discretion. *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1991). "An abuse of discretion occurs when a circuit court chooses a result that falls outside the range of reasonable and principled outcomes." *Lenawee Co*, 301 Mich App at 162.

Plaintiff maintains that her request to amend her witness list to add a new standard-of-care expert to replace Dr. Lam was reasonable in view of the trial court's delay in deciding defendants' motions and her inability to prevail without a standard-of-care expert, and because defendants would not have been unfairly prejudiced by the amendment.

Plaintiff emphasizes that a trial date had not yet been set, and that the trial court failed to explain its delay in deciding defendants' motions. Plaintiff cites *Tisbury*, 194 Mich App at 20, in support of her argument that the trial court failed to consider factors related to the fairness of its decision. Unlike the situation before us, in *Tisbury*, the trial court granted the defendant's motion for summary disposition because the plaintiffs did not have an expert, and thus were unable to satisfy their burden of proof. *Id.* In *Tisbury*, the trial court previously had denied the plaintiffs' motions for an

adjournment and to amend their witness list. *Id.* This Court held that the trial court abused its discretion by denying the plaintiffs the opportunity to add a new expert witness because the plaintiffs "provided an adequate explanation for the absence of their expert witness, and we do not believe any prejudice would have resulted if their motions had been granted." *Id.* at 21. This Court remarked that "[t]he original expert witness had not yet been deposed and there would not necessarily have been any effect on mediation." *Id.* There was "no indication on the record that the trial had been repeatedly postponed because of a lack of diligence on plaintiffs' part." *Id.* This Court stated that it was "significant that the court's decision on plaintiffs' motions put an end to this lawsuit. Given the policy of this state favoring the meritorious determination of issues, ... we do not believe that the drastic remedy of summary disposition is appropriate in this case." *Id.* Thus, the factual scenario does not bear any resemblance to the record before us where plaintiff had retained an expert and that expert had been deposed.

Plaintiff argues that the trial court's denial of her request to amend her witness list is analogous to a court's decision to preclude a party from presenting witnesses as a sanction for failing to timely file a witness list. In *Duray Dev, LLC v Perrin*, 288 Mich App 143; 792 NW2d 749 (2010), this Court reviewed the trial court's sanction against a defendant who failed to timely file a witness list. This Court noted that the trial court had discretion to impose sanctions against a party for noncompliance with the court's scheduling order. *Id.* at 164. Precluding the party from calling witnesses was a possible sanction, but "[d]isallowing a party to call witnesses can be a severe punishment, equivalent to a dismissal." *Id.* This Court stated:

> ***5** 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. Because the decision is within the trial court's discretion, caselaw mandates that the trial court consider the circumstances of each case to determine if such a drastic sanction is appropriate. The 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. Relevant factors can include, but are not limited to,
>
> (1) whether the violation was wilful 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) 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. This list should not be considered exhaustive.
>
> The trial court should also determine whether the party can prove the elements of his position based solely on the parties' testimony and any other documentary evidence. [*Duray Dev*, 288 Mich App at 164-165 (cleaned up).]

This Court concluded that the trial court failed to consider these factors and failed to consider "all of its options in determining what sanction was just and proper in the context of the case before it." *Id.* at 165.

Plaintiff's reliance on *Duray Dev* is misplaced. That case involved discovery sanctions, in contrast to this case in which a party's choice of an expert witness is not qualified to provide the testimony that the party needs to prevail. A trial court's decision regarding a witness's qualification as an expert and whether to allow replacement of a disqualified expert is not equivalent to precluding a witness from testifying as a sanction for untimely discovery. Both decisions may result in defeating a plaintiff's claims, but only in the former situation are the claims defeated because of a lack of admissible and substantive evidence. Moreover, in *Duray Dev*, plaintiff had not yet named a potential standard-of-care expert. Discovery had already been completed, but would have to be reopened if a new expert were allowed, and new motions in limine and dispositive motions would have to be permitted.

Plaintiff emphasizes that a trial date had not yet been set in the matter before us and that neither party was responsible for the delay in deciding defendants' motions. However, discovery had already closed before defendants filed their motions here, and the facts plaintiff cites still do not bring the trial court's decision outside of the range reasonable and principled outcomes. Moreover, the delay in deciding defendants' motions gave plaintiff time to plan an alternative strategy if defendants' motion to strike Dr. Lam was granted but, apparently, she did not avail herself of this opportunity.

Under these circumstances, the trial court did not abuse its discretion by denying plaintiff's request to amend her witness list to name a new standard-of-care expert.

IV. CAUSATION

Plaintiff argues that the trial court erred by ruling that Dr. Bader's causation testimony was inadmissible and granting summary disposition for defendants on this basis. We disagree.

The trial court's decision on a motion for summary disposition is reviewed de novo. *Heaton v Benton Constr Co*, 286 Mich App 528, 531; 780 NW2d 618 (2009). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v Pontiac No 2*, 309 Mich App 611, 617-618; 873 NW2d 783 (2015). When deciding a motion for summary disposition under MCR 2.116(C)(10), a reviewing court considers the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition should be granted when "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id.* A trial court's decision regarding the admissibility of expert testimony is reviewed for an abuse of discretion. *Lenawee Co*, 301 Mich App at 161.

***6** "In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%." MCL 600.2912a(2). "Thus, to recover for the loss of an opportunity to survive or an opportunity to achieve a better result, a plaintiff must show that had the defendant not been negligent, there was a greater than fifty percent chance of survival or of a better result." *Dykes v William Beaumont Hosp*, 246 Mich App 471, 477; 633 NW2d 440 (2001).

In medical malpractice cases, expert testimony is required to establish the applicable standard of care and to demonstrate a breach of that standard. *Gonzalez v St John Hosp & Med Ctr (On Reconsideration)*, 275 Mich App 290, 294-295; 739 NW2d 392 (2007). Expert testimony may not be based on mere speculation, and there "must be facts in evidence to support the opinion testimony of an expert." *Teal v Prasad*, 283 Mich App 384, 395; 772 NW2d 57 (2009). The admission of expert testimony is governed by MRE 702 and MCL 600.2955. See *Elher v Misra*, 499 Mich 11, 22; 878 NW2d 790 (2016).

MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

MCL 600.2955 provides:

> (1) In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:
>
> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
>
> (b) Whether the opinion and its basis have been subjected to peer review publication.

(c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.

(d) The known or potential error rate of the opinion and its basis.

(e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.

(f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.

(g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.

(2) A novel methodology or form of scientific evidence may be admitted into evidence only if its proponent establishes that it has achieved general scientific acceptance among impartial and disinterested experts in the field.

(3) In an action alleging medical malpractice, the provisions of this section are in addition to, and do not otherwise affect, the criteria for expert testimony provided in section 2169.

***7** The trial court "may admit evidence only once it ensures, pursuant to MRE 702, that expert testimony meets that rule's standard of reliability." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782; 685 NW2d 391 (2004). "This gatekeeper role applies to *all stages* of expert analysis. MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data." *Id.* at 782.

The trial court analyzed defendants' summary disposition motion from two perspectives: (1) whether Dr. Bader could provide admissible expert opinion testimony if whether Dr. Braver had appropriately followed up on the 2015 CT scan, plaintiff's pancreatic cancer would have been timely treated and resulted in a more favorable outcome and prognosis; and (2) whether plaintiff could prove that she did not have metastasis to the liver in 2015, and that the spread of cancerous cells to the liver could have been prevented but for Dr. Braver's malpractice in 2015. With respect to the first perspective, the trial court concluded:

> There is no genuine issue of material fact that the cancer was in the pancreas 2015 and it grew larger, the extent of which was measured by a comparison of the two scans, the 2015 missed scan and the 2017 scan. The treatment and consequences of it are not in issue as there is no genuine issue of material fact as to it, as evidence by the agreement of the experts, the deferral of plaintiff's expert to the treating physicians and the treating physicians' testimony the growth was indolent and the treatment of it not effected nor changed by the year and a half delay. The issue of proximate cause is undisputed.

The trial court summarized Dr. Bader's expert opinion as follows:

> Bader's opinion is that a person with a single metastasis (i.e. to the pancreas alone) has a better than 50% chance of a five-year survival but that a person, like plaintiff, who had multiple metastasis (to the pancreas and the liver) does not. That is, since there was one organ involved in the 2015 renal cell carcinoma metastasis, to the pancreas, and the 2017 showed metastasis to the liver and the pancreas, not just the pancreas, plaintiff has a reduced outcome for recovery.

The trial court excluded this opinion because Dr. Bader failed to demonstrate its scientific validity. The article that plaintiff attached to her response to defendants' summary disposition motion did not corroborate Dr. Bader's opinion that the appearance of a second metastasis in the June 2017 CT scan indicated a sharp reduction in the likelihood of five-year survival. Thus, the trial court found plaintiff's theory fatally flawed. The opinion that plaintiff lost an opportunity to achieve a 50 percent or greater likelihood of a more favorable outcome because of the 18-month delay between the two CT scans did not meet the requirements for admissibility in MCL 600.2955 as it was unsupported by any indicia of reliability. Plaintiff disputes the trial court's conclusion, but her argument is based mainly on an analysis of whether a question of fact exists, with little analysis of scientific literature cited by Dr. Bader in support of her conclusion.

Dr. Bader testified in his deposition that his opinion was supported by an article posted on the UptoDate website, but he did not produce the article at the time of his deposition and he had difficulty identifying it. When asked the title of the article, he replied, "It is renal cell carcinoma. There may be some detailed modifier there, but I don't remember." He testified regarding the 2017 CT finding of two locations of metastasis:

***8** *Q.* So if we go to June 2, 2017, there are two metastatic lesions, correct?

A. Right.

* * *

Q. Are you aware of any literature that equates to, and I am going, actually, to your number 12 here, it says that, "In a situation as this, the prognosis for a solitary metastasis as opposed to multiple metastasis is considerably better," correct?

A. Correct.

Q. Have you seen any literature in which it talks about the solitary metastasis but also equates it to also a limited number of distant metastasis?

* * *

A. Oligo; in other words, are there survival statistics for people with more than one metastatic site?

Q. Correct. You made a statement in your affidavit with respect to solitary mets.

Is there literature that you are aware of that also discusses limited distance?

A. With limited but multiple mets, the five-year overall survival is about 29 percent. It is a – solitary mets is about 55 percent.

Q. So I'm sorry. So limited, which is basically two to what?

A. It's two to several, but they can't be too big and they can't be in bad places.

Q. And she was limited in June of 2017?

A. Yes.

Q. Okay. And you said that survival rate is what?

A. 29.

Q. Five year?

A. Five-year overall.

Q. And you said the solitary is 50?

A. About 55.

Q. And where was this, all in the up-to-date, or somewhere else?

A. All in the up-to-date.

Dr. Bader testified that if plaintiff had the solitary pancreatic metastasis treated in 2015, the five-year overall survival rate was 73 percent, or "three chances out of four of never developing another metastasis." In 2015, plaintiff's metastatic cancer "only seeded to the pancreatic area by December 2015." Dr. Bader stated, "[Y]ou got a negative CAT scan in '15 and a positive CAT scan in '17, so, plus that thing, pancreatic lesion, had been around a long time. So I think it is more likely than not that it had no[t] seeded beyond the pancreas in ... 2015." However, he admitted that he was not certain.

Plaintiff later submitted the UptoDate article on which Dr. Bader relied, which was entitled *Role of surgery in patients with metastatic renal cell carcinoma* (October 2019) ("*Role of Surgery*"). The *Role of Surgery* article discusses treatment rates for patients with metastatic renal cell carcinoma (RCC) who received "surgical resection of metastatic foci," or "metastasectomy, which is "a treatment option that can yield

long-term disease-free survival." The study selected 278 patients "with recurrent RCC in which 51 percent underwent removal of all of their metastatic disease with curative intent, 25 percent underwent partial resection of their metastatic disease, and 24 percent were treated without surgery." The metastases occurred "most frequently resected from the lung, brain, bone, and soft tissue." The article indicates that "resections of solitary metachronous liver metastases are possible, although the morbidity may be high." In selected patients, "two-year survival is greater than 50 percent." In a paragraph regarding pancreatic metastases, plaintiff underlined the following passages:

> Patients with pancreatic metastases seem to have a better prognosis, which may be a result of a more indolent biology. In addition, patients who present with pancreatic metastases also respond better to targeted agents, although the reason for this is unknown. A systematic literature review of 384 patients with RCC metastases to the pancreas managed with (n = 321) or without (n = 73) metastasectomy revealed five-year overall survivals of 73 and 14 percent respectively. The postoperative in-hospital mortality associated with pancreatic resection was 2.8 percent. The presence of extrapancreatic RCC metastases was associated with worse disease-free survival, and symptomatic metastases were associated with worse overall survival. Surprisingly, the size of the largest tumor resected, number of pancreatic metastases, type of pancreatic resection, and interval from diagnosis of RCC to pancreatic metastasis were not predictive of survival.

***9** The underlined text does not corroborate Dr. Bader's opinion that plaintiff's chances for five-year survival dropped from 73 percent to 29 percent between December 2015 and June 2017. The 73 percent figure stated in the article is not related to a comparison of single-metastasis to multiple metastasis patients, or a comparison of success rates correlated to timeliness of diagnosis and treatment. Nothing in the article relates to Dr. Bader's opinion.

Plaintiff argues that the difference of opinion between Dr. Bader and the defense experts is a matter for the jury to decide, but this argument overlooks the trial court's gatekeeping role in determining the admissibility of expert testimony. Dr. Bader's testimony failed to establish that his opinion regarding plaintiff's lost opportunity for a more favorable outcome was subjected to scientific testing and replication, or subjected to peer review publication. MCL 600.2955(1)(a)-(b). His testimony also fails to show the "degree to which the opinion and its basis are generally accepted within the relevant expert community." MCL 600.2955(1)(e). He did not demonstrate that "the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered." MCL 600.2955(1)(f). There is no evidence related to the factors in MCL 600.2955(1)(c) ("existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique") or (1)(d) ("known or potential error rate of the opinion and its basis"). Nor is there any indication in the record that Dr. Bader's opinion "is relied upon by experts outside of the context of litigation." MCL 600.2955(1)(g). Therefore, the trial court did not err by excluding Dr. Bader's opinion that failure to timely follow up with the 2015 CT scan cost plaintiff the opportunity for a better outcome.

Plaintiff argues that there is no factual dispute that the pancreatic cancer grew in the 18-month period and that liver cancer also appeared in the June 2017 CT scan. This is accurate, but it does not address the deficiency in plaintiff's proofs, namely, the lack of scientific support for Dr. Bader's lost-opportunity theory and causation. Additionally, the trial court found that Dr. Bader's testimony failed to support causation with respect to other unfavorable outcomes, such as proteinuria or the necessity of the Whipple procedure or Votrient, but plaintiff does not challenge these conclusions on appeal.

In sum, the trial court did not err by granting summary disposition because plaintiff failed to establish by scientifically acceptable evidence that she lost an opportunity for a more favorable outcome in the 18 months that elapsed between the December 2015 and June 2017 CT scans.

V. DEFENDANTS' ISSUE ON CROSS-APPEAL

Defendants argue in their cross-appeal that the trial court should have also granted summary disposition on the ground that the factual basis for plaintiff's causation theory was speculative. However, because we have rejected each of plaintiff's claims of error and are affirming the trial court's dismissal of plaintiff's claims, it is unnecessary to address this issue.

VI. CONCLUSION

***10** The trial court did not err by ruling that Dr. Lam was not qualified to testify as a standard-of-care expert in the specialty of family practice medicine. The trial court also did not abuse its discretion by denying plaintiff's request to amend her witness list to name a new standard-of-care expert, and it did not err by granting summary disposition as plaintiff fails to establish, by scientifically acceptable evidence, that she lost an opportunity for a more favorable outcome. We affirm.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Nicole PAWLOWSKI, Plaintiff-Appellant,
v.
Mary KOSAR, Defendant-Appellee,
and
Farm Bureau General Insurance Company of Michigan, Defendant.

No. 365803
|
May 30, 2024

Wayne Circuit Court, LC No. 21-008261-NI

Before: Feeney, P.J., and M. J. Kelly and Rick, JJ.

Opinion

Per Curiam.

***1** In this no-fault action, plaintiff appeals as of right an order granting summary disposition to defendant under MCR 2.116(C)(10) (no genuine issue of material fact). We affirm.

I. FACTUAL BACKGROUND

This action arises out of a car accident that occurred in July 2018, in Emmet County, Michigan. When the accident happened, plaintiff was the passenger in a car that was stopped on M-68, at an intersection with US-31. Defendant rear-ended the car, causing injury to plaintiff. Plaintiff filed a complaint, naming defendant and Farm Bureau General Insurance Company as defendants, and alleging one count of breach of contract against Farm Bureau only. Plaintiff claimed that Farm Bureau was required to pay her no-fault personal protection insurance benefits because defendant was uninsured when the accident occurred. Farm Bureau was dismissed as a party by stipulation on August 16, 2021, and the case continued with defendant Kosar as the only remaining party. [1]

In March 2022, defendant filed a motion for a *Daubert* [2] evidentiary hearing regarding the qualification of one of plaintiff's expert witnesses. Defendant indicated that plaintiff sought to have Margaret Rorick, a nurse practitioner, qualified as an expert. Defendant further explained that plaintiff wanted to introduce testimony from Rorick to link her recent diagnosis of fibromyalgia with the car accident. Defendant noted that a qualified expert witness's testimony would be necessary in order for plaintiff to establish a causal link between her fibromyalgia diagnosis and the car accident. Defendant questioned whether Rorick could provide reliable testimony to demonstrate causation and asked that an evidentiary hearing be held to explore the issue.

In response, plaintiff argued that defendant was not seeking a *Daubert* hearing to determine whether Rorick could be qualified as an expert, but rather sought to exclude her as an expert on causation as the first step toward filing a motion for summary disposition. Plaintiff further stated that the "court should rule that defendant's motion to exclude expert testimony at this juncture is wholly inappropriate and untimely because it is not made with the expectation of an actual trial being conducted, and is instead, being requested for an improper purpose or use."

On September 12, 2022, the trial court granted the motion for a *Daubert* hearing. A hearing on the matter was held in October 2022. Rorick testified that she is a board-certified nurse practitioner and previously worked as a registered nurse. Rorick treated plaintiff on several occasions and stated that she was willing to testify that plaintiff's fibromyalgia was caused by the car accident because plaintiff did not develop symptoms of the disease until after the accident. When asked how she arrived at a diagnosis of fibromyalgia, Rorick testified that she input plaintiff's symptoms into an online medical database called Epocrates. Rorick testified that according to the Epocrates database, fibromyalgia can be brought on by trauma, including the trauma of a car accident. She attested that she believed Epocrates to be a reliable and widely-used resource, and agreed that she used Epocrates to diagnose a causal link between plaintiff's fibromyalgia diagnosis and her car accident. Rorick agreed that she first treated plaintiff on October 19, 2019, approximately 15 months after the car accident occurred in June 2018. She further agreed that in plaintiff's deposition, plaintiff testified that she experienced some symptoms typical of fibromyalgia before the June 2018 car accident. Rorick stated that at

her appointment, plaintiff did not mention experiencing any fibromyalgia related symptoms before the accident.

***2** Following Rorick's testimony, plaintiff's counsel noted that he did not intend to call Rorick as an expert witness and instead wished to call her as a treating physician to give opinion testimony about plaintiff's condition. Defendant's counsel responded that plaintiff would need to present an expert witness on the issue of causation and that the point of the *Daubert* hearing was to determine whether Rorick could be qualified as an expert. Defendant's counsel also noted that plaintiff had not presented a witness list with any potential expert witnesses listed on it. Defendant's counsel requested that the matter be adjourned and indicated that a motion for summary disposition would be forthcoming. The hearing was then adjourned.

In March 2023, defendant moved for summary disposition under MCR 2.116(C)(10). Defendant argued that summary disposition was proper because plaintiff could not establish a causal connection between her diagnosis of fibromyalgia and defendant's alleged negligence. Defendant explained that in order to show a causal link between the fibromyalgia diagnosis and the car accident, plaintiff would need to present expert testimony, particularly because the actual cause of fibromyalgia is not well understood. Defendant contended that plaintiff had not presented an expert witness, noting that Rorick was merely intended to be a fact witness, as admitted by plaintiff's counsel.

Defendant further argued that even if Rorick were presented as an expert witness, her testimony regarding causation was unreliable. Defendant explained that the only source Rorick cited as a basis for her conclusion that plaintiff's fibromyalgia was caused by the car accident was the online resource Epocrates, which is largely meant to be used to check drug interactions and pharmaceutical information, rather than to diagnose patients. Further, Rorick's only other basis for finding a causal link between plaintiff's fibromyalgia diagnosis and the car accident was the fact that plaintiff only developed the disease after the car accident occurred. A temporal relationship, argued defendant, is not enough to demonstrate causation. Defendant thus argued that plaintiff could not establish causation, and that her claim against defendant should be dismissed.

Plaintiff filed an answer on March 20, 2023. She contended that Rorick could testify as an expert witness in support of plaintiff's theory of causation even if she was not qualified as an expert witness. Plaintiff further argued that Rorick's causation testimony, as presented at the *Daubert* hearing, was sound and reliable. She explained that Epocrates was an application used by over one million doctors nationwide, and that it could be used for diagnostic purposes, not just to verify drug interactions or pharmaceutical information. Thus, said plaintiff, Rorick's causation testimony was based on a trustworthy foundation, and she could be qualified as an expert witness.

Additionally, if Rorick could not be qualified as an expert, plaintiff argued that Dr. Ryan O'Connor, who treated plaintiff before the *Daubert* hearing took place, could testify as an expert in support of plaintiff's causation theory. Plaintiff acknowledged that Dr. O'Connor was not on her witness list, but explained that this was so because her counsel was not made aware that she had seen Dr. O'Connor until after the *Daubert* hearing took place. Plaintiff asked that the motion for summary disposition be denied in order to allow plaintiff time to submit an amended witness list and to take Dr. O'Connor's deposition. Plaintiff contended that allowing the case to proceed at a slower pace before trial would minimize any prejudice to defendant.

Defendant replied that Rorick's so-called causation theory confused correlation with causation, was based on unreliable information, and ultimately amounted to mere speculation. Defendant further contended that plaintiff should not be allowed to introduce Dr. O'Connor as an expert witness, noting that plaintiff's original witness list was untimely and that plaintiff was only now trying to find an expert to support her causation theory. Defendant argued that plaintiff had made no real effort to demonstrate good cause for the late addition. Defendant thus asked the court to overlook plaintiff's attempts to keep her case alive and instead grant defendant's motion for summary disposition.

***3** A hearing on the motion took place in April 2023, and the parties largely argued consistent with their briefs. The trial court observed that despite stating at the *Daubert* hearing that Rorick was only being presented as a fact witness, plaintiff was now backpedaling and attempting to have Rorick introduced as an expert witness. Plaintiff's counsel averred that he did not mean to state that Rorick was only intended to be a fact witness and that he wished to have her qualified as an expert. Regarding plaintiff's attempt to add Dr. O'Connor as an expert witness, the court observed that it did not believe plaintiff's counsel acted in bad faith by failing to mention Dr. O'Connor before the *Daubert* hearing. Nevertheless, the

trial court ultimately chose to grant defendant's motion for summary disposition, reasoning:

> I think that I have to grant summary disposition motion, not because [plaintiff's counsel] ... said that they ... didn't intend to call [Rorick] as an expert, but I think that her—her testimony, as to causation, is insufficient to support her. I think that she's qualified. I think she's very competent and I think that she could qualify as an expert and, if asked to do so, I would certainly be—be inclined to qualify her, based upon her years of experience, but the problem is that, as it relates to her specific diagnosis with this particular plaintiff, her testimony fails to establish the appropriate nexus for causation, under the requisite case law and I think, under the circumstances, I think I'm required to grant the motion for summary disposition .... [A]s much as ... I may want to allow you an opportunity to amend your witness list and reopen discovery to allow you to have a new expert added that—with this new person that she sought treatment with, after the fact, I don't think that that would be fair. I think would be unfairly prejudicial, at this juncture, to allow you to do that, and I don't think there is any basis of authority for me to grant the alternate relief. Your request is, respectfully, I think, at this point, given the amount of—I think if it had been—the request had been made sooner, it's—it we're six months after you guys were here for this and ... at this point, when the summary disposition motion that we ... knew or should have known was forthcoming, after her testimony, to wait until now to ask for this alternative relief, would be unfairly prejudicial to the defendant. So, I'm gonna [sic] deny your request for alternate relief and I'm gonna [sic] grant the motion for summary disposition on behalf of the defendant, for the reasons stated on the record.

An order granting the motion for summary disposition was entered later that same day. This appeal followed.

II. ANALYSIS

Plaintiff argues that the trial court erred by declining to allow her to introduce either Rorick or Dr. O'Connor as an expert witness in support of the theory that her fibromyalgia was caused by the car accident. We disagree. [3]

***4** The trial court granted summary disposition to defendant under MCR 2.116(C)(10). This Court reviews de novo a trial court's decision on a motion for summary disposition. *El-Khalil v Oakwood Healthcare Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). A motion under MCR 2.116(C)(10) "tests the factual sufficiency of a claim." *Id.* at 160 (citation and emphasis omitted). In considering a motion under MCR 2.116(C)(10), the trial court "must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id.* The motion "may only be granted when there is no genuine issue of material fact." *Id.* "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *Id.* (quotation marks and citation omitted).

This Court reviews a trial court's ruling concerning the qualification of a proposed expert witness, as well as whether to permit the addition of an expert witness, for an abuse of discretion. *Crego v Edward W Sparrow Hosp Ass'n*, 327 Mich App 525, 529; 937 NW2d 380 (2019); *Cox v Hartman*, 322 Mich App 292, 312; 911 NW2d 219 (2017). Questions of law underlying an evidentiary ruling are reviewed de novo. *Elher v Misra*, 499 Mich 11, 21; 878 NW2d 790 (2016).

A. CAUSATION

In general, the no-fault act, MCL 500.3101 *et seq.*, limited traditional tort liability for automobile accidents in exchange

for "a compulsory motor vehicle insurance program under which insureds may recover directly from their insurers, without regard to fault, for qualifying economic losses arising from motor vehicle incidents." *McCormick v Carrier*, 487 Mich 180, 189; 795 NW2d 517 (2010). Under the no-fault act, a defendant may be liable in tort for an automobile accident only in certain circumstances. *Id.* Specifically, "[a] person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1).

Here, the question is whether plaintiff's fibromyalgia was caused by the car accident. "Causation is an issue that is typically reserved for the trier of fact unless there is no dispute of material fact." *Patrick v Turkelson*, 322 Mich App 595, 616; 913 NW2d 369 (2018) (citation omitted). Establishing causation in the no-fault context requires plaintiff to show that the other driver's conduct was a cause in fact and a legal cause of their injuries. *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). Cause in fact "requires the plaintiff to present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Patrick*, 322 Mich App at 617 (citation and quotation marks omitted). "[L]egal causation," on the other hand, is "that which operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the injuries would not have occurred." *Helmus v Mich Dep't of Transp*, 238 Mich App 250, 256; 604 NW2d 793 (1999).

"To be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994). "[T]he basic legal distinction between a reasonable inference and impermissible conjecture with regard to causal proof" is as follows:

> As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence. [*Id.*, quoting *Kaminski v Grand Trunk Western R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956).]

***5** "[A]t a minimum, a causation theory must have some basis in established fact." *Skinner*, 445 Mich at 164. *Id.* at 164. It is not "sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as any other theory." *Id.* Instead, "the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Id.* at 164-165.

Because this is an issue of medical causation, lay testimony alone that the car accident caused plaintiff's fibromyalgia is insufficient. See, e.g., *Elher*, 499 Mich at 21-22 (requiring expert testimony on negligence in a medical malpractice action unless the matter "is within the common knowledge and experience" of the average juror); *Howard v Feld*, 100 Mich App 271, 273; 298 NW2d 722 (1980) ("Where ... the contested issue involves medical questions beyond the scope of lay knowledge, such as ... the causal link between an alleged accident and an injury, testimony by [a] lay witness may be improper."). MRE 702, which governs the admissibility of expert testimony, provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge,

> skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Under MRE 702, the trial court must "ensure that each aspect of an expert witness's testimony, including the underlying data and methodology, is reliable" per "the standards of reliability that the United States Supreme Court articulated in *Daubert* ...." *Elher*, 499 Mich at 22.

"MCL 600.2955(1) requires the court to determine whether the expert's opinion is reliable and will assist the trier of fact by examining the opinion and its basis, including the facts, technique, methodology, and reasoning relied on by the expert[.]" *Elher*, 499 Mich at 23. Under the statute, the following factors may be considered:

> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
>
> (b) Whether the opinion and its basis have been subjected to peer review publication.
>
> (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
>
> (d) The known or potential error rate of the opinion and its basis.
>
> (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
>
> (f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
>
> (g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation. [MCL 600.2955(1)(a) through (g).]

However, not every factor identified in MCL 600.2955, nor every *Daubert* factor, is relevant in every case. *Elher*, 499 Mich at 24-25.

***6** The record reflects that on July 11, 2018, plaintiff treated with Abigail Scott, FNP, who noted that plaintiff had hypothyroidism and was suffering from lethargy. She then treated with John Wallace, PAC, on July 13, 2018, and Dr. Catherine Zimmerman, D.O., on August 1, 2018. Neither Wallace nor Dr. Zimmerman diagnosed plaintiff with fibromyalgia at that time. Dr. Zimmerman saw plaintiff again on August 18, 2019, and once again no mention of fibromyalgia is included in the medical records. Rorick was the first individual to diagnose plaintiff with fibromyalgia in October 2019, at OMH Medical Group in Indian River, Michigan. In November 2019, plaintiff treated with Dr. Michael Florek, D.O., at the same facility. Dr. Florek diagnosed plaintiff with chronic pain syndrome, but did not confirm the fibromyalgia diagnosis.

In April 2020, plaintiff treated with Dr. Srijana Bakshi, M.D., who diagnosed her with fibromyalgia and noted that the "most likely inciting event is the MVA [motor vehicle accident] from 2018[.]" However, at her deposition, Dr. Bakshi stated that she could not conclusively say that plaintiff's fibromyalgia was caused by the car accident. Additionally, when presented with evidence that plaintiff experienced symptoms of fibromyalgia before the car accident at issue in this case, Dr. Bakshi again confirmed that she could not definitively find that plaintiff's fibromyalgia was related to the car accident involving defendant. Thus, of the witnesses on plaintiff's witness list before the summary disposition proceedings took place, Rorick was the only potential witness willing to testify that there was a causal link between the car accident and plaintiff's fibromyalgia diagnosis.

Defendant does not take issue with Rorick's qualifications as an expert in her field, and instead states that she could not testify as to causation because the foundation for her opinion on that subject was unreliable. Rorick presented two bases for her causation theory at the *Daubert* hearing. The first was that plaintiff did not have fibromyalgia before the car accident, suggesting that the accident was the most likely cause of the disease. The second was that plaintiff's symptoms matched

the symptoms of fibromyalgia listed in the medical database Epocrates, in which it was also noted that fibromyalgia is often caused by trauma. Rorick related that the precipitating trauma in this case could have been the car accident.

To survive summary disposition, plaintiff's "causation theory must have some basis in established fact[,]" and "plaintiff must present substantial evidence from which a jury may conclude that more likely than not" the car accident caused her fibromyalgia. *Skinner*, 445 Mich at 164-165. The rationale that plaintiff's fibromyalgia was related to the car accident because plaintiff did not have the disease prior to the car accident is speculative at best. That there is a temporal connection between an event and an injury is not in itself evidence of causation. *Craig v Oakwood Hosp*, 471 Mich 67, 87; 684 NW2d 296 (2004); *West v Gen Motors Corp*, 469 Mich 177, 186; 665 NW2d 468 (2003). Rorick did not elaborate on this theory beyond merely stating that it seemed likely that the fibromyalgia was related to the car accident. Moreover, she agreed that plaintiff had apparently experienced symptoms of fibromyalgia *before* the car accident, suggesting that there might have been some other cause for the disease. Additionally, the information obtained from the Epocrates medical database does little to support Rorick's claim; at best, according to Epocrates, trauma can be a cause of fibromyalgia. On that basis, Rorick concluded that the car accident caused plaintiff's fibromyalgia. Notably, Rorick never testified that Epocrates directly stated that a car accident could cause fibromyalgia, and she further stated that Epocrates indicated that the disease could also be caused by "infection ... emotional trauma or war deployment or major surgical procedure." Rorick presented no further scientific data to support her theory of causation.

***7** Ultimately, our Supreme Court has explained that "[t]o be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." *Skinner*, 445 Mich at 164. It is not enough "to submit a causation theory that, while factually supported, is, at best, just as possible as another theory." *Id.* Viewing the transcripts and medical records in the light most favorable to plaintiff, we conclude that plaintiff's theory of causation is not sufficiently supported by scientific data or record evidence. While it is possible that the car accident at issue here could have caused plaintiff's fibromyalgia, it is equally likely that some other factor in plaintiff's life—including emotional or physical trauma from an entirely separate source—could have been the onset for the disease. Accordingly, the trial court did not err by granting defendant's motion for summary disposition and dismissing plaintiff's claim.

B. AMENDMENT OF WITNESS LIST

As noted, plaintiff also argues that the trial court erred by declining to allow her to add Dr. Ryan O'Connor as an expert witness. The original scheduling order in this case was entered September 23, 2021, and indicated that the filing deadline for witness lists was December 29, 2021. On February 2, 2022, the trial court entered an order extending discovery and moving the deadline for filing witness lists to March 6, 2022. On May 26, 2022, the parties stipulated to extend discovery through the case evaluation deadline, which, according to the original scheduling order, was set for July 2022. Plaintiff did not file a witness list before the July 2022 deadline, and instead filed her first and only witness list on September 6, 2022, nearly two months after the close of discovery. Plaintiff first made mention of Dr. O'Connor as a potential expert witness in her response to defendant's motion for summary disposition, in which her counsel explained that plaintiff had not mentioned that she saw Dr. O'Connor before the *Daubert* hearing. While that may be so, the *Daubert* hearing took place in October 2022, and plaintiff did not file her response to defendant's motion for summary disposition until March 2023. Thus, approximately five months passed with no indication from plaintiff that she had seen another doctor who could serve as an expert witness. Neither plaintiff nor her counsel have presented an explanation for the oversight, other than a general admission from plaintiff's counsel indicating that he did not know plaintiff had gone to see another doctor while the trial court proceedings were ongoing.

Plaintiff argues that the trial court's denial of her request to amend her witness list was a sanction for failing to submit a timely witness list. A trial court may preclude a party from introducing expert witnesses as a sanction for failing to follow discovery orders. MCR 2.313(B)(2)(b). "Witness lists are an element of discovery," and are imposed to avoid "trial by surprise." *Grubor Enterprises, Inc v Krotidis*, 201 Mich App 625, 628; 506 NW2d 614 (1993) (quotation marks and citation omitted). As a case proceeds, the trial court sets a deadline for submitting witness lists and for disclosing any expert witnesses. MCR 2.401(I)(1). If a witness is not disclosed in accordance with the court rule, the trial court has discretion to prevent the witness from testifying unless good cause for the nondisclosure is shown. MCR 2.401(I)(2). "Disallowing a party to call witnesses can be a severe

punishment, equivalent to a dismissal." *Duray Dev, LLC v Perrin*, 288 Mich App 143; 792 NW2d 749 (2010). However,

> 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. Because the decision is within the trial court's discretion, caselaw mandates that the trial court consider "the circumstances of each case to determine if such a drastic sanction is appropriate." "[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." Relevant factors can include, but are not limited to,
>
> > ***8** (1) whether the violation was willful [sic] 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) 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. This list should not be considered exhaustive.
>
> The trial court should also "determine whether the party can prove the elements of his position based solely on the parties' testimony and any other documentary evidence." [*Duray Dev*, 288 Mich App at 164-165.]

We conclude that plaintiff's reliance on *Duray Dev* and caselaw concerning discovery sanctions is misplaced. Although it is true that plaintiff failed to timely file a witness list, the motion to amend the witness list to add Dr. O'Connor as an expert is a different matter entirely. Notably, plaintiff only attempted to amend the witness list in response to defendant's motion for summary disposition, in which defendant argued that plaintiff's claim should be dismissed because Rorick could not provide expert testimony in support of plaintiff's causation theory. 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. Plaintiff nevertheless argues that denying the amendment of the witness list was a severe sanction, and claims that defendant would not have been prejudiced by the amendment of the witness list had the court extended discovery and set a date for trial. But plaintiff overlooks that by the time she sought to amend her witness list, discovery had been completed, and would have had to be reopened in order for a new expert to be admitted. On this record, the trial court's decision to deny the attempt to amend the witness list did not fall outside the range of reasonable and principled outcomes. Thus, the trial court did not abuse its discretion by denying plaintiff's motion to amend the witness list.

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2024 WL 2795604

Footnotes

1 As a result of the dismissal, Farm Bureau does not participate in this appeal. Accordingly, all references to "defendant" are references only to Mary Kosar.

2 *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

3 As an initial matter, we note that the table of contents and the substance of plaintiff's brief do not match her statement of the issues. In the body of the brief, plaintiff's Issue II asks "[w]hether the court erred in disallowing an alternative witness or subsequent expert witness (doctor) who would have testified that plaintiff's fibromyalgia diagnosis was linked to her auto accident, who was not previously on plaintiff's witness

list, but revealed after the evidentiary hearing." This question is not listed in her statement of the issues; Issue II instead concerns the weight and admissibility of expert testimony.

In general, if an issue is not contained in the statement of questions presented, it is waived on appeal. *Seifeddine v Jaber*, 327 Mich App 514, 521; 934 NW2d 64 (2019); MCR 7.212(C)(5). Similarly, if an issue is presented in the statement of issues, but is not substantively addressed in the body of the brief, it is considered abandoned. See *Berger v Berger*, 277 Mich App 700, 712; 747 NW2d 336 (2008) ("A party abandons a claim when it fails to make a meaningful argument in support of its position."). Nevertheless, plaintiff discusses the issue in full and cites authority in support of her arguments. Likewise, defendant addresses those arguments despite plaintiff's failure to include them in her statement of the issues. Accordingly, we will address plaintiff's arguments as though they were properly presented on appeal. See *Mack v Detroit*, 467 Mich 186, 207; 649 NW2d 47 (2002) ("[A]ddressing a controlling legal issue despite the failure of the parties to properly frame the issue is a well understood judicial principle."); *Tingley v Kortz*, 262 Mich App 583, 588; 688 NW2d 291 (2004) ("[T]his Court possesses the discretion to review a legal issue not raised by the parties.").

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Jennifer MORRIS, Plaintiff-Appellant,
v.
ST. CLAIR ORTHOPAEDICS & SPORTS MEDICINE, PC, and Glenn Minster, M.D., Defendants-Appellees.

No. 367109
|
September 19, 2024

Wayne Circuit Court, LC No. 21-016798-NH

Before: Letica, P.J., and Garrett and Feeney, JJ.

Opinion

Per Curiam.

***1** In this medical malpractice action, plaintiff, Jennifer Morris (plaintiff), appeals as of right, the order granting summary disposition in favor of defendants, St. Clair Orthopaedics & Sports Medicine, PC (SC Orthopaedics), and Glenn Minster, MD (Dr. Minster). We affirm.

I. FACTUAL AND PROCEDURAL HISTORY

On December 6, 2021, plaintiff filed a complaint alleging she suffered from back pain in 2019 and treated with defendants. As a result of the pain, plaintiff, then 46 years old, underwent a computed tomography (CT) scan on her pelvis on February 28, 2019. Additionally, on February 10, 2019, plaintiff had a magnetic resonance imaging (MRI) scan on her lumbar spine. The MRI scan results revealed disc bulging and narrowing. Plaintiff reported that she had a history of low back pain that radiated into her legs, causing numbness and weakness, and she did not receive relief through other means, causing her to seek operative decompression and fusion. Because of the inability to manage her pain, plaintiff had surgery on June 7, 2019, performed by defendant Dr. Minster, an orthopedic spine surgeon. Post-operation, plaintiff experienced significant pain radiating into her left leg, and medication did not provide pain relief. A CT scan disclosed that fixation screws were protruding. Plaintiff sought surgical intervention, and defendant Dr. Minster recommended hardware removal at L5-S1 on the left side. Yet, plaintiff did not receive relief after the surgery occurred on July 27, 2019. Plaintiff asserted that her pain medications caused her to suffer from a bowel perforation which required additional surgery, a temporary colostomy, and reversal surgery. Plaintiff alleged negligence against defendant Dr. Minster (count I), identifying the breaches of the standard of care as including: (a) correct use of neuromonitoring; [1] (b) timely addressing patient complaints and surgical complications; (c) timely investigation of post-operative complaints; and (d) other acts and omissions as uncovered in discovery. In essence, plaintiff claimed that there was a failure to timely investigate and address plaintiff's pain complaints following the surgery. Plaintiff alleged vicarious liability (count II) against defendant SC Orthopaedics, contending that defendant Dr. Minster was its employee or agent. Therefore, it was allegedly vicariously liable for Dr. Minster's negligent acts and omissions. Plaintiff claimed that these defendants were responsible for her damages which exceeded $25,000.

With the complaint, plaintiff submitted an affidavit of merit from Dr. Peter G. Whang, a board-certified orthopedic surgeon licensed to practice in Connecticut. Dr. Whang averred that he reviewed plaintiff's hospital medical records and opined that defendant Dr. Minster breached the standard of care as set forth in the complaint.

On April 13, 2023, plaintiff filed a motion for leave to amend the witness list. Plaintiff noted that this medical malpractice action supported by Dr. Whang's affidavit was initially assigned the track one scheduling order but was adjourned by the parties' stipulation to track two. And, the court adjourned the scheduling order again on January 17, 2023, which required the exchange of witnesses by February 1, 2023. During Dr. Whang's deposition on the last day before discovery closed, he identified that the timing of the CT scan breached the standard of care. But, the timeframe Dr. Whang cited did not comport with plaintiff's theory of the case. Rather, plaintiff's theory concluded that there was a five-week delay in pursuing the hardware removal, not two weeks as Dr. Whang concluded upon review of the entire medical record. Plaintiff's counsel sought to replace plaintiff's expert in light of Dr. Whang's deposition testimony, but the witness list deadline had passed. Plaintiff asked defense counsel to stipulate to extend the timeframe to file the witness list. When

defense counsel did not receive a response from defendants about the stipulation, plaintiff moved for leave to amend the witness list.

***2** Plaintiff contended that, under MCR 2.401(I), the trial court may direct the time for filing and serving witness lists, and the court may order that a witness cannot testify except upon good cause shown. Plaintiff acknowledged that both the decision to allow an expert witness and to grant an adjournment were discretionary. And, the trial court could deny a plaintiff's request for leave where the facts involved multiple requests for continuances, failure to exercise due diligence, and "lack of injustice to the movant." In the present case, plaintiff claimed that there was a prior adjournment but noted that the medical malpractice action had not been pending for 18 months. The parties had recently completed case evaluation, and a trial date was not scheduled. If the motion were granted, plaintiff would present her expert for deposition within a short timeframe. The additional expert would not add new legal theories. And, plaintiff asserted that she exercised due diligence by seeking a stipulation to add a new expert upon learning one was necessary. When the stipulation was not forthcoming, plaintiff filed the formal motion. Plaintiff claimed that defendants would not be prejudiced by permitting an amendment to the witness list to replace Dr. Whang. But, plaintiff alleged that she would be prejudiced by a denial because the change in Dr. Whang's testimony addressed the issue of damages.

On April 19, 2023, defendants filed their response in opposition to plaintiff's motion for leave. Defendants alleged that, during Dr. Whang's deposition, he noted that he did not have the complete medical records when preparing his affidavit of merit. After receipt of those records, Dr. Whang purportedly abandoned all criticisms of defendants' treatment of plaintiff. Additionally, defendants claimed that they had to make numerous requests to take Dr. Whang's deposition, first on December 29, 2022, a renewed request on January 17, 2023, and again on February 14, 2023. Dr. Whang was not produced for deposition until March 31, 2023, the last day of discovery. And, the case evaluation occurred on April 3, 2023. Accordingly, discovery was now closed, and the case evaluation completed.

Defendants asserted that the trial court should not exercise its discretion and allow the addition of an expert witness or an adjournment because good cause could not be established. Plaintiff presented an affidavit of merit from an expert who rendered standard of care criticism without reviewing the available medical records. Additionally, plaintiff merely relied on a single standard of care expert and did not produce the expert until the close of discovery and just prior to case evaluation. Defendants claimed that "[p]laintiff's lack of a standard of care expert to bring her case to the jury is not a reason for the court to reopen discovery." Accordingly, defendants requested that the trial court deny the motion to amend her witness list. Alternatively, if the trial court granted the motion, defendants asked that the amendment be limited to the addition of a single standard of care expert, that the expert be added within 14 days, and that defendants be entitled to depose the expert within 21 days of the filing of the amended witness list. If plaintiff's new expert failed to identify a breach of the standard of care by defendant Dr. Minster, defendants requested that the case be dismissed with prejudice.

On April 26, 2023, the trial court heard oral argument addressing plaintiff's motion for leave to amend the witness list. The parties argued their positions as reflected in their written pleadings. The trial court denied the motion for leave to amend, ultimately adopting defendants' arguments. The trial court determined that plaintiff failed to meet her burden of demonstrating good cause and prejudice. The court noted that case evaluation was conducted and the cost of Dr. Whang's deposition incurred. There was no rationale offered to explain the disparity between Dr. Whang's opinion as set forth in his affidavit of merit and his deposition testimony. And, Dr. Whang was not deposed until the last date for discovery.

On May 8, 2023, defendants filed a motion for summary disposition under MCR 2.116(C)(10) for plaintiff's failure to support a breach of the standard of care. Specifically, plaintiff filed her medical malpractice action, claiming that defendant Dr. Minster failed to timely address her post-operative surgery complaints and ongoing neurological problems in her left leg. In a medical malpractice action, expert testimony was required to establish the standard of care, breach thereof, and proximate causation. Although Dr. Whang submitted an affidavit of merit, identifying breaches of the standard of care by defendant Dr. Minster, defendants alleged that he did not identify any such breach during his deposition. That is, when questioned about medical malpractice, Dr. Whang stated that nothing came to mind at that time. In light of plaintiff's failure to support her claim with standard of care testimony, defendants contended that summary disposition was warranted.

***3** On May 18, 2023, plaintiff moved for reconsideration of the order denying plaintiff's motion for leave to amend her witness list. Plaintiff alleged that the trial court should reconsider its decision to deny leave to amend the witness list because: Dr. Whang changed his opinion during the deposition; defendants failed to show prejudice; the time and money expended on Dr. Whang's deposition was not prejudicial; plaintiff was prejudiced by the change in opinion; plaintiff exercised due diligence by seeking to amend the witness list after Dr. Whang's deposition; neither party accepted the case evaluation thereby not altering the status of the matter; and defendants moved for summary disposition premised on Dr. Whang's deposition opinion, thereby causing plaintiff prejudice. Because plaintiff asserted and demonstrated good cause in the denial of an amendment, she alleged that the trial court abused its discretion and should grant reconsideration.

On June 8, 2023, plaintiff filed a response in opposition to defendants' motion for summary disposition, contending that summary disposition was improper because Dr. Whang opined that the CT scan should have been obtained on June 27, 2019, and defendants did not obtain the CT scan until July 11, 2019. Furthermore, there had been a substantial breakdown in the relationship between plaintiff and Dr. Whang because he elected to withdraw as plaintiff's expert. Therefore, plaintiff renewed her request to amend her witness list to add a new expert. In her responsive brief, however, plaintiff acknowledged that defendants were entitled to summary disposition because Dr. Whang withdrew as an expert from the case. Accordingly, plaintiff renewed her request for leave to amend the witness list to add a new expert and to grant reconsideration in lieu of deciding the dispositive motion.

On June 14, 2023, defendants filed a reply brief in support of summary disposition. Defendants asserted that plaintiff failed to rebut defendants' claim that she could not support her medical malpractice action with standard of care testimony. Although plaintiff alleged that Dr. Whang's deposition contained sufficient standard of care testimony to survive summary disposition, Dr. Whang failed to articulate standard of care criticism in his deposition. Dr. Whang explained the disparity between his affidavit of merit and his opinion during the deposition – it was because the medical records were incomplete at the time of his review. And, in response to defendants' motion for summary disposition, plaintiff needed to produce documentary evidence to establish a genuine issue of material fact. Plaintiff's recitation of allegations in the complaint and pledge to retain a new expert was insufficient to prevent the grant of summary disposition. Because plaintiff failed to rebut the merits of the dispositive motion, she tacitly agreed with the dismissal.

On June 22, 2023, the trial court heard oral argument addressing the motions for reconsideration and summary disposition. The trial court denied the motion for reconsideration, citing the prejudice and monetary expenditures to defendants in light of the posture of the case for the last 18 months. And it concluded that plaintiff failed to establish good cause. The trial court granted defendants' motion for summary disposition determining that Dr. Whang's testimony did not create a genuine issue of material fact regarding a breach of the standard of care. Moreover, plaintiff, in her response brief, acknowledged that summary disposition was appropriate because Dr. Whang withdrew as an expert from the case.

II. ANALYSIS

A. MOTION FOR LEAVE TO AMEND WITNESS LIST

Plaintiff first asserts that that the trial court abused its discretion by denying the motion for leave to amend the expert witness list. We disagree.

Witness lists constitute a part of discovery. *Grubor Enterprises, Inc v Kortidis*, 201 Mich App 625, 628; 506 NW2d 614 (1993) (citation omitted). The primary objective for engaging in pretrial discovery is to "make available to all parties, in advance of trial, all relevant facts which might be admitted into evidence at trial." *Id.* Witness lists are designed to avoid "trial by surprise." *Id.* (quotation marks and citation omitted). The trial court's decision to deny a request for leave to add an expert witness is reviewed for an abuse of discretion. *Cox v Hartman*, 322 Mich App 292, 312; 911 NW2d 219 (2017) (citation omitted). An abuse of discretion occurs if the decision is outside the range of principled outcomes. *Id.*

***4** The construction and interpretation of the court rules also presents an issue reviewed de novo. *Associated Builders & Contractors of Mich v Dep't of Technology, Management, & Budget*, —— Mich App ——, ——*Associated Builders & Contractors of Mich v Dep't of Technology, Management, & Budget*, —— Mich App ——, ——; —— NW3d —— (2024)—— NW3d —— (2024) (Docket No. 363601), slip op. at 2. The use of the term "shall" denotes mandatory, not

discretionary action. *Yachcik v Yachcik*, 319 Mich App 24, 36; 900 NW2d 113 (2017) (citation omitted). MCR 2.401 addresses pretrial procedure and witness lists, providing in pertinent part:

> **(I) Witness Lists.**
>
> (1) No later than the time directed by the court under subrule (B)(2)(a), the parties shall file and serve witness lists. The witness list must include:
>
> (a) the name of each witness, and the witness' address, if known; however, records custodians whose testimony would be limited to providing the foundation for the admission of records may be identified generally;
>
> (b) whether the witness is an expert, and the field of expertise.
>
> (2) The court may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown.
>
> (3) This subrule does not prevent a party from obtaining an earlier disclosure of witness information by other discovery means as provided in these rules.

Thus, the failure to identify a witness on the list results in the exclusion of the witness from testifying at trial unless good cause is demonstrated. MCR 2.401(I)(2). Good cause "simply means a satisfactory, sound or valid reason." *Thomas M Cooley Law Sch v Doe*, 300 Mich App 245, 264; 833 NW2d 331 (2013) (quotation marks and citation omitted). The trial court has broad discretion regarding what constitutes "good cause." *Id.* (citation omitted). Plaintiff bears the burden of demonstrating good cause for the late addition of a new expert witness. *Cox*, 322 Mich App at 314.

Review of the docket entries reveals that the complaint was filed on December 6, 2021. An answer was filed on March 1, 2022. On March 14, 2022, a scheduling order issued indicating that the case was assigned to track one, with the witness list date of May 30, 2022. On March 28, 2022, the trial court signed and entered an order adopting the parties' stipulation to proceed on track two. Under track two, the witness list date was August 15, 2022. On October 6, 2022, the trial court signed an order altering the scheduled dates. The witness list date was November 1, 2022. After the defense filed a motion to adjourn the scheduling order 90 days (to which plaintiff did not object), the trial court signed an order altering the scheduling order on January 17, 2023. This order provided that the witness list exchange was February 1, 2023, the discovery cutoff was March 31, 2023, with case evaluation to occur in April 2023. Dr. Whang was produced for his deposition on March 31, 2023, the last day of discovery. Thus, the timeframe to file the witness list was extended three different times.

Plaintiff alleged that she requested a stipulation to amend the witness list on the date of Dr. Whang's deposition. Defense counsel represented that the request would be conveyed to defendants. When an answer was not received from defendants, plaintiff filed her motion to amend the witness list on April 13, 2023 (after the witness list exchange was due February 1, 2023). On April 26, 2023, the trial court heard oral argument on the motion and denied it, concluding that it did not find good cause. It noted that Dr. Whang signed his affidavit of merit on November 30, 2021, and the complaint was filed on December 6, 2021. The trial court concluded that there was no explanation for the divergence between the opinion offered in the affidavit of merit and at the deposition. Furthermore, the trial court noted that the necessity of deadlines, that deposing the expert involved financial expense, and that good cause was not established by plaintiff's failure to secure favorable testimony.

***5** Under the circumstances, we conclude that the trial court did not abuse its discretion in denying the motion for leave to amend the witness list to add a new expert. Its decision did not fall outside the range of reasonable and principled outcomes. *Cox*, 322 Mich App at 312. Plaintiff failed to meet the burden of demonstrating good cause for the late addition of a new expert witness. *Cox*, 322 Mich App at 312. That is, plaintiff failed to demonstrate "a satisfactory, sound or valid reason," for the late addition of an expert. *Thomas M Cooley Law Sch*, 300 Mich App at 264. Plaintiff should have been aware of the information conveyed or provided to Dr. Whang and could have avoided this issue by naming an additional expert witness on her witness list from the outset or taking the deposition of Dr. Whang earlier. By waiting until the last day of discovery to depose Dr. Whang, plaintiff risked that deficiencies in her expert's testimony would fail to support the medical malpractice alleged or limit her damages (from five weeks to two weeks), and she would not have a remedy.

Moreover, we agree with defendants' contention that it was speculative whether plaintiff could secure another expert witness. In her appellate briefs, plaintiff alleged that she

identified to defendants the expert as Dr. John Tydings, his board certification, and his unavailability from May 6, to May 16, 2023. However, defense counsel stated that plaintiff identified her new expert by name in the breakout session held before the parties appeared via Zoom. Defense counsel was unfamiliar with this expert, and the expert was unavailable one week such that plaintiff was going to pursue another expert. Although plaintiff had the burden of demonstrating good cause, she failed to present an affidavit from her new expert to support the breaches of the standard of care addressed in Dr. Whang's original affidavit of merit. Without such evidence, the trial court and this Court do not have any record support for the medical malpractice action. It is noteworthy that although the parties dispute whether Dr. Whang's deposition testimony supports a limited breach of the standard of care, Dr. Whang withdrew his expert opinion. Under the circumstances, the trial court did not abuse its discretion in denying plaintiff's motion for leave to amend the witness list.

Our conclusion is buttressed by caselaw. In *Cox*, 322 Mich App at 296-297, the plaintiff alleged that the defendant Tracey McGregor, R.N., negligently assisted in the delivery of the plaintiff's minor daughter and that defendant Port Huron Hospital was vicariously liable for McGregor's negligence. After discovery, the defendants moved for summary disposition under MCR 2.116(C)(10), contending that the plaintiff's proposed nursing expert was not qualified to offer standard-of-care testimony against McGregor; therefore, the defendants were entitled to dismissal of the nursing malpractice claim. The trial court agreed and granted summary disposition on this claim. *Id.* at 297-298. The plaintiff moved for leave to name a new nursing expert and to amend the affidavit of merit addressing the nursing malpractice claim. The trial court denied this motion, and the plaintiff appealed. *Id.* at 298.

Initially, this Court determined that the nursing care expert was not qualified to testify regarding the appropriate standard of care. And therefore, the trial court properly granted summary disposition to the defendants. *Id.* at 306-307. This Court then concluded that the trial court did not abuse its discretion by denying the plaintiff's motion to add an expert witness. *Id.* at 312. First, this Court determined that the trial court did not err in concluding that the plaintiff's motion was untimely. Specifically, the plaintiff did not move to add a new expert until June 10, 2016, which was four days after the trial court entered an order granting the defendants' summary disposition motion. When the plaintiff opposed the defendants' dispositive motion, the plaintiff relied entirely on her expert's affidavit and failed to seek to add another expert at that time. Indeed, the crux of the trial court's ruling was that the plaintiff's expert was unqualified, and the plaintiff "had presented no other expert to testify concerning the standard of care." *Id.* at 312-313.

***6** This Court also addressed the trial court's other grounds for denying the motion:

> In any event, the trial court's decision was not premised solely on the untimeliness of the motion. After concluding that the motion was untimely, the trial court went on to state that even if the motion was properly before the court, the court would deny the motion given the prejudice to [the] defendants. The trial court's decision fell within the range of principled outcomes. MCR 2.401(I)(1) provides that parties must file and serve witness lists no later than the time directed by the trial court. "The court may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown." MCR 2.401(I)(2). The trial court's scheduling order required [the] plaintiff to file and serve her witness lists by March 6, 2015. Hence, [the] plaintiff's June 10, 2016 motion to add a new expert witness was filed more than one year and three months after the due date for filing and serving witness lists. It was thus [the] plaintiff's burden to demonstrate good cause for the late addition of a new expert witness. 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." *Tisbury*, 194 Mich App at 20. A court should consider whether prejudice would result from granting a motion to add an expert witness. *Id.* at 21; *Levinson v Sklar*, 181 Mich App 693, 698-699; 449 NW2d 682 (1989). [*Cox*, 322 Mich App at 314-315.]

As in *Cox*, our plaintiff failed to explain the disparity between Dr. Whang's affidavit and his deposition testimony as well as his complete withdrawal from the litigation. Additionally, plaintiff did not delineate the diligent efforts that she made to secure Dr. Whang's opinion in accord with the affidavit. And, plaintiff failed to demonstrate good cause for the late addition of an expert. The parties obtained three extensions of the witness list and discovery cutoff dates. Despite these extensions, plaintiff did not depose Dr. Whang until the last day of discovery. The trial court did not abuse its discretion

by denying plaintiff's motion for leave to amend her witness list to add a new expert. [2]

B. SUMMARY DISPOSITION [3]

***7** Next, plaintiff contends that the trial court erred in granting summary disposition in favor of defendants because it should have granted her motions for leave to amend and for reconsideration. We disagree.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Charter Twp of Pittsfield v Washtenaw Co Treasurer*, 338 Mich App 440, 448; 980 NW2d 119 (2021). A motion for summary disposition premised on MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id.* at 449. The moving party must identify and support the issues to which the moving party believes there is no genuine issue of material fact, and the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted with the motion must be examined. *Id.* Once the moving party makes and supports its motion, the opposing party may not rest on mere allegations or denials in the pleadings, but must submit documentary evidence setting forth specific facts to demonstrate a genuine issue for trial. *Id.* (quotation marks and citation omitted).

Defendants made and supported their dispositive motion. In response, plaintiff conceded that defendants were entitled to summary disposition in light of Dr. Whang's withdrawal as an expert in the case. It is noteworthy that plaintiff did not submit an affidavit from another expert to validate the breaches of the standard of care as delineated in Dr. Whang's affidavit of merit. This affidavit possibly would have caused the trial court to determine that summary disposition was unwarranted because the previously expressed and withdrawn opinion by Dr. Whang was validated by another orthopedic surgeon. Plaintiff simply took no action in response to the motion for summary disposition. Under the circumstances, the trial court did not err in granting defendants' motion for summary disposition.

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2024 WL 4249304

Footnotes

1 On February 28, 2023, the parties stipulated to dismiss plaintiff's claim addressing neuromonitoring after receipt of the pertinent medical records.

2 Plaintiff contends that the trial court should have imposed graduated sanctions and analyzed the factors underlying the exclusion of the witness. See *Duray Development, LLC v Perrin*, 288 Mich App 143, 165; 792 NW2d 749 (2010); *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990). This case does not involve the complete failure to file a witness list. Additionally, the plain language of MCR 2.401(I)(2) does not contain a degree of sanction contingent on the violation at issue. ("The court may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown."). Instead, MCR 2.401(I)(2) requires an analysis of whether the party met their burden of showing good cause. Furthermore, a medical malpractice action differs from other types of actions. Specifically, since April 1, 1994, it requires that a party submit a notice of intent to sue, MCL 600.2912b, and obtain an affidavit of merit from an expert addressing the validity of the claim, MCL 600.2912d. In this case, plaintiff obtained an affidavit of merit from Dr. Whang in November 2021, filed the complaint on December 6, 2021, and deposed Dr. Whang on March 31, 2023, the date discovery closed. There is no indication that plaintiff consulted with Dr. Whang to ensure that additional review of plaintiff's medical records did not alter Dr. Whang's opinion. And, plaintiff could have named an additional expert witness as a precaution but did not do so. More importantly, when

plaintiff filed her motion for leave to amend her witness list, she did not attach an affidavit from a new expert to support her claims of medical malpractice. Thus, it was speculative whether plaintiff could support her claim.

3 In her statement of questions presented, plaintiff challenged the trial court's failure to grant her motion for reconsideration. But, plaintiff failed to address the merits of this issue. Therefore, this claim was abandoned. *In re Murray*, 336 Mich App 235, 260-261; 970 NW2d 372 (2021) (citation omitted).

End of Document

2024 WL 2790504
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

RED FIT, LLC and Cali Red, LLC, Plaintiffs-Appellants,
v.
RED EFFECT INTERNATIONAL FRANCHISE, LLC, Red Effect Holdings, LLC, Red Effect La County, LLC, Red Effect Orange County, LLC, Allie Mallad, Carlos Guzman, Erica Mallad, Robert Vendittelli, and Chelsie Bender, Defendants-Appellees.

No. 363686
|
May 30, 2024

Oakland Circuit Court, LC No. 2021-186383-CB

Before: Feeney, P.J., and M. J. Kelly and Rick, JJ.

Opinion

Per Curiam.

***1** Plaintiffs, Red Fit, LLC, and Cali Red, LLC, appeal as of right, challenging the trial court's final order of involuntary dismissal and many of the court's earlier orders. We affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND

The underlying facts generally are not in dispute. Brothers Hayden Epstein and Joshua Epstein are the members of plaintiffs Red Fit, LLC and Cali Red, LLC. On September 26, 2017, Hayden and Joshua entered into agreements with defendant Red Effect International Franchise, LLC.[1] These agreements allowed the Epstein brothers to own and operate three separate franchise locations in the San Diego area (the San Diego Franchise Agreements). That same day, the Epsteins executed with Red Effect International an Area Development Agreement (ADA) for the San Diego County territory.[2] The San Diego Franchise Agreements and the San Diego ADA all contain the same arbitration provision, which provided:

> **17.1 Binding Arbitration**
>
> Except for actions described in Section 17.6, all controversies, disputes or claims between: (i) Franchisor and/or its Affiliates and their respective owners, officers, directors, members, managers, employees, agents or representatives; and (ii) Franchisee, and/or its Affiliates and their respective owners, officers, directors, members, managers, employees, agents or representative; arising out of or related to (1) this Agreement or any other agreement between Franchisor and Franchisee or any provision of such agreement; (2) Franchisor's relationship with Franchisee; or (3) the scope and validity of this Agreement or any other agreement between Franchisee and Franchisor or any provisions or such agreements (including the validity and scope of the arbitration obligations under this Article, which the parties acknowledge is to be determined by an arbitrator and not a court); must be submitted for binding arbitration in accordance with the provisions of this Article 17 on the demand of either party....

Also on September 26, 2017, Hayden entered into three other franchise agreements to own and operate three franchise locations in Illinois (the Illinois Franchise Agreements). Hayden also executed a contemporaneous ADA associated with the Illinois locations.

The Epstein brothers wanted to acquire area development and franchise rights to Orange County, California. At their request, Red Effect agreed to swap the Illinois ADA and Illinois Franchise Agreements with area development and franchise rights to Orange County. As a result, on July 10, 2018, Hayden signed a Franchise Termination Agreement terminating the Illinois Franchise Agreements. On that same date, Red Fit and Red Effect International entered into ADAs for Orange County and Los Angeles County and three franchise agreements for franchises to be operated in each county. On May 30, 2019, Red Fit assigned its rights in the San Diego ADA to plaintiff Cali Red.

***2** Red Fit sold its rights to the Orange County ADA and its rights to the Los Angeles County ADA to defendant Red Effect Orange County and defendant Red Effect LA County, respectively, in repurchase agreements dated November 5, 2019. On November 12, 2019, Red Effect International and Red Fit executed Franchise Termination and Mutual Release

Agreements (the 2019 TRAs) for the Los Angeles County and Orange County ADAs. The TRAs contained a release provision, in which both sides released the other side "from all liability, right, claim, debt and cause of action whatsoever, known or unknown, suspected or unsuspected ... arising under or related to the [ADA] or any other agreement entered into between the parties on or before the date of this Agreement."

Red Effect International and Red Fit then entered into three franchise agreements for Orange County (the 2019 Orange County Franchise Agreements) and three franchise agreements for Los Angeles County (the 2019 LA County Franchise Agreements). These agreements do not contain arbitration provisions and instead state:

> Franchisee and Franchisor have negotiated regarding a forum in which to resolve any disputes which may arise between them and have agreed to select a forum in order to promote stability in their relationship. Therefore, unless expressly provided for otherwise in this Agreement, if a claim is asserted in any legal proceeding involving Franchisee (or its owners, officers, directors, or Affiliates) and Franchisor (or its officers, directors, members, Affiliates, or sales employees) both parties agree that the exclusive jurisdiction for disputes between them shall be the U.S. Federal Courts for the Eastern District of Michigan or the State Courts for Oakland County, Michigan and each waive any objection either may have to the personal jurisdiction of or venue in the State of Michigan.

A dispute arose regarding franchise royalties owed on the San Diego Franchise Agreements. Red Effect International filed a demand for arbitration against plaintiffs, and Red Fit objected, arguing that the matter was not subject to arbitration. Red Fit maintained that the 19 subsequent agreements it executed with Red Effect International provide that "any" claims are to be resolved in Michigan court. The arbitrator ruled that the arbitration clauses in the San Diego Franchise Agreements controlled because "each of the several agreements here is a discrete agreement, and disputes arising under each agreement are to be resolved within the four corners of the particular agreement involved, including their respective dispute resolution clauses."

On February 12, 2021, plaintiffs filed the instant complaint in the Oakland Circuit Court, alleging the following counts: Count I (breach of contract based on Red Effect International's arbitration demand), Count II (breach of contract based on the 2019 Repurchase Agreements), Count III (violation of Michigan's Franchise Investment Law (MFIL), MCL 445.1501 *et seq.*, regarding the November 2019 Agreements), Count IV (violation of California's Franchise Investment Law (CFIL), Cal. Corp. Code 31000 *et seq.*, regarding the November 2019 Agreements), Count V (reformation of the Orange County and LA County Agreements), Count VI (violation of the CFIL regarding the San Diego Agreements), Count VII (violation of the MFIL regarding the San Diego Agreements), Count VIII (violation of the CFIL regarding the San Diego Agreements), Count IX (violation of the MFIL as to the San Diego Agreements), Count X (violation of the CFIL as to the San Diego Agreements), Count XI (violation of the MFIL as to the Orange County and LA County Agreements), Count XII (discharge of the San Diego ADA and San Diego Franchise Agreement by frustration of purpose), Count XIII (discharge of the San Diego ADA and San Diego Franchise Agreements by impracticability), Count XIV (declaratory judgment—modification and waiver of two of the San Diego Franchise Agreements), Count XV (breach of contract and covenant of good faith and fair dealing regarding the San Diego ADA), Count XVI (unjust enrichment), Count XVII (breach of contract and covenant of good faith and fair dealing regarding the San Diego Franchise Agreements), and Count XVIII (breach of contract regarding the San Diego ADA commissions.

***3** In lieu of filing an answer, defendants moved for partial summary disposition under MCR 2.116(C)(7) and argued that all of the counts except for Count II were subject to mandatory arbitration or barred by release. Defendant alternatively argued that Counts III and IV failed to state a claim for relief, warranting summary disposition under MCR 2.116(C)(8) on those counts. In response, plaintiffs argued, among other things, that defendants ignored the 19 subsequent agreements between Red Fit and Red Effect International that supersede the arbitration agreements and that provide for resolution in the Oakland Circuit Court.

On June 11, 2021, the trial court entered an amended scheduling order that provided, in pertinent part, that lists of witnesses and proposed exhibits were to be submitted to opposing counsel and the court by December 15, 2021 and disclosure of expert witnesses were due by November 30, 2021.

On August 26, 2021, the trial court granted in part and denied in part defendants' motion. The court ruled that because Counts I, VI-X, and XII-XVIII all related to the San Diego Agreements, which were subject to binding arbitration, those claims should be dismissed in favor of arbitration. The court rejected plaintiffs' argument that the subsequent agreements superseded the San Diego Agreements. The court noted that because the agreements were "separate and distinct," the earlier agreements were not superseded. The trial court also ruled that Counts V and XI were barred because of release. To the extent that Counts III and IV, which sought rescission, related to the 2019 ADA Repurchase Agreements and TRAs, those claims were barred by release. But to the extent that Counts III and IV pertained to the 2019 Franchise Agreements, they were not barred by release. The trial court denied defendants' motion with respect to MCR 2.116(C)(8).[3] Consequently, only Count II and certain aspects of Counts III and IV remained.

Defendants filed their expert-witness list on November 30, 2021, and their lay-witness and proposed-exhibit list on December 15, 2021. Both filings stated that they were being made pursuant to the court's "Amended Scheduling Order Dated June 11, 2021." Plaintiffs, as of those dates, had not filed any witness or exhibit lists.

On January 31, 2022, defendants filed another motion for summary disposition. This motion sought summary disposition under MCR 2.16(C)(8) and (10). Defendants argued that under MCR 2.116(C)(8), the remaining Counts II, III, and IV against the individual defendants should be dismissed because they are not individually liable and are not individual parties to the contracts at issue. Defendants further argued that those counts should be dismissed in their entirety under MCR 2.116(C)(10) because, with plaintiffs having failed to file witness lists, they were unable to substantiate their claims.

On February 2, 2022, plaintiffs filed a motion to extend dates, stay proceedings, and stay arbitration pending appeal.[4] In the motion, plaintiffs' counsel acknowledged that he "dropped the ball" by failing to recognize that the court had entered the June 11, 2021 scheduling order and failing to file any witness list. Plaintiffs argued that judicial economy favored a stay and that defendants would not be prejudiced if one were granted. Regarding this latter argument, plaintiffs averred that "[d]efendants are not without fault" and have "unclean hands" because they failed to file an answer.

***4** The trial court denied plaintiffs' motion. The court found that there was no good cause asserted, that there were no unforeseen or exceptional circumstances present, and that the motion did not comply with MCR 2.503(B)(2) or (3) because the motion failed to specify how many adjournments have already been granted or how many adjournment requests have been made. The court noted that "[s]elf-inflicted wounds do not void the Court's scheduling order." The court also sanctioned plaintiffs because the section in their brief starting with "Defendants are not without fault" was "completely devoid of factual and legal merit." Plaintiffs were to pay defendants their reasonable attorney fees and costs for having to respond to that argument.[5]

The day after the trial court entered its order denying plaintiffs' motion to extend dates, plaintiffs filed with the trial court their witness and exhibit lists. Plaintiffs also filed with the court clerk notices of default against defendants. Defendants immediately filed a motion to strike and for involuntary dismissal pursuant to MCR 2.504(B). Defendants sought to strike the notices of default and the witness and expert lists. Defendants also argued that plaintiffs' complaint should be involuntarily dismissed because of plaintiffs' failure to abide by two court orders: the June 11, 2021 scheduling order and the court's recent order denying plaintiffs' motion to extend dates.

The trial court issued an opinion and order granting in part and denying in part defendants' motion. The court noted that because the underlying notices of default were never accepted for filing, the issue regarding them was moot. The trial court granted defendants' motion to strike plaintiffs' witness lists and ruled that meeting the deadline was entirely within plaintiffs' control and that negligence or carelessness does not constitute good cause. The court, however, denied defendants' request for involuntary dismissal under MCR 2.504(B), reasoning that any issues with regard to the defaults were moot and the striking of the untimely witness lists was an appropriate and proportional lesser remedy.

The remaining claims had proceeded to case evaluation. The case evaluation panel unanimously determined that

plaintiffs' action (the remaining portions of Counts II, III, and IV) was frivolous. Defendants accepted the award, while plaintiffs rejected it. Plaintiffs never sought review of the frivolous determination. See MCR 2.403(N)(2) (allowing a party to have a court review a case evaluation panel's frivolous finding). Plaintiffs also never posted any bond. See MCR 2.403(N)(3) ("[I]f a party's claim or defense was found to be frivolous under subrule (K)(4), that party shall post a cash or surety bond ...."). Defendants subsequently moved for the dismissal of plaintiffs' remaining claims with prejudice. Defendants argued that plaintiffs' failure to post the required bond required dismissal under MCR 2.403(N)(3)(c).[6] Plaintiffs asserted that the court rule pertaining to frivolous claims only applies to tort claims and that while Counts II, III, and IV were submitted to case evaluation, none of the claims was a tort claim.

The trial court granted in part and denied in part defendants' motion to dismiss. The court noted that "[t]he lynchpin of the Motion is whether any of the Plaintiff's [sic] various Counts actually constitute torts." The court ruled that Count II "obviously" is a breach-of-contract claim and that because piercing the corporate veil is a theory of recovery and not a separate cause of action, the motion was denied "with regard to those claims and the Defendants named therein." However, the trial court granted the motion with respect to Counts III and IV. The court ruled that the claims against the individual defendants sounded in tort. The court also noted that the Michigan Supreme Court has previously held that any civil wrong that is not based on contract sounds in tort. The court therefore granted the motion "as to individual Defendants Allie Mallad ("Mallad"), Carlos Guzman, Erica Mallad, Robert Vendittelli, and Chelsie Bender."

***5** On August 30, 2022, the trial court denied defendants' January 31, 2022 motion for summary disposition. The court acknowledged that because of the intervening partial grant of defendants' motion to dismiss, there was only a single count, Count II, that was up for consideration. The court denied defendants' motion because it concluded that defendants did not adequately argue or cite any authority that there was no genuine issue of material fact for trial.

Trial on the remaining Count II commenced on October 11, 2022. In his opening statement, counsel for plaintiffs reiterated his point from his trial brief that because defendants never filed an answer to the complaint, the allegations in the complaint are deemed admitted. In defense counsel's opening statement, he moved for involuntary dismissal under MCR 2.504(B)(2), maintaining that because plaintiffs were precluded from presenting any witnesses or exhibits, they could not meet their burden to prove a prima facie case of breach of contract. With regard to failing to file an answer, defense counsel averred that it was irrelevant because he received an "indefinite extension" from plaintiffs in December 2021. Moreover, defense counsel argued that, assuming the failure to file an answer had a consequence, that consequence would be liability, but damages would still need to be proven, which plaintiffs could not do without any witnesses. The trial court recognized that both sides argued that trial was not warranted for differing reasons. The court took the matter under advisement and stated it would issue a written opinion.

The trial court issued an opinion and order on October 14, 2022. The court framed the issues as follows:

> In their Opening Statements, the parties, who disagree on just about everything, agreed on one thing—the case should not go to trial. This tortuous journey presents a couple of civil procedure questions that would be excellent for a final exam in law school. What happens when a party never files an answer, but no default is ever entered? Or what occurs when a party's witness list is struck, can they still present witnesses at trial? This Opinion and Order unravels these and a few more mysteries.

Regarding the first issue, the trial court ruled that defendants' failure to file an answer resulted in them admitting liability in connection with Count II. This was the case despite no default having ever been entered. But the court ruled that this admission did not extend to "the amount of damage or the nature of the relief demanded."

Related to the second issue, the trial court held that plaintiffs' failure to follow the scheduling order did not constitute good cause to reopen discovery and adjourn trial. The court also ruled that plaintiffs' request to allow them to present witnesses is an untimely motion for reconsideration of the court's February 25, 2022 order and should be denied for that independent reason. The court further ruled that, assuming

the request was timely, plaintiffs abandoned the argument by failing to address the pertinent factors from *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990), and instead "cursorily declar[ing] that the Defendants knew who the witnesses were and that to bar the Plaintiffs' witnesses is too harsh a remedy equivalent to dismissing the case." Moreover, the trial court determined that assuming the issue was not abandoned, after analyzing many facts, it would exercise its discretion to not allow plaintiffs to present witnesses. Consequently, with plaintiffs unable to prove any damages, the trial court dismissed the sole remaining Count II.

***6** This appeal followed.

II. FIRST MOTION FOR SUMMARY DISPOSITION

Plaintiffs challenge the trial court's grant of summary disposition under MCR 2.116(C)(7) on the basis of an agreement to arbitrate and release. We find no error.

This Court reviews a trial court's decision to grant or deny a motion for summary disposition de novo. *PNC Nat'l Bank Ass'n v Dep't of Treasury*, 285 Mich App 504, 505; 778 NW2d 282 (2009). Likewise, the proper interpretation of a contract and whether a particular issue is subject to arbitration are issues that this Court reviews de novo. *Altobelli v Hartmann*, 499 Mich 284, 295; 884 NW2d 537 (2016).

"Under MCR 2.116(C)(7), summary disposition is appropriate if a claim is barred because of 'an agreement to arbitrate.' *Id.* Summary disposition also is warranted under that subrule if a claim is barred "because of release." MCR 2.116(C)(7). "A movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. Moreover, the contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 553; 837 NW2d 244 (2013).

The trial court granted summary disposition in favor of defendants on plaintiffs' Counts I, VI-X, and XII-XVIII because those claims involved disputes related to the San Diego Agreements, which contained arbitration clauses. There is no dispute that these counts pertained to the San Diego Agreements and that those agreements contained arbitration clauses. Despite this clear language, plaintiffs maintain that the arbitration clauses were superseded by the parties' later agreements, which contain the following language:

> Franchisee and Franchisor have negotiated regarding a forum in which to resolve any disputes which may arise between them and have agreed to select a forum in order to promote stability in their relationship. Therefore, unless expressly provided for otherwise in this Agreement, if a claim is asserted in any legal proceeding involving Franchisee (or its owners, officers, directors, or Affiliates) and Franchisor (or its officers, directors, members, Affiliates, or sales employees) both parties agree that the exclusive jurisdiction for disputes between them shall be the U.S. Federal Courts for the Eastern District of Michigan or the State Courts for Oakland County, Michigan and each waive any objection either may have to the personal jurisdiction of or venue in the State of Michigan.

Plaintiffs contend that the fact that the parties unambiguously agreed to resolve "any" dispute in the above manner indicates that this agreement superseded the prior agreement to arbitrate.

The Court's primary task in construing contracts is to give effect to the intent of the parties at the time they entered into the contract. *Beck v Park West Galleries, Inc*, 499 Mich 40, 45-46; 878 NW2d 804 (2016). In *Beck*, the plaintiffs purchased art. from the defendant on multiple occasions over the course of several years. *Id.* at 42. However, at one point, the parties' agreements started to contain an arbitration clause; which provided that "[a]ny disputes or claims of any kind" were to be resolved through arbitration. *Id.* at 43. Thus, while the earlier invoices did not contain such an agreement, the later ones did. The Supreme Court unanimously ruled that despite the broad language of the later arbitration agreement, it nonetheless did not apply to any disputes related to the earlier contracts. *Id.* at 50-51. The Court

noted that under Michigan law, "separate contracts [are] to be treated separately." *Id.* at 46. The Court ruled that there was no basis to conclude that the parties had intended for the later arbitration clauses to apply retroactively. *Id.* at 47. The Court relied on the fact that despite the broad language in the arbitration clause, there was no reference to the previous transactions to suggest that the clause was to apply to those transactions. *Id.* at 48.

***7** The same rationale applies to this case. The earlier San Diego Agreements solely involve franchise locations in the San Diego area. The other agreements addressed franchise locations in other locations, including Orange County, California; Los Angeles County, California; and Illinois. Because each contract is considered a "separate contract" and because there is no indication that the parties contemplated that the forum clauses in the later contracts would apply to disputes arising from the earlier San Diego contracts, the trial court did not err by concluding that the arbitration provisions in the San Diego Agreements were not superseded. We therefore affirm the grant of summary disposition under MCR 2.116(C)(7) to defendants on plaintiffs' Counts I, VI-X, and XII-XVIII.

We next address the trial court's grant of summary disposition with respect to the entirety of Counts V and XI and partial aspects of Counts III and IV on account of release. Defendants' motion was premised on the releases in the November 12, 2019 TRAs, which provided:

> Area Developer and the affiliates, representatives, owners, employees, officers, guarantors, agents and assigns of Area Developer (the "Area Developer Parties") hereby release and forever discharge Franchisor and its affiliates and the representatives, owners, employees, officers, agents and assigns of Franchisor and its affiliates (the "Franchisor Parties") from all liability, right, claim, debt and cause of action whatsoever, known or unknown, suspected or unsuspected, which the Area Developer Parties ever had, now have or may have at any time based on, arising under or relating to the Area Development Agreement or any other agreement entered into between the parties on or before the date of this Agreement or the relationship between the parties involving the Area Development Agreement or any other agreement or any acts or omissions of the Franchisor Parties occurring before the date of this Agreement: provided that, this release will not affect; (a) any obligations of Franchisor Parties under this Agreement; and (b) any obligations of the Franchisor Parties required to be performed after the date of this Agreement under any other agreements between the parties.

In opposing defendants' motion, plaintiffs did not contest that the scope of the above release reached the claims at issue. Instead, plaintiffs contended that the TRAs containing the releases were subject to rescission under Counts III and IV of the complaint, which would then vitiate the release provisions. Count III alleged a violation of the MFIL and Count IV alleged a violation of the CFIL. Both counts were premised on the allegation that each respective franchise law was violated because defendants failed to provide a finance disclosure document before the execution of the 2019 agreements, as required by those acts. Thus, the parties agree that the resolution of this issue depends on the validity of Counts III and IV.

Count III alleges a violation of MCL 445.1508(1) of the MFIL, which provides:

> A franchise shall not be sold in this state without first providing to the prospective franchisee, at least 10 business days before the execution by the prospective franchisee of any binding franchise or other agreement or at least 10 business days before the receipt of any consideration, whichever occurs first, a copy of the disclosure statement described in [MCL 445.1508(2)], the notice described in [MCL 445.1508(3)], and

> a copy of all proposed agreements relating to the sale of the franchise.

And "[a] person who offers or sells a franchise in violation of [MCL 445.1505 or MCL 445.1508] is liable to the person purchasing the franchise for damages or rescission." MCL 445.1531(1).

The California law is similar and provides:

> ***8** It is unlawful to sell any franchise in this state that is subject to registration under this law without first providing to the prospective franchisee, at least 14 days prior to the execution by the prospective franchisee of any binding franchise or other agreement, or at least 14 days prior to the receipt of any consideration, whichever occurs first, a copy of the franchise disclosure document, together with a copy of all proposed agreements relating to the sale of the franchise. [Cal. Corp. Code 31119(a).]

And "[a]ny person who offers or sells a franchise in violation of [list of sections, including Section 31119] ... shall be liable to the franchisee or subfranchisor, who may sue for damages caused thereby, and if the violation is willful, the franchisee may also sue for rescission." Cal. Corp. Code 31300.

While plaintiffs focus on the "or other agreement" language in MCL 445.1508(1) and Cal. Corp. Code 31119(a), the relevant provisions are MCL 445.1531(1) and Cal. Corp. Code 31300 because those are the provisions that authorize the pertinent rescission remedies. And under those provisions, rescission is only available when a "person who offers or sells a franchise" is in violation of the disclosure requirement. MCL 445.1531(1); Cal. Corp. Code 31300.

The trial court correctly ruled that the 2019 TRAs did not involve the offer or sale of a "franchise." A "franchise" under the MCL 445.1502(3) of the MFIL is defined as follows:

> [A] contract or agreement, either express or implied, whether oral or written, between 2 or more persons to which all of the following apply:
>
> (a) A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor.
>
> (b) A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate.
>
> (c) the franchisee is required to pay, directly or indirectly, a franchise fee.

As the trial court recognized, this definition is substantially the same as California's definition. See Cal. Corp. Code 31005(a).

In the TRAs in this case, the parties agreed to terminate the Orange County and Los Angeles County ADAs, dated July 10, 2018. There is nothing in the TRAs granting a franchisee the right to engage in the business of offering, selling, or distributing goods or services. Instead, the TRAs simply terminate the prior ADAs. Because the TRAs do not involve the offer or sale of a "franchise," the TRAs are not subject to rescission under the MFIL and CFIL, and their release provisions are valid and enforceable. Consequently, any of plaintiffs' causes of action asserting claims that pre-dated November 12, 2019, are barred by release and were properly dismissed under MCR 2.116(C)(7).

Because Counts V and XI pertain to such agreements, the trial court properly dismissed those claims in their entirety. With regard to Counts III and IV, plaintiff sought rescission of the ADA Repurchase Agreement, the ADA TRAs, and the November 22, 2019 Franchise Agreements. Because only the November 22, 2019 Franchise Agreements did not pre-date the November 12, 2019 release, the court correctly denied the motion for summary disposition with respect to that aspect of plaintiffs' claims, but properly granted the motion with respect to the other aspects that pre-dated the November 12, 2019 release. [7]

***9** Plaintiffs on appeal argue that the TRAs are "consideration" for the November 22, 2019 Franchise Agreements and therefore should be subject to rescission. We disagree. The TRAs state that they constitute the entire agreement with respect to the matters covered in them. The stated purpose of the TRAs is found in ¶ 1, which provides:

> Franchisor and Area Develop are parties to an Area Development Agreement dated July 10, 2018, as amended, for Orange County, California (the "Area Development Agreement"). Area Developer has entered into an agreement to sell its rights under the Area Development Agreement to a purchaser acceptable to Franchisor (the "Purchaser"). Franchisor has waived its right of first refusal and approved the transfer in accordance with Section 13.3 of the Area Development Agreement. In accordance with Section 13.3 of the Area Development Agreement, the Franchisor and Area Developer are terminating the Area Development Agreement so that Franchisor may enter into a new area development agreement with the Purchaser.

Section 13.3 of the ADAs that were being terminated provide, in pertinent part:

> If Franchisor does not exercise its right of first refusal under Section 13.2, Area Developer may only engage in the proposed Transfer if Franchisor consents to the proposed Transfer. Before Franchisor consents to a proposed Transfer, the conditions listed below, as well as any other reasonable conditions specified by Franchisor, must be fulfilled. If these conditions are met, Franchisor will not unreasonable withhold its consent to a proposed Transfer of the type permitted by this Agreement.
>
> Before Franchisor consents to a proposed Transfer, the following conditions must be fulfilled:
>
> * * *
>
> (f) Area Developer must sign at the time of sale an agreement terminating this Agreement (unless this Agreement will be assigned to the transferee ...) and must sign an agreement, in the form specified by Franchisor, releasing Franchisor and its Affiliates, owners, officers, directors, employees and agents from any and all claims and causes of action and agreeing to abide by the post-termination restrictions contained in Articles 11 and 12 and all other obligations under this Agreement that survive termination of this Agreement.

Therefore, it is clear that under § 13.3(f) of the ADAs, the signing of the TRAs was a contractually required step for plaintiffs to sell their rights under the ADAs to another party. While this step may have been a *condition* for them to go forward with a subsequent franchise purchase agreement, it is not *consideration* for that completely separate contract. Notably, plaintiffs do not point to any language in any contract to support their position. Moreover, our review of the November 22, 2019 Franchise Agreements reveals that there is no express mention that executing the TRAs is consideration. Instead, the consideration for the Franchise Agreements appears to be that, in exchange for granting franchise rights in a protected area, the franchisee would be obligated to pay many fees, including a percentage of its gross sales going forward. Critically, there is no mention that part of the consideration the franchisee owed would be to have entered into a TRA for any prior ADA. Therefore, plaintiffs' position, that the TRAs are consideration and subject to rescission just as the November 22, 2019 Franchise Agreements are, is not supported by the plain language of the pertinent contracts.

III. ISSUES RELATED TO WITNESSES AND WITNESS LISTS

***10** Plaintiffs argue that the trial court erred when it denied their motion to extend the deadline for filing witness lists, struck their late-filed witness lists, and prohibited them from calling witnesses. We disagree on all points.

We review a trial court's decision on a motion to extend deadlines for an abuse of discretion. See *Decker v Trux R Us, Inc*, 307 Mich App 472, 478; 861 NW2d 59 (2014) (stating that court's decision on a motion to extend discovery is reviewed for an abuse of discretion); *Grubor Enterprises, Inc v Kortidis*, 201 Mich App 625, 628; 506 NW2d 614 (1993)

(stating that "[w]itness lists are an element of discovery"). We also review a trial court's decision to strike a witness list and a decision to bar witness testimony after a party has failed to timely submit a witness list for an abuse of discretion. See *EDI Holdings, LLC v Lear Corp*, 469 Mich 1021 (2004); *Duray Dev, LLC v Perrin*, 288 Mich App 143, 162; 792 NW2d 749 (2010); *Linsell v Applied Handling, Inc*, 266 Mich App 1, 21; 697 NW2d 913 (2005). A court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

The trial court's decisions to deny plaintiffs' motion to extend the deadline for filing witness lists and to strike plaintiffs' late-filed witness lists do not fall outside the range of reasonable or principled outcomes. A trial court has the inherent authority to control its own docket and internal affairs. *Baynesan v Wayne State Univ*, 316 Mich App 643, 651; 894 NW2d 102 (2016); see also *Maldonado*, 476 Mich at 376 (stating that courts have the vested power "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases"). As our Supreme Court has noted, "The court rules provide for and encourage the use of scheduling orders to promote the efficient processing of civil and criminal cases." *People v Groves*, 455 Mich 439, 465; 566 NW2d 547 (1997). Indeed, decisions made for the enhancement of "docket control" and the elimination of "unjustifiable expense and delay" are proper considerations of a trial court. *Id.*; see also *EDI Holdings*, 469 Mich at 1021 (stating that a court does not abuse its discretion when it enforces a summary-disposition scheduling order, even if doing so results in the movant prevailing because the opposing party failed to timely file a response).

We do not see how the trial court's decisions were unprincipled. The court's scheduling order clearly provides deadlines for filing the witness lists. Plaintiffs' counsel admittedly missed it and did not provide any good explanation except for suggesting that he had transitioned to a new legal assistant who failed to obtain the scheduling order from the electronic filing system. Plaintiffs then went on to suggest that defendants bore some blame because, had they filed an answer, "[p]laintiffs would have promptly discovered their error." While defendants did fail to file an answer, that does not provide a strong rationale for plaintiffs' failure to recognize the existence of the June 11 scheduling order. Indeed, plaintiffs argued that they were under the erroneous impression that the court was withholding entering a scheduling order until plaintiffs' application for leave to appeal in this Court was resolved. It is unclear to us how the filing of an answer by defendants would have alerted plaintiffs to the existence of the June 11 order if they truly thought the trial court was waiting to issue its order until after this Court resolved the appeal. Furthermore, when defendants timely filed their expert-witness list on November 30, 2021, and their lay-witness list on December 15, 2021, both lists referenced that they were being filed pursuant to the trial court's "Amended Scheduling Order Dated June 11, 2021." Plaintiffs offered no explanation for why they were not aware as of November 30, 2021, that there was a June 11, 2021 scheduling order.[8] Although this notice may have been too late for plaintiffs to comply with the November 30 deadline for expert witnesses, they could have at least complied with the lay-witness list deadline. Instead, they did nothing and waited until defendants moved for summary disposition on the remaining claims. Under these circumstances, the trial court's decisions to deny plaintiffs' motion to extend the deadline dates and to strike the late-filed witness lists did not fall outside the range of reasonable or principled outcomes.[9]

***11** Plaintiffs next argue that the trial court erred when it disallowed them from calling any witnesses because there was no timely filed witness list. "MCR 2.401(I)(1) provides that all parties must file and serve witness lists within the time allotted by the trial court. MCR 2.401(I)(2) provides that '[t]he trial court may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown.' " *Duray Dev*, 288 Mich App at 162-163. As this Court explained in *Duray Dev*:

> Once 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. Disallowing a party to call witnesses can be a severe punishment, equivalent to a dismissal. 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

> the equivalent of dismissal. Because the decision is within the trial court's discretion, caselaw mandates that the trial court consider the circumstances of each case to determine if such a drastic sanction is appropriate. The 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.* at 164-165 (quotation marks, citations, and brackets omitted).]

In *Dean*, 182 Mich App at 32-33, this Court provided the following nonexhaustive list of factors a court should consider as relevant:

> (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) 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. [Citations omitted.]

The trial court addressed these eight factors, plus five other ones it deemed relevant. On appeal, plaintiffs do not directly address the trial court's analysis of all of these factors. They only address the first and third factors and then cursorily claim that "[e]ach of the remaining factors, save for the 'sanctionable conduct' factor, discussed below, would have weighed in [plaintiffs'] favor." Arguably, by failing to fully address the trial court's analysis, the issue could be deemed abandoned. See *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). Regardless, we will proceed with the pertinent analysis.

For Factor (1), the court found that the failure to timely file a witness list was "reckless" with plaintiffs' "indifference" being "obvious and palpable." Aside from the issuance of the order itself, the court noted that it discussed the deadline dates at the case management conference. The court further recognized that plaintiffs had two separate notices—when defendants filed their expert-witness list on November 30, 2021, and when defendants filed their lay-witness list on December 15, 2021—that plaintiffs conceded should have alerted them to the fact that there was a scheduling order. As the court found, "[t]here is no reasonable explanation of why all of these opportunities were completely missed by the Plaintiffs."

***12** For the next factor, the court noted that it was unaware of any refusal to comply with discovery requests.

For Factor (3), the trial court found that with no witness lists and only corporate defendants remaining, there is "extreme prejudice" for them. [10] The court rejected plaintiffs' position that defendants knew who was involved in the case and what their testimony would be. The trial court noted that not knowing which witnesses plaintiffs intended to call until after discovery was closed results in "tremendous" prejudice to defendants. Further, the court recognized that without knowing who plaintiffs intended to call, defendants' trial strategy could be "completely flummoxed."

For Factor (4), the trial court recognized that plaintiffs provided some notice of the witnesses they intended to call when they filed their late witness list and that some of those witnesses were on defendants' own witness list. But the notice was supplied after the close of discovery. This seems to align with the analysis from Factor (3) above.

For Factor (5), which relates to whether plaintiffs had a history of engaging in "deliberate delay," the court found that although plaintiffs may not have engaged in deliberate delay, their failure to timely file witness lists constituted "reckless indifference."

Factor (6) addresses plaintiffs' degree of compliance with other provisions of the court's order. The court noted that it was unaware of any additional noncompliance.

Factor (7) addresses whether plaintiffs attempted to timely cure the defect. The court found that this factor was addressed in Factor (4), where it noted that plaintiffs had not attempted to timely cure the defect because the attempt occurred after the close of discovery.

For Factor (8), addressing whether a lesser sanction would better serve the interests of justice, the court noted that the only lesser sanction available would be to allow the untimely witness list filing, reopen discovery, set a new deadline for motions for summary disposition, and resubmitting the case to facilitation. The trial court found that this would "eviscerate the authority of [the court] to control its docket." Plaintiffs cite the trial court's ruling but do not explain why the court was incorrect at the time it made its ruling. Plaintiffs aver that at the time of the final order, more than half of the one-year-and-nine-months' delay is attributable to the trial court's orders. We find this fact to be irrelevant. As discussed later, plaintiffs' primary argument seems to be that the court should have considered these *Dean* factors at the time it struck plaintiffs' late-filed witness list.

In addition to the eight *Dean* factors, the trial court addressed several other factors it deemed relevant, stating as follows:

> **(9) the age of the case.** As noted, this case is 1 year and 9 months old. To allow a lesser sanction would push this well beyond the normal limits of a case.
>
> ***13 (10) sanctionable conduct.** When the Plaintiffs first sought an adjournment, they engaged in sanctionable conduct by speciously attempting to push the blame on the Defendants for the self-inflicted wounds. They continue to case blame on others, now including the Court Clerk and the Court (they are not being sanctioned for such deflections).
>
> **(11) the number of witnesses.** This is not a case in which the Plaintiffs are asking to present one or two witnesses missed on a witness list. The Plaintiffs demand that they present 7 witnesses, presumably over a series of days. This substantially increased the prejudice to the Defendants.
>
> **(12) the type of witnesses.** The individual Defendants have been dismissed. As such, the necessity of identifying who would testify in connection with entity claims was even more vital.
>
> **(13) prior rulings on the merits.** Although clearly the Plaintiffs would have otherwise been entitled to a trial on Count II and perhaps prevailed (all things being even), 17 of the 18 counts have been dismissed, as have all the individual Defendants. The entire case was found to be frivolous and the tort claims were dismissed because of the failure to post a bond.

The court concluded, "Considering the totality of the factors (even excluding factor 13), as well as the jurisprudence cited above, prohibiting the Plaintiffs from calling witnesses is warranted."

Plaintiffs challenge the trial court's findings related to Factors (1) and (3). Plaintiffs contend that their "prompt action in response to discovering that the deadline for filing witness lists had passed" demonstrates that there was no reckless indifference. Plaintiffs focus on what they did *after* learning that there was a witness-list deadline, however. Their argument does not address why it took them so long to finally realize that there was a scheduling order with deadlines. It is this aspect that the court categorized as a reckless indifference. The trial court did not clearly err. Plaintiffs also contend that defendants would not have been prejudiced because they knew, from plaintiffs' late-filed witness lists, who plaintiffs intended to call. Unfortunately, this does not address the bigger problem—the disclosure came after discovery had closed, meaning that defendants did not know what plaintiffs' witnesses would say, which obviously prejudices defendants. To alleviate this, the trial court noted that the only available remedy would be to afford more discovery and adjourn the matter a significant amount of time. The court decided this was too much to ask, given how long the case had been pending at that time (almost two years). The trial court's decision is reasonable and principled.

We also note that plaintiffs do not directly address the trial court's October 2022 analysis precluding them from calling witnesses at trial. Related to this point, plaintiff primarily argues that the trial court's main error was not analyzing the *Dean* factors at the time it struck plaintiffs' late witness list in February 2022. We disagree with this argument. The *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. See *Duray Dev*, 288 Mich App at 164; *Vicencio v Ramirez*, 211 Mich App 501, 507; 536 NW2d 280 (1995) ("This Court has summarized some of the factors that a court should consider before imposing the sanction of dismissal[.]"), citing *Dean*, 182 Mich App at 32-33; *Dean*, 182 Mich App at 32 (describing the factors as ones that "should be considered

in determining the appropriate sanction"). In other words, 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. The sanction is not allowing the witnesses to be called, which was only raised and decided at trial.

IV. SANCTIONS

***14** Plaintiffs next argue that the trial court erred when it sanctioned them for casting blame on defendants for plaintiffs' failure to realize the existence of the June 11, 2021 scheduling order. When a trial court's decision to sanction a litigant is premised on a finding of frivolousness, such a decision is reviewed for clear error. See *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.* at 661-662.

The trial court stated that it was sanctioning plaintiffs for the reasons articulated by defendants. Defendants sought sanctions under MCR 1.109(E), which provides, in pertinent part:

> (5) *Effect of Signature.* The signature of a person filing a document, whether or not represented by an attorney, constitutes a certification by the signer that:
>
> (a) he or she has read the document;
>
> (b) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
>
> (c) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> (6) *Sanctions for Violation.* If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

Thus, under MCR 1.109(E)(6), sanctions are appropriate when, among other things, the party had no reasonable basis to believe that the facts underlying the party's legal position were true or the party's legal position was devoid of arguable legal merit. See also *Ford Motor Co v Dep't of Treasury*, 313 Mich App 572, 589; 884 NW2d 587 (2015).

The portion of plaintiffs' brief that the trial court found sanctionable started with the sentence, "Defendants are not without fault." Plaintiffs went on to aver that defendants were partially at "fault" because they failed to file an answer to the complaint. Although this statement is located in a section of plaintiffs' brief titled "Defendants Will Not Be Prejudiced by a Stay," the broad assertion goes beyond that particular concept of prejudice to imply that defendants shared some "fault" for plaintiffs' failure to not file their witness lists. Regardless of what defendants did or did not do, it is a complete stretch to label their action or inaction as "fault" in the context of plaintiffs not recognizing the existence of the June 11, 2021 scheduling order. Indeed, had defendants filed an answer, it is not evident why or how that event would have alerted plaintiffs to the existence of the June 11 order. This lack of causation or fault is even more evident because plaintiffs also claimed that they were under the impression that there was no scheduling order because one would be forthcoming only after their interlocutory appeal to this Court was resolved. Whether an answer was filed would not have changed that erroneous view.

Plaintiffs in this same section of their trial court brief also averred that defendants had "unclean hands," which prevented them from claiming any prejudice.

> ***15** It is well settled that one who seeks equitable relief must do so with clean hands. The unclean-hands doctrine is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the opposing party, and is only relevant to equitable actions or defenses. [*Varela v Spanski*, 329

Mich App 58, 83; 941 NW2d 60 (2019) (quotation marks, citations, and brackets omitted).]

On appeal, plaintiffs seem to acknowledge that the unclean-hands doctrine in the context of their motion in the lower court is inapplicable. Instead, they state on appeal that they were not invoking the formal doctrine but instead using the term "in [a] rushed fashion (having just discovered the witness list deadline issue)" to show that defendants also were not following the court rules. A trial court is not a mind-reader and would have had no way to know that despite citing "unclean hands," plaintiffs were not actually invoking the unclean-hands doctrine. A court should be allowed to presume that an attorney means what he says, and in this instance, plaintiffs' counsel cited the legal doctrine of unclean hands. See *Robinson v Peake*, 21 Vet App 545, 554 (2008) (stating that it is proper to presume that an experienced attorney "says what he means and means what he says" and that "[w]here an attorney uses terms of art. that make sense in the context used, the [court] may reasonably conclude that there is no ambiguity to be resolved"), aff'd 557 F3d 1355 (CA Fed, 2009).

Accordingly, considering the circumstances, we are not left with a definite and firm conviction that the trial court made a mistake when it sanctioned plaintiffs for violating MCR 1.109(E).

V. DISMISSAL UNDER MCR 2.403(N)(3)(c)

Plaintiffs argue that the trial court erred when it granted defendants' motion to dismiss with respect to Counts III and IV. We need not address this issue in light of our conclusion that the trial court did not err in preluding plaintiffs from calling any witnesses. See *Grubor Enterprises v Kortidis*, 201 Mich App 625, 629; 506 NW2d 614 (1993) (where a witness list is stricten or barred, the trial court may in its discretion allow individual named parties to testify, but not individuals representing institutional parties).

Without being able to present evidence, plaintiffs cannot prove damages, a necessary element. See *Van Buren Twp v Visteon Corp*, 319 Mich App 538, 550; 904 NW2d 192 (2017). Thus, even assuming that the trial court erred in dismissing some (or even all) of the claims, plaintiffs inability to prove damages would necessarily result in a judgment for defendants. [11]

VI. CONCLUSION

Affirmed. Defendants may tax costs.

All Citations

Not Reported in N.W. Rptr., 2024 WL 2790504

Footnotes

1 The agreement was actually with Zifit International Franchise, LLC, but Zifit later changed its name to Red Effect International Franchise, LLC. For ease of reference and consistency, we will refer to any agreements made with Zifit as having been made with Red Effect International.

2 Hayden and Joshua later assigned their rights in the San Diego Franchise Agreements and the San Diego ADA to their company, Red Fit, LLC.

3 Plaintiff filed with this Court an application for leave to appeal the trial court's decision, which this Court denied "for failure to persuade the Court of the need for immediate appellate review." *Red Fit LLC v Red Effect Int'l Franchise LLC*, unpublished order of the Court of Appeals, entered February 10, 2022 (Docket No. 358561).

4 Defendant Red Effect International had filed a new arbitration case, alleging additional violations of the San Diego Franchise Agreements.

5 The parties later stipulated to an amount of reasonable attorney fees and costs.

6 MCR 2.403(N)(3)(c) provides:

> If the bond is not posted as required by this rule, the court shall dismiss a claim found to have been frivolous .... The action shall proceed to trial as to the remaining claims and parties ....

7 The trial court declined to address whether Counts VI-X were also subject to release because of its earlier ruling that those claims were barred given they were subject to arbitration. We likewise will not address those claims in the context of release.

8 Indeed, in the trial court, plaintiffs acknowledged that these lists "should have alerted [counsel] to the overlooked Amended Scheduling Order dated June 11, 2021."

9 Because the court's decision is authorized though its inherent powers, whether the trial court erroneously relied on MCR 2.503(B) or local administrative order 2004-6(D) is of no consequence.

10 As discussed later, individual defendant Mallad should not have been dismissed under MCR 2.403(N)(3)(c) and should have been a defendant at trial as well. Regardless, the concept that a defendant would have been prejudiced by the lack of a witness list applies to corporate and individual defendants alike.

11 In theory, plaintiffs might be entitled to a judgment in their favor on liability in light of defendants' failure to file an answer, but with a damage award of zero. It would, however, be a waste of judicial resources to empanel a jury merely to then require it to return a damage award of zero.

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Re: The Estate of Jacqueline Harris, deceased

AFFIDAVIT OF MERITORIOUS CLAIM OF B. SONNY BAL, M.D.

STATE OF MISSOURI)
)ss.
COUNTY OF BOONE)

I, B. SONNY BAL, M.D., by this Affidavit, state that during 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, and I attest to the following:

1. I have read the Notice of Intent to File a Claim in this action.

2. I have reviewed all the medical records provided to me by Plaintiff's Counsel.

3. Jack D. Lennox D.O., a licensed and practicing physician, specializing in Orthopedic Surgery, and an agent and/or employee of Beaumont Health and Tri County Orthopedics, PC when presented with a patient exhibiting the history, signs and symptoms such as those demonstrated by Jacqueline Harris had a duty to:

   a. Timely and properly obtain a thorough and complete history from that patient at regular and proper intervals;

   b. Timely and properly perform a thorough and complete assessment/evaluation of that patient at regular and proper intervals;

   c. Implement recommendations made by physicians consulting upon that patient;

   d. Perform proper and appropriate total knee arthroplasty in a safe and acceptable manner;

   e. Take any and all reasonable steps to ensure that patients with comorbidities, such as hypertension, diabetes mellitus, morbid obesity and a sedentary lifestyle, who undergo total knee arthroplasty will not develop thromboembolic events postoperatively;

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f. Provide intensive medical/surgical care and treatment to that patient, including, but limited to, appropriate postoperative anticoagulation;

g. Refer that patient to or himself consult with an appropriate medical/surgical specialist to determine that person's thromboembolic risk factors and/or to prescribe appropriate anticoagulation medications in the appropriate dosage for the appropriate duration of time postoperatively;

h. Prescribe an anticoagulation regimen in addition to aspirin for a minimum of 30 days postoperatively to prevent the development of thromboemboli in a patient such as Jacqueline Harris;

i. Timely inform that patient that she was at high risk of developing deep vein thrombosis and/or pulmonary emboli due to her comorbidities and lifestyle and/or instruct the patient that she should seek immediate medical attention should she experience any of the signs or symptoms associated with deep vein thrombosis and/or pulmonary emboli;

j. Refer that patient to an appropriate medical specialist to create, implement and employ an anticoagulation regimen postoperatively;

k. Review his prior medical records concerning the 2014 left total knee arthroplasty to determine whether the patient had been prescribed postoperative anticoagulation at that time and/or to institute the same or similar anticoagulation regimen pertaining to the 2019 right total knee arthroplasty;

l. Any negligence acts subsequently revealed during discovery.

4. Beaumont Health and Tri County Orthopedics, PC a duly accredited and licensed health care institution, by and through its agents, actual and/or ostensible, servants and/or employees, including but not limited to, Jack D. Lennox, DO which holds itself out to the public as being competent of rendering medical services, when confronted with a patient with the signs and symptoms such as those demonstrated Jacqueline Harris, owed a duty to:

a. Create, institute, monitor and enforce protocols and procedures whereby patients undergoing proposed total knee arthroplasty would undergo an evaluation for that patient's risk of developing postoperative thromboembolic events;

b. Select, employ, train and monitor its employees, servants, agents, ostensible agents, staff of nurses, residents and/or its staff of physicians

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including, but not limited to, Jack D. Lennox, DO, to insure they were competent to perform optimum medical and surgical care;

c. Ensure that appropriate policies and procedures were adopted and followed including, but not limited to, the safe, timely and proper care and treatment of patients undergoing total knee arthroplasty, centered upon their individual risk of developing postoperative thromboembolic events;

d. Create, institute, monitor and enforce protocols and procedures whereby patients undergoing total knee arthroplasty would receive postoperative anticoagulation for a minimum of 30 days, together with close monitoring of clotting and other times.

e. Any additional acts of negligence identified through the discovery process.

5. It is my opinion, based upon the available information, as well as my training knowledge, education, and experience in Orthopedic Surgery, that there was a failure to do those acts listed above, and such omissions constitute violations of the applicable standard of care.

6. In order to have conformed to the standard of care, the above-named should have done those things listed in paragraphs 3 through 4, and the respective subsections above.

7. As a direct and proximate result of the above-listed breaches of the applicable standard of practice or care, the above-referenced healthcare providers caused Jacqueline Harris to develop a deep vein thrombosis, and to develop multiple pulmonary emboli in her vena cava and pulmonary artery, causing cardiovascular collapse and death. Had the standard of care been followed, including anticoagulation medications being prescribed for a minimum of 30 days postoperatively, Jacqueline Harris would not have developed a deep vein thrombosis, would not have developed multiple pulmonary emboli in her vena cava and pulmonary artery, causing cardiovascular collapse and death. Jacqueline Harris, to a reasonable degree of medical certainty, would still be alive.

8. This opinion is based upon a review of the information to date and may or may not change upon review of additional materials.

B. SONNY BAL, M.D.

Subscribed and sworn to before me on
this 11 day of ~~June~~, 2020
March, 2021

[Name]
Notary Public Boone [County]
My Commission Expires: 4/7/2022

JERRILYN CAREY
My Commission Expires
April 7, 2022
Boone County
Commission #14436362

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF IOSCO

KINDE R. HUMERICKHOUSE,)
)
Plaintiff,)
)CASE NO. 19-1844-NH
vs.)
)
ASCENSION ST. JOSEPH HOSPITAL,)
f/k/a ST. JOSEPH HEALTH SYSTEM)
d/b/a ST. JOSEPH BONE & JOINT)
CENTER, MARK L. DAVIS, D.O.,)
P.L.L.C. OF EAST LANSING, MARK L.)
DAVIS, D.O., P.C. and MARK L.)
DAVIS, D.O., JOINTLY AND SEVERALLY,)
)
Defendants.)

DEPOSITION OF B. SONNY BAL, M.D.

TAKEN ON BEHALF OF THE DEFENDANTS

SEPTEMBER 23RD, 2020

INDEX

EXHIBITS

NOTE: Exhibits were attached to the original transcript.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF IOSCO

KINDE R. HUMERICKHOUSE,)
)
Plaintiff,)
)CASE NO. 19-1844-NH
vs.)
)
ASCENSION ST. JOSEPH HOSPITAL,)
f/k/a ST. JOSEPH HEALTH SYSTEM)
d/b/a ST. JOSEPH BONE & JOINT)
CENTER, MARK L. DAVIS, D.O.,)
P.L.L.C. OF EAST LANSING, MARK L.)
DAVIS, D.O., P.C. and MARK L.)
DAVIS, D.O., JOINTLY AND SEVERALLY,)
)
Defendants.)

DEPOSITION OF B. SONNY BAL, M.D.,
produced, sworn and examined on SEPTEMBER 23RD, 2020, between the hours of 9:00 o'clock in the forenoon and 11:00 o'clock in the forenoon of that day, at the offices of Alaris Litigation Services, 2511 Broadway Bluffs, Suite 201, Columbia, Missouri 65201, before Mary Lynn Cushing, a Certified Court Reporter (MO), and a Notary Public within and for the State of Missouri, in a certain cause now pending in the Circuit Court for the County of Iosco, State of Michigan, between KINDE R. HUMERICKHOUSE, Plaintiff, vs. ASCENSION ST. JOSEPH HOSPITAL, f/k/a ST. JOSEPH HEALTH SYSTEM d/b/a ST. JOSEPH BONE & JOINT CENTER, MARK L. DAVIS, D.O., P.L.L.C. OF EAST LANSING, MARK

L. DAVIS, D.O., P.C. and MARK L. DAVIS, D.O., JOINTLY AND SEVERALLY, Defendants; on behalf of the Defendants.

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Mary Lynn Cushing
Missouri CCR #1077
Alaris Litigation Services
1608 Locust Street
Kansas City, Missouri 64108
(816) 221-1160
1-800-280-3376

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the Plaintiff and counsel for the Defendant that this deposition may be taken in shorthand by Mary Lynn Cushing, CCR, a Certified Court Reporter, and Notary Public, and afterwards transcribed into typewriting; and the signature of the witness is expressly waived.

* * * * *

(Exhibits 1 to 9 were marked for identification in the deposition.)

B. SONNY BAL, M.D.,

of lawful age, produced, sworn and examined on behalf of the DEFENDANTS, deposes and says:

(Starting time of the deposition: 9:00 a.m.)

EXAMINATION

BY MR. SVESKA:

Q. Dr. Bal, my name is Kim Sveska. We met a few minutes ago before we started. I want to make sure on the record that you're okay with me attending this deposition live even in spite of the COVID-19 circumstances?

A. Perfectly okay.

Q. All right. Thank you, sir. Doctor, would you state your name for the record?

A. Sonny Bal, B-a-l.

Q. Mr. Kay got me a copy of your CV last night and so I'm going to start by asking some background questions related to your education, training and professional experience.

A. Okay.

Q. Now I assume you've given many depositions so I do not need to provide any instructions, right?

A. Sure.

Q. Since I am speaking through a surgical mask, if you have difficulty hearing or understanding, obviously let me know and I'll do what I can to fix it.

A. Will do.

Q. Okay. The 2000 East Broadway No. 251 address what is that?

A. That's just a mailing box.

Q. So like a PO box?

A. Yes.

Q. Got it. Do you reside here in the Columbia area?

A. I do.

Q. The PO box is what you use professionally?

A. Yes.

Q. Do you have an office here as well?

A. Yes.

Q. Where is that?

A. It's right next to the PO box in a building.

Q. Okay. Is that the same address?

A. I never used that mailing address. I think it's -- the address you cited was 2000 East Broadway, No. 251.

Q. Yes.

A. That's the mailing box. The physical address of the office is 200 Old Highway 63.

Q. All right. Is that some sort of -- has some sort of a label or, you know, what do you consider that to be?

A. It's simply a remote office where I prefer to do work instead of at the home office.

Q. Okay. It's not like a corporate office where you have staff. It's more of just a personal space?

A. Correct, it is.

Q. All right. You obviously went to medical school. Let me pull-up where that was. Cornell, graduating in 1987?

A. True.

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Q. At some point you did an orthopedic surgery residency?
A. Yes.
Q. When and where and when did you complete it?
A. It was 1989 through 1993 at the University of Missouri in Kansas City.
Q. And then it looks like you did some additional training at Mass General in hip and implant surgery?
A. Correct.
Q. It doesn't show that that was a -- I guess it does show that's a fellowship, right?
A. Correct.
Q. You completed that additional training in '94?
A. Yes.
Q. And then it looks like you also did a Research Assistant Fellowship in the orthopedic biomechanic laboratory from August of '94 through July of '95?
A. Correct.
Q. Okay. At some point you sat for the orthopedic board?
A. Right.

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Q. When?
A. That would have been about '95.
Q. All right. And you would have completed that on the first attempt?
A. Yes.
Q. And have you had to recert?
A. Correct.
Q. Is that a ten year recert?
A. Yes.
Q. So you're recerted out through 2025?
A. 2027.
Q. All right. It looks like you started in general surgery. Was that because you were thinking at that point in time you wanted to go into general surgery or is that just as a preparation for orthopedics?
A. A little bit of both. I was halfway certain I wanted orthopedic surgery, but not 100 percent sure at that time.
Q. All right. When you first started practicing orthopedics where was that? Here in Missouri?
A. A suburb of Kansas City called Blue Springs. Four year experience in general orthopedic surgery with a private group.

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Q. Okay. Did you take -- did you subspecialize in any specific area in that practice? Did you take all comers, general, what were you doing?
A. It was a general orthopedic practice.
Q. And then it looks like you came to the University of Missouri here in Columbia in '99 and stayed through 2017?
A. Correct.
Q. And was that like a traditional academic orthopedic practice?
A. Very traditional.
Q. All right. And did you have a general practice or was that more specialized in maybe implants or whatever?
A. Specialize to hip and knee surgery; more specifically hip and knee implant replacement surgery.
Q. All right. We'll talk generally for a few minutes, but then I'm going to focus on 2016 and 2017. While at the University of Missouri what percentage of your surgeries would be related to hip and knee, would you say 100 percent?
A. 90 percent.
Q. And if you can break that down, was it

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it more hips or more knees or 50/50?
A. Equal.
Q. Obviously this would be a practice where you're seeing more senior type patients that have worn out or had trauma to their hips or knees?
A. Correct.
Q. Of the 10 percent that wasn't a hip and knee, was there anything else that you specialized in?
A. No. People happy with their hip or knee replacement would refer other patients much younger including teenagers with hip and knee problems and a small percentage of the practice was trauma surgery because I was taking call at a Level 1 trauma medical center.
Q. Got it. When you were again in the Columbia University of Missouri practice, were you doing anything with scopes?
A. Yes.
Q. Explain that.
A. I had one entire day, Friday generally, devoted to arthroscopic surgery of the hip and of the knee; particularly the knee joint.
Q. So were you doing sports injury type patients, regular type patients? Was there -- for

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the knee was there any pattern?

A. Most older patients with knee pain where we -- I believe that arthroscopic intervention would buy them some time until a replacement. There were some sports patients with ligament repairs, osteotomies, that type of surgery.

Q. Were there types of procedures and, again, I know you have focused on hip and knee, but were there types of procedures where if you were asked to do them you would not, you would refer them to one of your colleagues?

A. Yes.

Q. Like what?

A. Relevant to this case the type of procedure that Ms. Humerickhouse had I might attempt an arthroscopic surgery, if necessary, for a locking knee from a loose body or if the case showed no trochlea dysplasia and was a recurrent dislocation, patient that had failed physical therapy and the evidence showed that an arthroscopic lateral release and medial imbrication would help, then I would do so. If assessment of the patient showed that the etiology of the patella dislocation was multifactorial, then generally I would refer it more for the sake of time since I was busy with other

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kinds of surgery and also because over the years we hired sports medicine doctors who made it a career to devote themselves to that type of surgery.

Q. Got it. Well, I was going to get to that point and thank you for offering that up early. So this young lady that we're going to be talking about today had a shallow trochlea or --

A. Correct.

Q. -- trochlea dysplasia?

A. That is true.

Q. And you would be able to discern that on plain x-ray?

A. You would be able to discern that on plain x-ray and if there is any question on the plain x-ray, then a CT scan is the idea study to study bone anatomy.

Q. And if you had a patient like that with this set of circumstances you would refer them out?

A. Yes. I would refer them out to a sports colleague and sometimes time willing I would scrub in on the case as an assistant surgeon, so I'm very familiar with how the operation is done, a trochleoplasty, but in general it's better to have these patients follow-up with somebody who is

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committed to long term follow-up and has experience with that type of operation.

Q. Sure. So I'm going to guess that you feel that you are competent to perform that surgery you just choose not to?

A. That's exactly right.

Q. In your career can you estimate how many, if you have done any, how many of these -- I assuming you're suggesting a trochleoplasty would be indicated?

A. Correct.

Q. And if you were -- thinking back did you do that with any great frequency?

A. No, I didn't do it with any great frequency. I certainly worked up these patients so I would recognize when they had trochlea atrophy or developmental variance and I was able to refer them, but just a handful of cases with a sports medicine colleague more out curiosity and sometimes at the request of the patient I assisted in the trochleoplasty.

Q. So it sounds like you probably personally as the primary surgeon did just a handful?

A. Correct.

Q. Do you know when the last time you

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would have done one independently?

A. Probably 2016 is when a family friend's daughter needed the surgery and I referred the patient to our sports colleague and I scrubbed in with him. That would be the last time.

Q. Got it. I was thinking of the last time you did one independently?

A. No, I don't remember.

Q. Okay. All right. In 2016-2017 timeframe you were in the academic practice at the University of Missouri?

A. That's true.

Q. Give me a thumbnail sketch of what your typical week looked like in that timeframe in terms of your professional activities as an orthopedic surgeon?

A. By that time I dialed it down to clinic one day a week, surgery one day a week, but mostly handing off the practice to a couple colleagues that we had hired to take over my practice. I had a very busy practice and we were anticipating and preparing for what was the planned retirement.

Q. So in the 2016-2017 timeframe in terms of your orthopedic practice, you were doing one day a

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week of surgery and one day a week in the clinic?
A. Correct.
Q. Did you do any teaching on top of that?
A. Yes. There were grand rounds each week, mortality and morbidity conference and a special conference on hip and knee surgery with residents and fellows attending. I would attend and participate.
Q. And I would assume that these educational things you just described were obviously spread out; grand rounds is probably not more than once a week?
A. Correct.
Q. M&M, maybe once a month?
A. Correct.
Q. And hip and knee maybe once a month?
A. Once a week.
Q. Once a week. Got it. If we totaled up the amount of hours that you practiced or taught orthopedic surgery in 2016 and 2017, it looks to me like it's probably in the range of about 20 hours, is that reasonable?
A. Probably more like 30 hours.
Q. Was that variable through the course

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of those two years or was that pretty steady?
A. No, variable. It was dialing down. Essentially last time I had a full-time practice was, a very busy practice, was 2015, and then at that time I discussed with my chairman staying on until 2017 when I turned the right age to get retirement from the University and he left me with the option of either returning to full-time medical practice or exiting. At that time I wasn't certain, so then I started dialing it down in 2000, late 2015, early 2016.
Q. In 2016 to 2017 did it continue at that same rate of about 30 hours per week or did you taper it further as you got closer to retirement?
A. Well, starting August 2017 I dialed it down even further, meaning started referring all new patients, all new comers, all new e-mails to one of my two colleagues.
Q. Does that mean you were no longer doing surgery?
A. No, I was still going into surgery, but letting other people bill for it.
Q. Were you going into surgery as the surgeon who was primarily responsible for the case?
A. Correct.

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Q. But you stopped seeing new patients?
A. Correct.
Q. So that means you probably went well below that 30 hours per week?
A. No, because it was a very big practice I've had for almost 20 years and patients would still come and I would work them up, introduce another surgeon and hand over the future management because patients with hip and knee problems generally need continuity of care.
Q. How old are you, sir?
A. 58.
Q. So in terms of retirement you're speaking of not that you reached an age requiring it, just that you chose to and it was a benefit provided by the University?
A. And the earliest you can do it is 55; no sooner.
Q. Got it.
A. Plus a certain number of years of service.
Q. Number of years of service plus a certain age?
A. Yes.
Q. At some point it appeared you

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developed a significant interest in materials?
A. Yes.
Q. And you have I assume been very active in clinical studies as well as other studies regarding various materials and implants?
A. Yes.
Q. Let's just -- I'm interested in a very big overview on this. But if you could just explain to me in basic overview style, what types of research interests and research and maybe even patents you have been involved with?
A. I developed an interest early on in the academic career in ceramic materials in the bearings for artificial hips and knees and that interest led me to a sister camp that's called University of Missouri at Rolla, R-o-l-l-a. And lead to a clinical study using ceramic balls and artificial hips to additional collaborations with outside institutions, basic science research, research on retrieved implants and ultimately engagement with a company called Amedica, A-m-e-d-i-c-a, located in Salt Lake City that manufactured silicon nitride non-oxide ceramics and they were a startup company interested in applying ceramics, silicon nitride specifically to the

TRIAL TRANSCRIPT OF BHAJANJIT SINGH BAL, J.D., M.B.A., M.D. ; 2019 TRIAL TRANS. LEXIS 70

CIRCUIT COURT OF MISSISSIPPI, HARRISON COUNTY, FIRST JUDICIAL DISTRICT

CAUSE NO. 24CI1:16-cv-00186

August 28, 2019

Reporter
2019 TRIAL TRANS. LEXIS 70

HUNTER WILLIAM FOOTE, JR., PLAINTIFF VERSUS DUDLEY S. BURWELL, M.D., ADVANCED ORTHOPEDIC ASSOCIATES, P.C., AND MEMORIAL HOSPITAL AT GULFPORT, DEFENDANTS

Expert Name: Bhajanjit Singh *Bal*, J.D., M.B.A., M.D.

Disclaimer

Counsel

Present and Representing the PLAINTIFF: HONORABLE JOE SAM OWEN, Owen, Galloway & Myers, PLLC, P.O. Drawer 420, Gulfport, MS 39502.

Present and Representing the Defendants, Dudley Burwell, M.D. and Advanced Orthopedic Associates, P.C.: HONORABLE WILLIAM E. WHITFIELD, III, HONORABLE KAARA LIND, Copeland, Cook, Taylor & Bush, P.A., 2781 C.T. Switzer Sr. Drive, Suite 200, Biloxi, MS 39531.

Present and Representing the Defendant, Memorial Hospital at Gulfport: HONORABLE ROLAND F. SAMSON, III, Samson & Powers, PLLC, 2217 Pass Road, Gulfport, MS 39531.

Proceedings

1

[12]TRANSCRIPT OF AN EXCERPT OF THE PROCEEDINGS HAD AND

[8]A. No.

[9]Q. You haven't practiced medicine since how

[10]long?

[11]A. November 2017.

[12]Q. And you quit practicing medicine to devote

[13]all of your attention to other pursuits?

[14]A. Correct.

[15]Q. Including starting your own law firm?

[16]A. No. I don't have a law firm.

[17]Q. Well, what's BalBrenner?

[18]A. It's an academic affiliation with Larry

[19]Brenner, an attorney. It no longer exists, and we

[20]wrote articles for the peer-reviewed literature, some

[21]hundred or so articles. Now we're putting a book

[22]together on medical/legal issues for the medical

[23]profession.

[24]Q. Well, so when BalBrenner -- when did

[25]BalBrenner cease to exist?

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[1]A. A couple of years ago.

[2]Q. When it existed, did you all do anything

[3]that would be remotely associated with the practice of

[4]law?

[5]A. Not one bit.

[6]Q. Okay. Did you consult with different

Contact

www.linkedin.com/in/sonnybal (LinkedIn)
www.hipandknee.org (Personal)

Top Skills

Healthcare
Hospitals
Healthcare Management

Certifications

American Board of Orthopaedic Surgery
American Board of Orthopaedic Surgery, recertified
Missouri Bar Examination

B. Sonny Bal MD, MBA, JD, PhD

CEO & President, SINTX Technologies
West Valley City, Utah, United States

Summary

SINTX Technologies leads in the knowledge, development, and commercialization of silicon nitride, a super-tough, bioactive, non-oxide ceramic material that is FDA-approved for spinal fusion surgery. Other applications under development include implants for cranio-maxillofacial surgery, arthroplasty, and dentistry. We have the deepest bench of peer-reviewed, published data on the performance of silicon nitride as a biomedical implant material.

Silicon nitride is highly versatile in our hands; we recently shipped a polymer-ceramic composite intended for biomedical implants, and are working on special coatings to enhance medical-grade titanium. Beyond the biomedical space, SINTX's products meet or exceed industrial requirements, with a range of applications from machine tools, industrial parts, and much more.

An intriguing property of silicon nitride is a potent antibacterial and antiviral effect, including the ability to inactivate SARS-CoV-2 in laboratory studies. A number of antipathogenic applications, especially in medical fabrics, are under development to leverage thi fortuitous property toward protecting us, and hopefully reducing the worldwide burden of infection.

SINTX is especially excited to enter the defense sector, with the purchase of manufacturing and technical assets of a ballistic body armor manufacturer in Dayton, Ohio. From medical innovations that improve the health of our fellow citizens, to protecting those who dedicate themselves to guarding our nation and its citizens, we take great pride in our company!

Experience

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

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

Missouri S&T
Adjunct Professor
January 2005 - November 2017 (12 years 11 months)
Rolla, Missouri, United States

Optimizing bioactive glasses for bone repair, basic science research in ceramic technology

University of Missouri Health Care
Professor of Orthopaedic Surgery
September 1999 - November 2017 (18 years 3 months)
University of Missouri-Columbia

Hip and Knee surgery, educator and researcher

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

Massachusetts General Hospital
Research Assistant
August 1994 - July 1995 (1 year)
Boston, Massachusetts

Education

Kyoto Institute of Technology (Japan)
Doctor of Philosophy (Ph.D.), Materials Engineering · (2014 - 2016)

University of Missouri-Columbia School of Law
Doctor of Law (JD) · (2002 - 2009)

Kellogg Graduate School of Management

Master of Business Administration (MBA) · (1997 - 1999)

Harvard Medical School

Fellowship, Hip and Implant Surgery, Post-graduate year 7 · (1993 - 1994)

University of Missouri-Kansas City School of Medicine

Orthopedic Surgery Residency Program · (1989 - 1993)

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

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

Plaintiff,

Case No. 21-187353-NH
HON. NANCI J. GRANT

v

BEAUMONT HEALTH;
TRI COUNTY ORTHOPEDICS, P.C.; and
JACK D. LENNOX, D.O.,
Jointly and Severally,

Defendants.

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bdemsky@fbmjlaw.com

DEFENDANTS TRI COUNTY ORTHOPEDICS, P.C. AND JACK LENNOX, D.O.'S MOTION TO COMPEL DEPOSITION OF PLAINTIFF'S EXPERT, SONNY BAL, M.D.

NOW COME the Defendants, TRI COUNTY ORTHOPEDICS, P.C. and JACK D. LENNOX, D.O., by and through their attorneys, FOLEY, BARON, METZGER & JUIP, PLLC, and for their Motion to Compel the Deposition of Plaintiff's Expert, Sonny Bal, M.D., state as follows:

FEE

1. Plaintiff filed this lawsuit against Defendants Tri County Orthopedics, P.C. and Jack Lennox, D.O., among others, alleging claims of medical malpractice and wrongful death on or around April 9, 2021. (**Exhibit A** – *Complaint*).

2. Attached to plaintiff's complaint was an Affidavit of Merit signed by orthopedic surgeon, Sonny Bal, M.D. (**Exhibit A** – *Complaint*).

3. On June 23, 2021, defendants arbitrarily noticed the deposition of Dr. Bal for August 3, 2021 at 9:00 a.m. (**Exhibit B** – Notice of Deposition of Sonny Bal, M.D.).

4. Dr. Bal's deposition did not proceed as scheduled on August 3, 2021.

5. Defendants then re-noticed Dr. Bal's deposition for August 15, 2022 at 1:00 p.m. **(Exhibit C** – Re-Notice of Deposition of Sonny Bal, M.D.). This date and time was mutually agreed upon by all parties. (**Exhibit D –** Emails between counsel confirming Dr. Bal's deposition).

6. On August 15, 2022, at 7:28 a.m., plaintiff's counsel canceled Dr. Bal's deposition at Dr. Bal's request because he had "an emergency." Plaintiff's counsel advised "[w]e will be in touch with new dates." (**Exhibit E -** Email from plaintiff's counsel regarding cancelation of Dr. Bal's deposition).

7. No new dates were ever provided for Dr. Bal's deposition. As such, on August 28, 2022, defendants' counsel emailed plaintiff's counsel requesting deposition dates for Dr. Bal in September 2022. Again, no dates were provided. (**Exhibit F –** Email to plaintiff's counsel requesting new dates for Dr. Bal's deposition).

8. To date, defendants have been unable to take the deposition of plaintiff's orthopedic surgery expert who authored the Affidavit of Merit attached to the complaint despite persistent, continuous, and diligent attempts to schedule this deposition.

9. Discovery is set to close on December 12, 2022, the summary disposition file by date is November 4, 2022, and the parties are to facilitate by January 1, 2023. (**Exhibit G –** Order Adjourning Scheduling Order).

10. Defendants are entitled to the requested deposition and cannot adequately prepare motions for summary disposition or prepare for a meaningful facilitation or trial without this deposition.

11. MCR 2.302 and MCR 2.306 govern and detail the rights of parties to take depositions, including the depositions of nonparties.

12. MCR 2.313 confers upon this Court the authority to compel discovery from a party who fails to permit the same.

13. Defendants' counsel requested concurrence with this Motion's requested relief from plaintiff's counsel via email on September 9, 2022 but did not receive a response in advance of filing this Motion.

WHEREFORE, Defendants, Tri County Orthopedics, P.C. and Jack Lennox, D.O., respectfully request this Honorable Court grant their Motion and enter an Order compelling the deposition of plaintiff's orthopedic surgery expert, Sonny Bal, M.D. within fourteen (14) days of entry of the Order. Defendants also request an award of costs and attorney fees wrongfully incurred in having to file this Motion.

Respectfully submitted,

FOLEY, BARON, METZGER & JUIP, PLLC

BY: /s/ Benjamin A Demsky

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BENJAMIN A. DEMSKY (P81055)
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bdemsky@fbmjlaw.com

Dated: September 9, 2022

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

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

Plaintiff,

Case No. 21-187353-NH
HON. NANCI J. GRANT

v

BEAUMONT HEALTH;
TRI COUNTY ORTHOPEDICS, P.C.; and
JACK D. LENNOX, D.O.,
Jointly and Severally,

Defendants.

BRIAN J. McKEEN (P34123)
STEVEN C. HURBIS (P80993)
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BRIEF IN SUPPORT OF DEFENDANTS TRI COUNTY ORTHOPEDICS, P.C. AND JACK LENNOX, D.O.'S MOTION TO COMPEL DEPOSITION OF PLAINTIFF'S EXPERT, SONNY BAL, M.D.

MCR 2.302 and MCR 2.306 govern and detail the rights of parties to take depositions, including depositions of nonparties. MCR 2.313 confers upon this Honorable Court the authority to compel discovery from a party who fails to permit the same. As is apparent in the Motion above, as well as the exhibits attached hereto,

plaintiff's orthopedic surgery expert, Sonny Bal, M.D., has not been made available for oral deposition testimony, despite numerous attempts by defendants' counsel to schedule the same. Defendants cannot fully and sufficiently prepare its case for trial without the benefit of this requested deposition, which they are entitled to.

In support of their Motion, defendants rely upon MCR 2.302, MCR 2.306, MCR 2.313, the materials attached hereto, as well as the sound discretion of this Honorable Court.

Respectfully submitted,

FOLEY, BARON, METZGER & JUIP, PLLC

BY: /s/ Benjamin A Demsky

ENRICO G. TUCCIARONE (P52767)
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Dated: September 9, 2022

PROOF OF SERVICE

I state that I am employed with the firm of FOLEY, BARON, METZGER & JUIP, PLLC, and I hereby certify that on September 9, 2022, I served the foregoing document upon all counsel of record via the MiFile E-File and Serve System for the County of Oakland.

/s/ Robin M. Flores

Exhibit A

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

LAWANNA SMITH AS PERSONAL REPRESENTATIVE OFTHE ESTATE OF JACQUELINE HARRIS, DECEASED
Plaintiff,

vs.

2021-187353-NH
No. 21- -NH
Hon. JUDGE NANCI J. GRANT

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

Defendants.

BRIAN J. McKEEN (P34123)
STEVEN C. HURBIS (P80993)
McKEEN & ASSOCIATES, P.C.
Attorney for Plaintiff
645 Griswold St., Suite 4200
Detroit, MI 48226
(313) 961-4400

PLAINTIFF'S COMPLAINT AND AFFIDAVIT OF MERITORIOUS CLAIM

There is no other civil action pending, or previously filed and dismissed, transferred, or otherwise disposed of arising out of the transaction or occurrence alleged in the complaint.

/s/ Brian J. McKeen

BRIAN J. McKEEN (P34123)

NOW COMES Plaintiff, Lawanna Smith as Personal Representative of the Estate of Jacqueline Harris, Deceased, by and through her attorneys, McKeen & Associates, P.C., and for her Complaint and Demand for Jury Trial hereby states the following:

1. The amount in controversy exceeds Twenty-Five Thousand ($25,000.00) Dollars, excluding costs, interest, and attorney fees, and is otherwise within the jurisdiction of this court.

2. The cause of action arose in the County of Oakland, State of Michigan.

3. Plaintiff Jacqueline Harris was at all times relevant a resident of the County of Oakland, State of Michigan.

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4. Plaintiff Lawanna Smith was at all times relevant a resident of the County of Oakland State of Michigan.

5. Defendant Beaumont Health was at all times relevant hereto a health institution conducting business in the County of Oakland, State of Michigan.

6. Defendant Tri County Orthopedics, PC was at all times relevant hereto a health institution conducting business in the County of Oakland, State of Michigan.

7. Defendant Jack D. Lennox, DO was at all times relevant hereto a licensed and practicing physician, specializing in Orthopedic Surgery and conducting business in the County of Oakland, State of Michigan.

8. Jacqueline Harris had been afflicted with diabetes mellitus, hypertension, osteoarthritis and morbid obesity.

9. Over the years, Ms. Harris developed severe osteoarthritis in her left knee and had managed this condition with conservative means such as physical therapy, medications etc.

10. As of 2014, Jacqueline Harris' left knee pain began interfering with her activities of daily living and she sought an orthopedic consultation.

11. On July 10, 2014, Jacqueline Harris consulted Jack Lennox, DO, an orthopedic surgeon, pertaining to her severe left knee pain and dysfunction.

12. A left total knee replacement was planned.

13. Presumably, due to her comorbidities together, her sedentary lifestyle and other risk factors for developing thromboembolic phenomena, Ms. Harris was prescribed anticoagulation, to wit Coumadin, to be taken perioperatively.

14. Subsequently, on July 28, 2014, Dr. Lennox performed a left total knee arthroplasty at Beaumont Health's Botsford Hospital in Farmington Hills.

15. Following her discharge on July 31, 2014, Ms. Harris continued to take her anticoagulation medication and underwent laboratory testing for coagulability on a regular basis for approximately one month postoperatively.

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16. Sometime prior to May 18, 2018, Ms. Harris began to experience right knee pain, which became progressively worse and interfered with her ability to walk.

17. On May 7, 2019, Ms. Harris returned to her PCP complaining of worsening right knee pain, difficulty walking and right knee edema.

18. After medically addressing her pain issue in the office with an injection of Toradol, her PCP referred her to Dr. Lennox for evaluation and treatment of her right knee pain.

19. On May 14, 2019, Ms. Harris agreed to undergo a right total knee arthroplasty to be performed by Jack D Lennox, DO.

20. At that time, Dr. Lennox knew or should have known that Jacqueline Harris had a number of significant risk factors for the development of postoperative thromboembolic events, to wit., hypertension, morbid obesity, diabetes mellitus and a sedentary lifestyle but failed to prescribe any anticoagulation perioperatively.

21. On May 29, 2019, Ms. Harris was admitted to Beaumont Health's Botsford Hospital and underwent a right total knee arthroplasty performed by Jack D. Lennox, DO.

22. Although she was provided Lovenox while an inpatient, Ms. Harris was only prescribed a small dose of aspirin as her sole anticoagulation medication.

23. Coumadin or any of the other novel oral anticoagulant medications were not prescribed for Ms. Harris postoperatively.

24. Ms. 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 ago.

25. At that time, Ms. Harris was complaining of right knee pain, muscle cramping, joint pain and stiffness, difficulty walking and "mild" swelling.

26. At no time did Dr. Lennox inform or communicate to Ms. Harris the signs and symptoms of deep vein thrombosis, pulmonary embolism or other thromboembolic event,

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despite the fact that he had not prescribed any meaningful anticoagulation for her following surgery.

27. Eight days after her appointment with Dr. Lennox, Jacqueline Harris suddenly collapsed at home.

28. EMS then transported her to Ascension Providence Hospital in Southfield where she was declared dead.

29. An autopsy revealed that Ms. Harris' death was caused by an overwhelming thromboembolic event causing a cascade of emboli occluding her pulmonary artery and vena cava, preventing outflow of blood from the heart.

30. Had appropriate anticoagulation been prescribed by Dr. Lennox to Jacqueline Harris, she would not have died on June 28, 2019 of a massive thromboembolic event.

COUNT I: MEDICAL NEGLIGENCE OF JACK D. LENNOX, DO

31. Plaintiff repeats and re-alleges the allegations contained in all prior paragraphs of Plaintiff's Complaint as though fully incorporated herein.

32. Jack D. Lennox D.O., a licensed and practicing physician, specializing in Orthopedic Surgery, and an agent and/or employee of Beaumont Health and Tri County Orthopedics, PC when presented with a patient exhibiting the history, signs and symptoms such as those demonstrated by Jacqueline Harris had a duty to:

a. a. Timely and properly obtain a thorough and complete history from that patient at regular and proper intervals;

b. Timely and properly perform a thorough and complete assessment/evaluation of that patient at regular and proper intervals;

c. Implement recommendations made by physicians consulting upon that patient;

d. Perform proper and appropriate total knee arthroplasty in a safe and acceptable manner;

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e. Take any and all reasonable steps to ensure that patients with comorbidities, such as hypertension, diabetes mellitus, morbid obesity and a sedentary lifestyle, who undergo total knee arthroplasty will not develop thromboembolic events postoperatively;

f. Provide intensive medical/surgical care and treatment to that patient, including, but limited to, appropriate postoperative anticoagulation;

g. Refer that patient to or himself consult with an appropriate medical/surgical specialist to determine that person's thromboembolic risk factors and/or to prescribe appropriate anticoagulation medications in the appropriate dosage for the appropriate duration of time postoperatively;

h. Prescribe an anticoagulation regimen in addition to aspirin for a minimum of 30 days postoperatively to prevent the development of thromboemboli in a patient such as Jacqueline Harris;

i. Timely inform that patient that she was at high risk of developing deep vein thrombosis and/or pulmonary emboli due to her comorbidities and lifestyle and/or instruct the patient that she should seek immediate medical attention should she experience any of the signs or symptoms associated with deep vein thrombosis and/or pulmonary emboli;

j. Refer that patient to an appropriate medical specialist to create, implement and employ an anticoagulation regimen postoperatively;

k. Review his prior medical records concerning the 2014 left total knee arthroplasty to determine whether the patient had been prescribed postoperative anticoagulation at that time and/or to institute the same or similar anticoagulation regimen pertaining to the 2019 right total knee

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arthroplasty;

l. Any negligence acts subsequently reveled during discovery.

33. Defendant Jack D. Lennox D.O., did none of these things, and such acts or omissions constitute professional negligence for which the Defendant Jack D. Lennox D.O., is directly liable to Plaintiffs.

34. At all times relevant hereto, Defendant Jack D. Lennox D.O., was an employee, agent, servant, or ostensible agent of Beaumont Health and Tri County Orthopedics, PC therefore, Defendants Beaumont Health and Tri County Orthopedics, PC are vicariously liable for the negligence of Defendant Jack D. Lennox D.O., pursuant to the Doctrine of Respondeat Superior and ostensible agency.

35. As a direct and proximate result of the above-listed breaches of the applicable standard of practice or care, the above-referenced healthcare providers caused Jacqueline Harris to develop a deep vein thrombosis, and to develop multiple pulmonary emboli in her vena cava and pulmonary artery, causing cardiovascular collapse and death. Had the standard of care been followed, including anticoagulation medications being prescribed for a minimum of 30 days postoperatively, Jacqueline Harris would not have developed a deep vein thrombosis, would not have developed multiple pulmonary emboli in her vena cava and pulmonary artery, causing cardiovascular collapse and death. Jacqueline Harris, to a reasonable degree of medical certainty, would still be alive.

36. As a consequence of the Defendants' negligence, Plaintiff further claims all elements of damages permitted under the Michigan Wrongful Death Act, Michigan Statutory Law, and Common Law whether known now or whether becoming known during the pendency of this case.

WHEREFORE, Plaintiff hereby requests an award of damages against the Defendants herein, jointly and severally, in whatever amount above Twenty-Five Thousand [$25,000.00] dollars that Plaintiff is found to be entitled to, together with costs, interest and attorney fees, as well as all other damages allowed under Michigan Law.

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COUNT II: VICARIOUS LIABILITY OF BEAUMONT HEALTH

37. Plaintiff repeats and re-alleges the allegations contained in all prior paragraphs of Plaintiff's Complaint as though fully incorporated herein.

38. Defendant Beaumont Health a duly accredited and licensed health care institution, by and through its agents, actual and/or ostensible, servants and/or employees, including but not limited to, Jack D. Lennox, DO which holds itself out to the public as being competent of rendering medical services, when confronted with a patient with the signs and symptoms such as those demonstrated Jacqueline Harris, owed a duty to:

a. Create, institute, monitor and enforce protocols and procedures whereby patients undergoing proposed total knee arthroplasty would undergo an evaluation for that patients risk of developing postoperative thromboembolic events;

b. Select, employ, train and monitor its employees, servants, agents, ostensible agents, staff of nurses, residents and/or its staff of physicians including, but not limited to, Jack D. Lennox, DO, to insure they were competent to perform optimum medical and surgical care;

c. Ensure that appropriate policies and procedures were adopted and followed including, but not limited to, the safe, timely and proper care and treatment of patients undergoing total knee arthroplasty, centered upon their individual risk of developing postoperative thromboembolic events;

d. Create, institute, monitor and enforce protocols and procedures whereby patients undergoing total knee arthroplasty would receive postoperative anticoagulation for a minimum of 30 days, together with close monitoring of clotting and other times.

e. Any additional acts of negligence identified through the discovery process.

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39. As a direct and proximate result of the above-listed breaches of the applicable standard of practice or care, the above-referenced healthcare providers caused Jacqueline Harris to develop a deep vein thrombosis, and to develop multiple pulmonary emboli in her vena cava and pulmonary artery, causing cardiovascular collapse and death. Had the standard of care been followed, including anticoagulation medications being prescribed for a minimum of 30 days postoperatively, Jacqueline Harris would not have developed a deep vein thrombosis, would not have developed multiple pulmonary emboli in her vena cava and pulmonary artery, causing cardiovascular collapse and death. Jacqueline Harris, to a reasonable degree of medical certainty, would still be alive.

40. As a consequence of the Defendants' negligence, Plaintiff further claims all elements of damages permitted under the Michigan Wrongful Death Act, Michigan Statutory Law, and Common Law whether known now or whether becoming known during the pendency of this case.

WHEREFORE, Plaintiff hereby requests an award of damages against the Defendants herein, jointly and severally, in whatever amount above Twenty-Five Thousand [$25,000.00] dollars that Plaintiff is found to be entitled to, together with costs, interest and attorney fees, as well as all other damages allowed under Michigan Law.

COUNT III: VICARIOUS LIABILITY OF TRI COUNTY ORTHOPEDICS, PC

41. Plaintiff repeats and re-alleges the allegations contained in all prior paragraphs of Plaintiff's Complaint as though fully incorporated herein.

42. Defendant Tri County Orthopedics, PC a duly accredited and licensed health care institution, by and through its agents, actual and/or ostensible, servants and/or employees, including but not limited to, Jack D. Lennox, DO which holds itself out to the public as being competent of rendering medical services, when confronted with a patient with the signs and symptoms such as those demonstrated Jacqueline Harris, owed a duty to:

f. Create, institute, monitor and enforce protocols and procedures whereby patients undergoing proposed total knee arthroplasty would undergo an

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evaluation for that patients risk of developing postoperative thromboembolic events;

g. Select, employ, train and monitor its employees, servants, agents, ostensible agents, staff of nurses, residents and/or its staff of physicians including, but not limited to, Jack D. Lennox, DO, to insure they were competent to perform optimum medical and surgical care;

h. Ensure that appropriate policies and procedures were adopted and followed including, but not limited to, the safe, timely and proper care and treatment of patients undergoing total knee arthroplasty, centered upon their individual risk of developing postoperative thromboembolic events;

i. Create, institute, monitor and enforce protocols and procedures whereby patients undergoing total knee arthroplasty would receive postoperative anticoagulation for a minimum of 30 days, together with close monitoring of clotting and other times.

j. Any additional acts of negligence identified through the discovery process.

43. As a direct and proximate result of the above-listed breaches of the applicable standard of practice or care, the above-referenced healthcare providers caused Jacqueline Harris to develop a deep vein thrombosis, and to develop multiple pulmonary emboli in her vena cava and pulmonary artery, causing cardiovascular collapse and death. Had the standard of care been followed, including anticoagulation medications being prescribed for a minimum of 30 days postoperatively, Jacqueline Harris would not have developed a deep vein thrombosis, would not have developed multiple pulmonary emboli in her vena cava and pulmonary artery, causing cardiovascular collapse and death. Jacqueline Harris, to a reasonable degree of medical certainty, would still be alive.

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44. As a consequence of the Defendants' negligence, Plaintiff further claims all elements of damages permitted under the Michigan Wrongful Death Act, Michigan Statutory Law, and Common Law whether known now or whether becoming known during the pendency of this case.

WHEREFORE, Plaintiff hereby requests an award of damages against the Defendants herein, jointly and severally, in whatever amount above Twenty-Five Thousand [$25,000.00] dollars that Plaintiff is found to be entitled to, together with costs, interest and attorney fees, as well as all other damages allowed under Michigan Law.

COUNT IV: RES IPSA LOQUITUR

45. Plaintiff repeats and re-alleges the allegations contained in all prior paragraphs of Plaintiff's Complaint as though fully incorporated herein.

46. The injuries sustained by Jacqueline Harris are the type which do not ordinarily occur in the absence of negligence.

47. The injuries sustained by Jacqueline Harris were caused by an agency or instrumentality within the exclusive control of the Defendants.

48. The injuries sustained by Jacqueline Harris are not due to any voluntary action or contribution on the part of the Jacqueline Harris.

49. The evidence of the true explanation of the injuries sustained by Jacqueline Harris is more readily accessible to the Defendants.

50. As a direct and proximate result of the above-listed breaches of the applicable standard of practice or care, the above-referenced healthcare providers caused Jacqueline Harris to develop a deep vein thrombosis, and to develop multiple pulmonary emboli in her vena cava and pulmonary artery, causing cardiovascular collapse and death. Had the standard of care been followed, including anticoagulation medications being prescribed for a minimum of 30 days postoperatively, Jacqueline Harris would not have developed a deep vein thrombosis, would not have developed multiple pulmonary emboli in her vena cava and pulmonary artery, causing

cardiovascular collapse and death. Jacqueline Harris, to a reasonable degree of medical certainty, would still be alive.

51. As a consequence of the Defendants' negligence, Plaintiff further claims all elements of damages permitted under the Michigan Wrongful Death Act, Michigan Statutory Law, and Common Law whether known now or whether becoming known during the pendency of this case.

WHEREFORE, Plaintiff hereby requests an award of damages against the Defendants herein, jointly and severally, in whatever amount above Twenty-Five Thousand [$25,000.00] dollars that Plaintiff is found to be entitled to, together with costs, interest and attorney fees, as well as all other damages allowed under Michigan Law.

Respectfully Submitted:

McKEEN & ASSOCIATES, P.C.

/s/ Brian J. McKeen

BRIAN J. McKEEN (P34123)
STEVEN C. HURBIS (P80993)
Attorneys for Plaintiff
645 Griswold St., Suite 4200
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DATED: April 6, 2021

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

LAWANNA SMITH AS PERSONAL REPRESENTATIVE OFTHE ESTATE OF JACQUELINE HARRIS, DECEASED
Plaintiff,

vs.

2021-187353-NH
No. 21- -NH
Hon. JUDGE NANCI J. GRANT

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

Defendants.

BRIAN J. McKEEN (P34123)
STEVEN C. HURBIS (P80993)
McKEEN & ASSOCIATES, P.C.
Attorney for Plaintiff
645 Griswold St., Suite 4200
Detroit, MI 48226
(313) 961-4400

DEMAND FOR JURY TRIAL

NOW COMES Plaintiff, Lawanna Smith as Personal Representative of the Estate of Jacqueline Harris, Deceased, by and through her attorneys, McKeen & Associates, P.C., and hereby demands a trial by jury in the above entitled cause of action.

Respectfully Submitted:

McKEEN & ASSOCIATES, P.C.

/s/ Brian J. McKeen

BRIAN J. McKEEN (P34123)
STEVEN C. HURBIS (P80993)
Attorneys for Plaintiff
645 Griswold St., Suite 4200
Detroit, MI 48226
(313) 961-4400

DATED: April 6, 2021

Exhibit B

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

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

Plaintiff,

Case No. 21-187353-NH
HON. NANCI J. GRANT

v

BEAUMONT HEALTH;
TRI COUNTY ORTHOPEDICS, P.C.; and
JACK D. LENNOX, D.O.,
Jointly and Severally,

Defendants.

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DEFENDANTS TRI COUNTY ORTHOPEDICS, P.C. AND JACK D. LENNOX, D.O.'S *(ARBITRARY)* NOTICE OF TAKING DEPOSITION FOR DISCOVERY PURPOSES ONLY, DUCES TECUM, OF PLAINTIFF'S EXPERT, B. SONNY BAL, M.D.

TO: ALL COUNSEL OF RECORD

PLEASE TAKE NOTICE that on **August 3, 2021 at 9:00 a.m.** the deposition upon oral discovery by Defendants will be taken of **Plaintiff's Expert, B. SONNY BAL, M.D.**, via Zoom.

This deposition is to be taken for the purpose of discovery only, in accordance with MCR. 2.302(c)(7) and 2.306, 2.306(B), and 2.308.

NOTICE TO PRODUCE DOCUMENTS

Demand is hereby made, pursuant to the Michigan Court Rules, including MCR 2.310, MCR 3.306, and MCR 2.305, for Plaintiff's expert, **B. SONNY BAL, M.D.,** to produce the following:

A. All material reviewed in preparation for deposition and all medical records pertaining to this case;

B. All records, documents and depositions which deponent received regarding this case;

C. All letters, correspondence, notes and reports received from anyone or which deponent has seen at any time;

D. Any and all notes, letters, correspondence, reports and documents or things which deponent has prepared pertaining to this case;

E. Any and all billing records regarding charges made for services rendered;

F. Citation of all books, journals or papers deponent has used to conduct research in this matter.

G. A copy of deponent's current curriculum vitae.

Respectfully submitted,

FOLEY, BARON, METZGER & JUIP, PLLC

BY: */s/ Enrico G. Tucciarone*

ENRICO G. TUCCIARONE (P52767)
SARAH T. BERARD (P70999)
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Dated: June 23, 2021

PROOF OF SERVICE

I state that I am employed with the firm of FOLEY, BARON, METZGER & JUIP, PLLC, and I hereby certify that on June 23, 2021, I served the foregoing document upon all counsel of record via the MiFile E-File and Serve System for the County of Oakland.

/s/ Carol J. Gaul
Carol J. Gaul

Exhibit C

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

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

Plaintiff,

Case No. 21-187353-NH
HON. NANCI J. GRANT

v

BEAUMONT HEALTH;
TRI COUNTY ORTHOPEDICS, P.C.; and
JACK D. LENNOX, D.O.,
Jointly and Severally,

Defendants.

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spolteraitis@fbmjlaw.com

DEFENDANTS TRI COUNTY ORTHOPEDICS, P.C. AND JACK LENNOX, D.O.'S NOTICE OF TAKING DEPOSITION FOR DISCOVERY PURPOSES ONLY, DUCES TECUM, OF PLAINTIFFS' EXPERT, SONNY BAL, M.D.

PLEASE TAKE NOTICE that on **Monday, August 15, 2022 at 1:00 p.m. Central/2:00 p.m. Eastern,** the deposition of **Plaintiff's Expert, SONNY BAL, M.D.** upon oral discovery by Defendants, will be taken before a qualified Notary

Public and Court Reporter at **Lexitas Deposition Suite, 2511 Broadway Bluffs Dr., Suite 201, Columbia, Missouri 65201 (800-280-3376)**.

This deposition is to be taken for the purpose of discovery only, in accordance with MCR. 2.302(c)(7) and 2.306, 2.306(B), and 2.308.

NOTICE TO PRODUCE DOCUMENTS

Demand is hereby made, pursuant to the Michigan Court Rules, including MCR 2.310, MCR 3.306, and MCR 2.305, for Plaintiff's expert, **SONNY BAL, M.D.**, to produce the following:

A. All material reviewed in preparation for deposition and all medical records pertaining to this case;

B. All records, documents and depositions which deponent received regarding this case;

C. All letters, correspondence, notes and reports received from anyone or which deponent has seen at any time;

D. Any and all notes, letters, correspondence, reports and documents or things which deponent has prepared pertaining to this case;

E. Any and all billing records regarding charges made for services rendered;

F. Citation of all books, journals or papers deponent has used to conduct research in this matter.

G. A copy of deponent's current curriculum vitae.

This deposition is to be taken in accordance with MCR 2.306.

Respectfully submitted,

FOLEY, BARON, METZGER & JUIP, PLLC

BY: */s/ Enrico G. Tucciarone*

ENRICO G. TUCCIARONE (P52767)
SAULIUS D. POLTERAITIS (P68840)
Attorneys for Defendants
Tri County Orthopedics, P.C.
and Jack D. Lennox, D.O.
38777 Six Mile Road, Suite 300
Livonia, MI 48152
(734) 742-1800/(734) 521-2379
etucciarone@fbmjlaw.com
spolteraitis@fbmjlaw.com

Dated: June 8, 2022

PROOF OF SERVICE

I state that I am employed with the firm of FOLEY, BARON, METZGER & JUIP, PLLC, and I hereby certify that on June 8, 2022, I served the foregoing document upon all counsel of record via the MiFile E-File and Serve System for the County of Oakland.

/s/ Laura J. Pilarski
LAURA J. PILARSKI

Exhibit D

Demsky, Benjamin

From: Krista Tester <krista.tester@tnmglaw.com>
Sent: Monday, June 6, 2022 8:18 AM
To: Sarah Schimitschek; Pilarski, Laura; Tucciarone, Eric; Steven Hurbis; Flores, Robin; Polteraitis, Saulius
Subject: RE: Lawanna Smith PR of the Estate of Jaqueline Harris, dec'd v Beaumont Health, et al

Please also obtain a Zoom link, as Paul Dwaihy will be taking by Zoom. Thank you

---

From: Sarah Schimitschek [mailto:sschimitschek@mckeenassociates.com]
Sent: Monday, June 6, 2022 8:01 AM
To: Pilarski, Laura <lpilarski@fbmjlaw.com>; Krista Tester <krista.tester@tnmglaw.com>; Tucciarone, Eric <eTucciarone@fbmjlaw.com>; Steven Hurbis <shurbis@mckeenassociates.com>; Charles Fisher <charles.fisher@tnmglaw.com>; Flores, Robin <RFlores@fbmjlaw.com>; Polteraitis, Saulius <spolteraitis@fbmjlaw.com>; Paul Dwaihy <paul.dwaihy@tnmglaw.com>
Subject: [EXTERNAL] RE: Lawanna Smith PR of the Estate of Jaqueline Harris, dec'd v Beaumont Health, et al

Good Morning,

Dr. Bal could do a 1pm or 2pm CST start time.

He suggested Lexitas Deposition Suite, you will need to call to request a room. Address is 2511 Broadway Bluffs Dr #201, Columbia, MO 65201.

https://link.edgepilot.com/s/08b0749f/lw4iL0sA9Um4nr2_GY4QFQ?u=https://www.lexitaslegal.com/locations/columbia

Thank you,

Sarah Schimitschek
Legal Assistant to Steven C. Hurbis, Esq.
McKeen & Associates, P.C.
Penobscot Building
645 Griswold Street, Suite 4200
Detroit, MI 48226
(313) 961-4400
sschimitschek@mckeenassociates.com
https://link.edgepilot.com/s/41861973/P0tQrEUj2EWWmuPsYi0-gw?u=http://www.mckeenassociates.com/


Think green! Please consider the environment before printing this e-mail.

From: Pilarski, Laura <lpilarski@fbmjlaw.com>
Sent: Friday, June 3, 2022 2:02 PM
To: Krista Tester <krista.tester@tnmglaw.com>; Sarah Schimitschek <sschimitschek@mckeenassociates.com>; Tucciarone, Eric <eTucciarone@fbmjlaw.com>; Steven Hurbis <shurbis@mckeenassociates.com>; Charles Fisher <charles.fisher@tnmglaw.com>; Flores, Robin <RFlores@fbmjlaw.com>; Polteraitis, Saulius <spolteraitis@fbmjlaw.com>; Paul Dwaihy <paul.dwaihy@tnmglaw.com>
Subject: External RE: Lawanna Smith PR of the Estate of Jaqueline Harris, dec'd v Beaumont Health, et al

We can do 08/15. Please provide the start time and Dr. Bal's address (if we can do the dep at his office) and I will prepare our dep notice.

Thank you.

Laura Pilarski
Legal Assistant to Enrico G. Tucciarone and David A. Occhiuto
Foley, Baron, Metzger & Juip, PLLC
38777 Six Mile Rd., Suite 300
Livonia, MI 48152
Office: 734-742-1800
Fax: 734-521-2379
lpilarski@fbmjlaw.com

From: Krista Tester <krista.tester@tnmglaw.com>
Sent: Friday, June 3, 2022 11:45 AM
To: Sarah Schimitschek <sschimitschek@mckeenassociates.com>; Pilarski, Laura <lpilarski@fbmjlaw.com>; Tucciarone, Eric <eTucciarone@fbmjlaw.com>; Steven Hurbis <shurbis@mckeenassociates.com>; Charles Fisher <charles.fisher@tnmglaw.com>; Flores, Robin <RFlores@fbmjlaw.com>; Polteraitis, Saulius <spolteraitis@fbmjlaw.com>; Paul Dwaihy <paul.dwaihy@tnmglaw.com>
Subject: RE: Lawanna Smith PR of the Estate of Jaqueline Harris, dec'd v Beaumont Health, et al

Paul is out of the office the week of 8/8. He is available 8/15 only.

From: Sarah Schimitschek [mailto:sschimitschek@mckeenassociates.com]
Sent: Friday, June 3, 2022 11:37 AM
To: Pilarski, Laura <lpilarski@fbmjlaw.com>; Krista Tester <krista.tester@tnmglaw.com>; Tucciarone, Eric <eTucciarone@fbmjlaw.com>; Steven Hurbis <shurbis@mckeenassociates.com>; Charles Fisher <charles.fisher@tnmglaw.com>; Flores, Robin <RFlores@fbmjlaw.com>; Polteraitis, Saulius <spolteraitis@fbmjlaw.com>; Paul Dwaihy <paul.dwaihy@tnmglaw.com>
Subject: [EXTERNAL] RE: Lawanna Smith PR of the Estate of Jaqueline Harris, dec'd v Beaumont Health, et al

Good Morning,

Dr. Bal has provided the following dates for an in-person deposition with an afternoon start time:

8/8
8/9
8/11
8/15
8/16

Please let us know if these dates will work.

Sarah Schimitschek
Legal Assistant to Steven C. Hurbis, Esq.
McKeen & Associates, P.C.
Penobscot Building
645 Griswold Street, Suite 4200
Detroit, MI 48226
(313) 961-4400
https://link.edgepilot.com/s/29a1e09d/ahaBY-gmTkG_2SPtCG1DDA?u=http://www.mckeenassociates.com/

From: Pilarski, Laura <lpilarski@fbmjlaw.com>
Sent: Friday, May 27, 2022 2:42 PM
To: Sarah Schimitschek <sschimitschek@mckeenassociates.com>; Krista Tester <krista.tester@tnmglaw.com>; Tucciarone, Eric <eTucciarone@fbmjlaw.com>; Steven Hurbis <shurbis@mckeenassociates.com>; Charles Fisher <charles.fisher@tnmglaw.com>; Flores, Robin <RFlores@fbmjlaw.com>; Polteraitis, Saulius <spolteraitis@fbmjlaw.com>; Paul Dwaihy <paul.dwaihy@tnmglaw.com>
Subject: External RE: Lawanna Smith PR of the Estate of Jaqueline Harris, dec'd v Beaumont Health, et al

Thank you, Sarah – I appreciate it!

Enjoy the long weekend!

Laura Pilarski
Legal Assistant to Enrico G. Tucciarone and David A. Occhiuto
Foley, Baron, Metzger & Juip, PLLC

38777 Six Mile Rd., Suite 300
Livonia, MI 48152
Office: 734-742-1800
Fax: 734-521-2379
lpilarski@fbmjlaw.com

From: Sarah Schimitschek <sschimitschek@mckeenassociates.com>
Sent: Friday, May 27, 2022 2:37 PM
To: Pilarski, Laura <lpilarski@fbmjlaw.com>; Krista Tester <krista.tester@tnmglaw.com>; Tucciarone, Eric <eTucciarone@fbmjlaw.com>; Steven Hurbis <shurbis@mckeenassociates.com>; Charles Fisher <charles.fisher@tnmglaw.com>; Flores, Robin <RFlores@fbmjlaw.com>; Polteraitis, Saulius <spolteraitis@fbmjlaw.com>; Paul Dwaihy <paul.dwaihy@tnmglaw.com>
Subject: Re: Lawanna Smith PR of the Estate of Jaqueline Harris, dec'd v Beaumont Health, et al

Hi Laura,

I am waiting to hear back from Dr. Bal with some additional dates. I'll be in touch when I do.

Thanks,

Sarah Schimitschek
Legal Assistant to Steven C. Hurbis, Esq.
McKeen & Associates, P.C.
Penobscot Building
645 Griswold Street, Suite 4200
Detroit, MI 48226
(313) 961-4400
https://link.edgepilot.com/s/596c7041/ksThapXcPEqCE3dlxfM16g?u=http://www.mckeenassociates.com/

From: Pilarski, Laura <lpilarski@fbmjlaw.com>
Sent: Friday, May 27, 2022 2:14:51 PM
To: Krista Tester <krista.tester@tnmglaw.com>; Sarah Schimitschek <sschimitschek@mckeenassociates.com>; Tucciarone, Eric <eTucciarone@fbmjlaw.com>; Steven Hurbis <shurbis@mckeenassociates.com>; Charles Fisher <charles.fisher@tnmglaw.com>; Flores, Robin <RFlores@fbmjlaw.com>; Polteraitis, Saulius <spolteraitis@fbmjlaw.com>; Paul Dwaihy <paul.dwaihy@tnmglaw.com>
Subject: External RE: Lawanna Smith PR of the Estate of Jaqueline Harris, dec'd v Beaumont Health, et al

Hi Sarah,

Mr. Dwaihy indicated he is not available on 06/15 and 07/25. Could you please obtain some more available dates from Dr. Bal for his deposition? If possible, we would like an afternoon start time so Mr. Tucciarone can fly in and out on the same day.

Thank you!

Laura Pilarski
Legal Assistant to Enrico G. Tucciarone and David A. Occhiuto
Foley, Baron, Metzger & Juip, PLLC

38777 Six Mile Rd., Suite 300
Livonia, MI 48152
Office: 734-742-1800
Fax: 734-521-2379
lpilarski@fbmjlaw.com

From: Krista Tester <krista.tester@tnmglaw.com>
Sent: Wednesday, May 25, 2022 10:52 AM
To: Sarah Schimitschek <sschimitschek@mckeenassociates.com>; Tucciarone, Eric <eTucciarone@fbmjlaw.com>; Steven Hurbis <shurbis@mckeenassociates.com>; Charles Fisher <charles.fisher@tnmglaw.com>; Flores, Robin <RFlores@fbmjlaw.com>; Pilarski, Laura <lpilarski@fbmjlaw.com>; Polteraitis, Saulius <spolteraitis@fbmjlaw.com>; Paul Dwaihy <paul.dwaihy@tnmglaw.com>
Subject: RE: Lawanna Smith PR of the Estate of Jaqueline Harris, dec'd v Beaumont Health, et al

Paul is not available on those days. Please provide alternative dates. Thank you

From: Milad Yatooma
Sent: Wednesday, May 25, 2022 10:20 AM
To: Krista Tester <krista.tester@tnmglaw.com>
Subject: FW: Lawanna Smith PR of the Estate of Jaqueline Harris, dec'd v Beaumont Health, et al

From: Sarah Schimitschek [mailto:sschimitschek@mckeenassociates.com]
Sent: Wednesday, May 25, 2022 9:59 AM
To: Tucciarone, Eric <eTucciarone@fbmjlaw.com>; Steven Hurbis <shurbis@mckeenassociates.com>; Charles Fisher <charles.fisher@tnmglaw.com>; Flores, Robin <RFlores@fbmjlaw.com>; Pilarski, Laura <lpilarski@fbmjlaw.com>
Cc: Polteraitis, Saulius <spolteraitis@fbmjlaw.com>; Milad Yatooma <milad.yatooma@tnmglaw.com>; Flores, Robin <RFlores@fbmjlaw.com>
Subject: [EXTERNAL] RE: Lawanna Smith PR of the Estate of Jaqueline Harris, dec'd v Beaumont Health, et al

Good Morning,

Dr Bal provided the following dates:

6/15 (all day)
7/25 (available until 1pm CST/2pm EST)

Thank you,

Sarah Schimitschek
Legal Assistant to Steven C. Hurbis, Esq.
McKeen & Associates, P.C.
Penobscot Building
645 Griswold Street, Suite 4200
Detroit, MI 48226
(313) 961-4400
sschimitschek@mckeenassociates.com
https://link.edgepilot.com/s/78578a5d/vRHxBAVml0iw3VwJ8U8Xpw?u=http://www.mckeenassociates.com/

From: Tucciarone, Eric <eTucciarone@fbmjlaw.com>
Sent: Wednesday, May 25, 2022 8:19 AM
To: Steven Hurbis <shurbis@mckeenassociates.com>; Charles Fisher <charles.fisher@tnmglaw.com>; Flores, Robin <RFlores@fbmjlaw.com>; Sarah Schimitschek <sschimitschek@mckeenassociates.com>; Pilarski, Laura <lpilarski@fbmjlaw.com>
Cc: Polteraitis, Saulius <spolteraitis@fbmjlaw.com>; Milad Yatooma <milad.yatooma@tnmglaw.com>; Flores, Robin <RFlores@fbmjlaw.com>
Subject: External RE: Lawanna Smith PR of the Estate of Jaqueline Harris, dec'd v Beaumont Health, et al

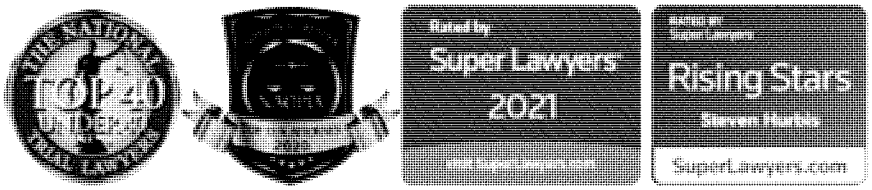
Just to be clear, I still have to get approval from my client to remove this from case evaluation. Waiting on her decision. Should have it today.

Also, Steve, I need more dates for Dr. Bal's deposition. I think the dates you previously provided didn't work with Charlie. Thanks.

From: Steven Hurbis <shurbis@mckeenassociates.com>
Sent: Wednesday, May 25, 2022 8:11 AM
To: Tucciarone, Eric <eTucciarone@fbmjlaw.com>; Charles Fisher <charles.fisher@tnmglaw.com>; Flores, Robin <RFlores@fbmjlaw.com>; Sarah Schimitschek <sschimitschek@mckeenassociates.com>; Pilarski, Laura <lpilarski@fbmjlaw.com>
Cc: Polteraitis, Saulius <spolteraitis@fbmjlaw.com>; Milad Yatooma <milad.yatooma@tnmglaw.com>
Subject: RE: Lawanna Smith PR of the Estate of Jaqueline Harris, dec'd v Beaumont Health, et al

Sadly he is and we've had good recent experiences with Mike.

Steven C. Hurbis, Esq.
McKeen & Associates, P.C.
Penobscot Building
645 Griswold St., Suite 4200
Detroit, MI 48226-3344
(313) 961-5985 (Facsimile)
(313) 961-4400 x 829



From: Tucciarone, Eric <eTucciarone@fbmjlaw.com>
Sent: Wednesday, May 25, 2022 8:10 AM
To: Charles Fisher <charles.fisher@tnmglaw.com>; Flores, Robin <RFlores@fbmjlaw.com>; Steven Hurbis <shurbis@mckeenassociates.com>; Sarah Schimitschek <sschimitschek@mckeenassociates.com>; Pilarski, Laura <lpilarski@fbmjlaw.com>
Cc: Polteraitis, Saulius <spolteraitis@fbmjlaw.com>; Milad Yatooma <milad.yatooma@tnmglaw.com>
Subject: External RE: Lawanna Smith PR of the Estate of Jaqueline Harris, dec'd v Beaumont Health, et al

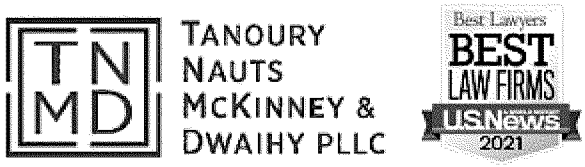
I heard Bob is scheduling out into January-February. I do like Dolenga.

From: Charles Fisher <charles.fisher@tnmglaw.com>
Sent: Wednesday, May 25, 2022 7:27 AM
To: Tucciarone, Eric <eTucciarone@fbmjlaw.com>; Flores, Robin <RFlores@fbmjlaw.com>; Steven Hurbis <shurbis@mckeenassociates.com>; Sarah Schimitschek <sschimitschek@mckeenassociates.com>; Pilarski, Laura <lpilarski@fbmjlaw.com>
Cc: Polteraitis, Saulius <spolteraitis@fbmjlaw.com>; Milad Yatooma <milad.yatooma@tnmglaw.com>
Subject: RE: Lawanna Smith PR of the Estate of Jaqueline Harris, dec'd v Beaumont Health, et al

No problem. Steve indicated he would agree to Bob, Bill Hurley, Mike Dolenga or Le Wulfmeier.

Charles Fisher
Tanoury, Nauts, McKinney & Dwaihy, PLLC
38777 Six Mile Road, Suite 101
Livonia, Michigan 48152
Firm Phone (313) 964-4500
Fax (734) 469-4298

Charles.Fisher@tnmdlaw.com
https://link.edgepilot.com/s/ce733662/2Ro1AOZqok_2kuFs0kYPNw?u=http://www.tnmdlaw.com/



From: Tucciarone, Eric [mailto:eTucciarone@fbmjlaw.com]
Sent: Tuesday, May 24, 2022 5:46 PM
To: Charles Fisher <charles.fisher@tnmglaw.com>; Flores, Robin <RFlores@fbmjlaw.com>; Steven Hurbis <shurbis@mckeenassociates.com>; Sarah Schimitschek <sschimitschek@mckeenassociates.com>; Pilarski, Laura <lpilarski@fbmjlaw.com>
Cc: Polteraitis, Saulius <spolteraitis@fbmjlaw.com>; Milad Yatooma <milad.yatooma@tnmglaw.com>
Subject: [EXTERNAL] RE: Lawanna Smith PR of the Estate of Jaqueline Harris, dec'd v Beaumont Health, et al

Don't remember who Steve suggested. Can you remind me?

From: Charles Fisher <charles.fisher@tnmglaw.com>
Sent: Tuesday, May 24, 2022 12:53 PM
To: Flores, Robin <RFlores@fbmjlaw.com>; Steven Hurbis <shurbis@mckeenassociates.com>; Sarah Schimitschek <sschimitschek@mckeenassociates.com>; Pilarski, Laura <lpilarski@fbmjlaw.com>
Cc: Polteraitis, Saulius <spolteraitis@fbmjlaw.com>; Tucciarone, Eric <eTucciarone@fbmjlaw.com>; Milad Yatooma <milad.yatooma@tnmglaw.com>
Subject: RE: Lawanna Smith PR of the Estate of Jaqueline Harris, dec'd v Beaumont Health, et al

Thank you both. From speaking with the Court, they will allow us to stipulate to an adjournment, but the judge would like us to include our choice of facilitator and the date for facilitation in the order. Eric would you be agreeable to any of the facilitators Steven suggested, or would you prefer someone else? Thanks.

Charles Fisher
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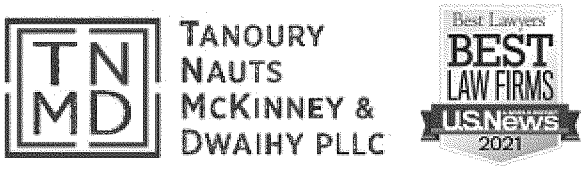
Livonia, Michigan 48152
Firm Phone (313) 964-4500
Fax (734) 469-4298

Charles.Fisher@tnmdlaw.com
https://link.edgepilot.com/s/9b6d5712/lLZ1J6LRn020smwp8OasQg?u=http://www.tnmdlaw.com/



information block, the typed name of the sender, nor anything else in this message is intended to constitute an electronic signature unless a specific statement to the contrary is included in this message.

From: Flores, Robin [mailto:RFlores@fbmjlaw.com]
Sent: Tuesday, May 24, 2022 11:16 AM
To: Steven Hurbis <shurbis@mckeenassociates.com>; Charles Fisher <charles.fisher@tnmglaw.com>; Sarah Schimitschek <sschimitschek@mckeenassociates.com>; Pilarski, Laura <lpilarski@fbmjlaw.com>
Cc: Polteraitis, Saulius <spolteraitis@fbmjlaw.com>; Tucciarone, Eric <eTucciarone@fbmjlaw.com>
Subject: [EXTERNAL] RE: Lawanna Smith PR of the Estate of Jaqueline Harris, dec'd v Beaumont Health, et al

Our office is also agreeable to stipulating to an adjournment.

Robin M. Flores
Legal Assistant to Saulius D. Polteraitis
Foley, Baron, Metzger & Juip, PLLC
Cambridge Center
38777 Six Mile Rd., Suite 300
Livonia, MI 48152

Office: 734-742-1840
Fax: 734-521-2379
Website: https://link.edgepilot.com/s/b09942aa/KVvBEpzGcE_kTnWgwJR0sA?u=http://www.fbmjlaw.com/

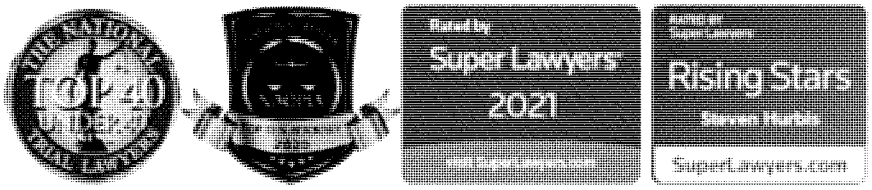
From: Steven Hurbis <shurbis@mckeenassociates.com>
Sent: Tuesday, May 24, 2022 11:07 AM
To: Charles Fisher <charles.fisher@tnmglaw.com>; Flores, Robin <RFlores@fbmjlaw.com>; Sarah Schimitschek <sschimitschek@mckeenassociates.com>; Pilarski, Laura <lpilarski@fbmjlaw.com>
Subject: RE: Lawanna Smith PR of the Estate of Jaqueline Harris, dec'd v Beaumont Health, et al

Of course.

Best,

Steven C. Hurbis, Esq.
McKeen & Associates, P.C.
Penobscot Building
645 Griswold St., Suite 4200
Detroit, MI 48226-3344
(313) 961-5985 (Facsimile)
(313) 961-4400 x 829

M&A | McKeen & Associates, PC
CIVIL JUSTICE ATTORNEYS



From: Charles Fisher <charles.fisher@tnmglaw.com>
Sent: Tuesday, May 24, 2022 9:01 AM
To: Flores, Robin <RFlores@fbmjlaw.com>; Sarah Schimitschek <sschimitschek@mckeenassociates.com>; Pilarski, Laura <lpilarski@fbmjlaw.com>; Steven Hurbis <shurbis@mckeenassociates.com>
Subject: External RE: Lawanna Smith PR of the Estate of Jaqueline Harris, dec'd v Beaumont Health, et al

Good Morning,

Case evaluation is on the horizon (July), discovery is set to end in early June, and based on the current scheduling for expert witnesses, we will need additional time to depose experts prior to case evaluation.

Would you be willing to stipulate to a 90 day adjournment? Thank you.

Charles Fisher
Tanoury, Nauts, McKinney & Dwaihy, PLLC
38777 Six Mile Road, Suite 101
Livonia, Michigan 48152
Firm Phone (313) 964-4500
Fax (734) 469-4298

Charles.Fisher@tnmdlaw.com
https://link.edgepilot.com/s/05653f15/pd167ZHoSkKkgztXSpWHFA?u=http://www.tnmdlaw.com/

TNMD TANOURY NAUTS McKINNEY & DWAIHY PLLC

Best Lawyers BEST LAW FIRMS U.S.News 2021

From: Flores, Robin [mailto:RFlores@fbmjlaw.com]
Sent: Wednesday, May 18, 2022 12:04 PM
To: Sarah Schimitschek <sschimitschek@mckeenassociates.com>; Milad Yatooma <milad.yatooma@tnmglaw.com>; Krista Tester <krista.tester@tnmglaw.com>; Charles Fisher <charles.fisher@tnmglaw.com>; Pilarski, Laura <lpilarski@fbmjlaw.com>
Cc: Steven Hurbis <shurbis@mckeenassociates.com>
Subject: [EXTERNAL] RE: Lawanna Smith PR of the Estate of Jaqueline Harris, dec'd v Beaumont Health, et al

Here are dates that work for our office:

Dr. Wagner: 7/13 (we have a trial starting that date, but may not go), 9/28

Dr. Baker: 8/8, 8/11, 8/15, 8/16, 8/17

Robin M. Flores
Legal Assistant to Saulius D. Polteraitis
Foley, Baron, Metzger & Juip, PLLC
Cambridge Center
38777 Six Mile Rd., Suite 300
Livonia, MI 48152

Office: 734-742-1840
Fax: 734-521-2379
Website: https://link.edgepilot.com/s/8c0354c3/pws2k-WqT0ib9Ud_lZAcXw?u=http://www.fbmjlaw.com/

From: Sarah Schimitschek <sschimitschek@mckeenassociates.com>
Sent: Monday, May 16, 2022 1:58 PM
To: Milad Yatooma <milad.yatooma@tnmglaw.com>; Flores, Robin <RFlores@fbmjlaw.com>; Krista Tester <krista.tester@tnmglaw.com>; Charles Fisher <charles.fisher@tnmglaw.com>; Pilarski, Laura <lpilarski@fbmjlaw.com>; Gaul, Carol <cgaul@fbmjlaw.com>
Cc: Steven Hurbis <shurbis@mckeenassociates.com>
Subject: RE: Lawanna Smith PR of the Estate of Jaqueline Harris, dec'd v Beaumont Health, et al

Good Afternoon

Our experts have provided the below dates for availability for their depositions.

Dr. Bal (CST)
6/7, 6/9 & 6/16 (10am CST/11am EST)

Dr. Wagner (PST)
7/13, 9/8 & 9/28

Dr. Baker (PST)
8/8, 8/11, 8/15, 8/16, 8/17 & 8/18

Thank you,

Sarah Schimitschek
Legal Assistant to Steven C. Hurbis, Esq.
McKeen & Associates, P.C.
Penobscot Building
645 Griswold Street, Suite 4200
Detroit, MI 48226
(313) 961-4400
sschimitschek@mckeenassociates.com
https://link.edgepilot.com/s/fc57d41a/9ExV48EN0U2ztmXDWXAVPA?u=http://www.mckeenassociates.com/

From: Milad Yatooma <milad.yatooma@tnmglaw.com>
Sent: Monday, May 9, 2022 7:26 AM
To: Flores, Robin <RFlores@fbmjlaw.com>; Sarah Schimitschek <sschimitschek@mckeenassociates.com>; Krista Tester <krista.tester@tnmglaw.com>; Charles Fisher <charles.fisher@tnmglaw.com>; Pilarski, Laura <lpilarski@fbmjlaw.com>
Cc: Steven Hurbis <shurbis@mckeenassociates.com>
Subject: External RE: Lawanna Smith PR of the Estate of Jaqueline Harris, dec'd v Beaumont Health, et al

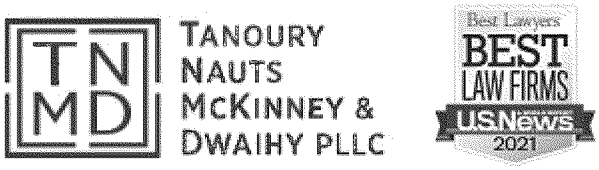
Our office is also available on the following dates for Dr. Dr. Dragovic and Dr. Thomson.

Thank you,

Milad Yatooma
Tanoury, Nauts, McKinney & Dwaihy, PLLC
38777 Six Mile Road, Suite 101
Livonia, MI 48152
Firm Phone (313) 964-4500

Fax (734) 469-4298

Milad.Yatooma@tnmdlaw.com
https://link.edgepilot.com/s/85673a9d/9HRC7br6Q0aMozAWqy-X9A?u=http://www.tnmdlaw.com/



From: Flores, Robin [mailto:RFlores@fbmjlaw.com]
Sent: Friday, May 6, 2022 4:41 PM
To: Sarah Schimitschek <sschimitschek@mckeenassociates.com>; Krista Tester <krista.tester@tnmglaw.com>; Charles Fisher <charles.fisher@tnmglaw.com>; Pilarski, Laura <lpilarski@fbmjlaw.com>; Milad Yatooma <milad.yatooma@tnmglaw.com>
Cc: Steven Hurbis <shurbis@mckeenassociates.com>
Subject: [EXTERNAL] RE: Lawanna Smith PR of the Estate of Jaqueline Harris, dec'd v Beaumont Health, et al

Those dates work for our office.

Robin M. Flores
Legal Assistant to Saulius D. Polteraitis
Foley, Baron, Metzger & Juip, PLLC
Cambridge Center
38777 Six Mile Rd., Suite 300
Livonia, MI 48152

Office: 734-742-1840
Fax: 734-521-2379
Website: https://link.edgepilot.com/s/a60512f9/jYHMd_WL8E6haN6s9hgedw?u=http://www.fbmjlaw.com/

From: Sarah Schimitschek <sschimitschek@mckeenassociates.com>
Sent: Friday, May 6, 2022 4:34 PM
To: Flores, Robin <RFlores@fbmjlaw.com>; Krista Tester <krista.tester@tnmglaw.com>; charles.fisher@tnmglaw.com; Pilarski, Laura <lpilarski@fbmjlaw.com>; 'milad.yatooma@tnmglaw.com' <milad.yatooma@tnmglaw.com>
Cc: Steven Hurbis <shurbis@mckeenassociates.com>
Subject: RE: Lawanna Smith PR of the Estate of Jaqueline Harris, dec'd v Beaumont Health, et al

Good Afternoon,

I am going to have to get some additional dates from Dr. Bal. 6/23 and 7/6 actually does not work for our office.

Is everyone good with the following dates/times?

Dr. Dragovic 6/22 at 4pm
Dr. Thomson 8/19 9am

Thank you,

Sarah Schimitschek
Legal Assistant to Steven C. Hurbis, Esq.
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645 Griswold Street, Suite 4200
Detroit, MI 48226
(313) 961-4400
sschimitschek@mckeenassociates.com
https://link.edgepilot.com/s/7bf34bc9/VBOv6A7zqEqf4H9_IefkaA?u=http://www.mckeenassociates.com/

From: Steven Hurbis <shurbis@mckeenassociates.com>
Sent: Monday, May 2, 2022 11:57 AM
To: Sarah Schimitschek <sschimitschek@mckeenassociates.com>
Subject: FW: Lawanna Smith PR of the Estate of Jaqueline Harris, dec'd v Beaumont Health, et al

Steven C. Hurbis, Esq.
McKeen & Associates, P.C.

Penobscot Building
645 Griswold St., Suite 4200
Detroit, MI 48226-3344
(313) 961-5985 (Facsimile)
(313) 961-4400 x 829

From: Flores, Robin <RFlores@fbmjlaw.com>
Date: Monday, May 2, 2022 at 11:55 AM
To: Barbara Colbert-Brooks <bcolbert@mckeenassociates.com>
Cc: Krista Tester <krista.tester@tnmglaw.com>, Steven Hurbis <shurbis@mckeenassociates.com>, charles.fisher@tnmglaw.com <charles.fisher@tnmglaw.com>, Pilarski, Laura <lpilarski@fbmjlaw.com>, Milad Yatooma <milad.yatooma@tnmglaw.com>
Subject: External RE: Lawanna Smith PR of the Estate of Jaqueline Harris, dec'd v Beaumont Health, et al

I'm sorry but 6/20 will not work for Dr. Bal. 6/23 and 7/6 work.

Thanks,

Robin

From: Flores, Robin
Sent: Monday, May 2, 2022 11:49 AM
To: Barbara Colbert <bcolbert@mckeenassociates.com>
Cc: Krista Tester <krista.tester@tnmglaw.com>; Steven Hurbis <shurbis@mckeenassociates.com>; charles.fisher@tnmglaw.com; Pilarski, Laura <lpilarski@fbmjlaw.com>; Milad Yatooma <milad.yatooma@tnmglaw.com>
Subject: FW: Lawanna Smith PR of the Estate of Jaqueline Harris, dec'd v Beaumont Health, et al

Please include me instead of Carol Gaul on emails on this file. Of the dates that Krista offered, here is our availability:

Dr. Dragovic – 4:00 p.m. on June 22 or 24

Dr. Bal – June 20 in p.m.

June 23 at 9:00 a.m.
July 6

Dr. Thomson – August 15 - 19

Thank you,

Robin M. Flores
Legal Assistant to Saulius D. Polteraitis
Foley, Baron, Metzger & Juip, PLLC
Cambridge Center
38777 Six Mile Rd., Suite 300
Livonia, MI 48152

Office: 734-742-1840
Fax: 734-521-2379
Website: https://link.edgepilot.com/s/9f4ada17/u8oi4BhlZkStctiS4efYNQ?u=http://www.fbmjlaw.com/

From: Krista Tester <krista.tester@tnmglaw.com>
Sent: Friday, April 29, 2022 10:21 AM
To: Barbara Colbert-Brooks <bcolbert@mckeenassociates.com>; Gaul, Carol <cgaul@fbmjlaw.com>; Steven Hurbis <shurbis@mckeenassociates.com>; Charles Fisher <charles.fisher@tnmglaw.com>
Cc: Pilarski, Laura <lpilarski@fbmjlaw.com>; Milad Yatooma <milad.yatooma@tnmglaw.com>
Subject: RE: Lawanna Smith PR of the Estate of Jaqueline Harris, dec'd v Beaumont Health, et al

Assuming these depositions will be via Zoom, our office is available on the following:

Dr. Dragovic – 4:00 p.m. on June 22, 23, or 24
Dr. Bal – June 20 in p.m.
June 23 at 9:00 a.m.
July 5
July 6
July 7 in p.m.
July 20
Dr. Thomson – August 15 - 19

From: Barbara Colbert-Brooks [mailto:bcolbert@mckeenassociates.com]
Sent: Thursday, April 28, 2022 2:31 PM
To: Krista Tester <krista.tester@tnmglaw.com>; Gaul, Carol <cgaul@fbmjlaw.com>; Steven Hurbis <shurbis@mckeenassociates.com>; Charles Fisher <charles.fisher@tnmglaw.com>
Cc: Pilarski, Laura <lpilarski@fbmjlaw.com>
Subject: [EXTERNAL] RE: Lawanna Smith PR of the Estate of Jaqueline Harris, dec'd v Beaumont Health, et al

Please be advised that Plaintiff's expert witnesses, Dr. Michael Thomson, Dr. Ljubisa J. Dragovic, and Dr. Sonny B. Bal, are available for deposition on the following dates/times:

Dr. Dragovic: Anytime after 4:00 p.m. on June 22nd, 24th;
Dr. Bal: Unavailable on Fridays. Flexible for the months of June and July with the exception the week of July 12th through July 19th;
Dr. Thomson: August 15th – 19th

Kindly indicate what dates and times work best for your calendars, and we will coordinate accordingly. Thank you.

From: Krista Tester <krista.tester@tnmglaw.com>
Sent: Wednesday, July 28, 2021 3:20 PM
To: Gaul, Carol <cgaul@fbmjlaw.com>; Barbara Colbert <bcolbert@mckeenassociates.com>; Steven Hurbis <shurbis@mckeenassociates.com>; Charles Fisher <charles.fisher@tnmglaw.com>
Cc: Pilarski, Laura <lpilarski@fbmjlaw.com>
Subject: External RE: Lawanna Smith PR of the Estate of Jaqueline Harris, dec'd v Beaumont Health, et al

Our office is available on all of the dates below

From: Gaul, Carol [mailto:cgaul@fbmjlaw.com]
Sent: Wednesday, July 28, 2021 2:53 PM
To: Barbara Colbert <bcolbert@mckeenassociates.com>; shurbis@mckeenassociates.com; Paul Dwaihy <paul.dwaihy@tnmglaw.com>; Krista Tester <krista.tester@tnmglaw.com>
Cc: Pilarski, Laura <lpilarski@fbmjlaw.com>
Subject: [EXTERNAL] RE: Lawanna Smith PR of the Estate of Jaqueline Harris, dec'd v Beaumont Health, et al

Hi Barbara,

My office is available: the week of September 20th through September 24th; September 27th - 28th ; October 4th, 5th, 8th, 14th , 15th, 18th through 20 ; October 25th, 26th, 28th, 29th with a start time of 10:30 a.m.

Carol J. Gaul
Legal Assistant to Sarah T. Berard and David A. Occhiuto
Foley, Baron, Metzger & Juip, PLLC
38777 Six Mile Rd., Suite 300
Livonia, MI 48152
Office: 734-742-1800
Fax: 734-521-2379
cgaul@fbmjlaw.com

FBMJ
FOLEY BARON
METZGER JUIP
ATTORNEYS

Exhibit E

Demsky, Benjamin

From: Sarah Schimitschek <sschimitschek@mckeenassociates.com>
Sent: Monday, August 15, 2022 7:28 AM
To: Pilarski, Laura; Krista Tester
Cc: Milad Yatooma; Tucciarone, Eric; Christopher Kwiecien; Steven Hurbis
Subject: RE: HARRIS - Dep of Sonny Bal, M.D.

Good Morning,

Dr. Bal had an emergency and asked that we cancel today's deposition. We will be in touch with new dates.

Sorry for the inconvenience.

Sarah Schimitschek
Legal Assistant to Steven C. Hurbis, Esq.
McKeen & Associates, P.C.
Penobscot Building
645 Griswold Street, Suite 4200
Detroit, MI 48226
(313) 961-4400
sschimitschek@mckeenassociates.com
www.mckeenassociates.com

From: Pilarski, Laura <lpilarski@fbmjlaw.com>
Sent: Friday, August 12, 2022 12:48 PM
To: Krista Tester <krista.tester@tnmglaw.com>; Sarah Schimitschek <sschimitschek@mckeenassociates.com>; Steven Hurbis <shurbis@mckeenassociates.com>
Cc: Milad Yatooma <milad.yatooma@tnmglaw.com>; Tucciarone, Eric <eTucciarone@fbmjlaw.com>; Christopher Kwiecien <christopher.kwiecien@tnmglaw.com>
Subject: External RE: HARRIS - Dep of Sonny Bal, M.D.

Hi Everyone,

Exhibit F

Demsky, Benjamin

From: Tucciarone, Eric <eTucciarone@fbmjlaw.com>
Sent: Monday, August 29, 2022 12:08 PM
To: Sheila A. Manson; Pilarski, Laura; Hakala, Justin; Occhiuto, David; O'Connor, Mina
Cc: Andrea Cwiklinski; Steven Hurbis
Subject: RE: Serafini - Dep Dr. Fintel

Sorry, this was meant for the Harris Case, which is Steve's.

From: Sheila A. Manson <smanson@mckeenassociates.com>
Sent: Monday, August 29, 2022 11:28 AM
To: Tucciarone, Eric <eTucciarone@fbmjlaw.com>; Pilarski, Laura <lpilarski@fbmjlaw.com>; Hakala, Justin <JHakala@plunkettcooney.com>; Occhiuto, David <dOcchiuto@fbmjlaw.com>; O'Connor, Mina <MOConnor@plunkettcooney.com>
Cc: Andrea Cwiklinski <acwiklinski@mckeenassociates.com>; Steven Hurbis <shurbis@mckeenassociates.com>
Subject: RE: Serafini - Dep Dr. Fintel

Sorry Eric, who is Dr. Bal? I am not familiar with the name; is this regarding Serafini?

Thank you.

Sheila A. Manson
Assistant to David Tirella

From: Tucciarone, Eric <eTucciarone@fbmjlaw.com>
Sent: Sunday, August 28, 2022 11:19 AM
To: Sheila A. Manson <smanson@mckeenassociates.com>; Pilarski, Laura <lpilarski@fbmjlaw.com>; Hakala, Justin <JHakala@plunkettcooney.com>; Occhiuto, David <dOcchiuto@fbmjlaw.com>; O'Connor, Mina <MOConnor@plunkettcooney.com>
Cc: Andrea Cwiklinski <acwiklinski@mckeenassociates.com>; Steven Hurbis <shurbis@mckeenassociates.com>
Subject: External RE: Serafini - Dep Dr. Fintel

Hi Sheila and Steve,

I would like to get Dr. Bal's deposition back on the calendar for September. Please provide some dates.

Thanks,

Eric

From: Sheila A. Manson <smanson@mckeenassociates.com>
Sent: Tuesday, August 16, 2022 11:25 AM
To: Tucciarone, Eric <eTucciarone@fbmjlaw.com>; Pilarski, Laura <lpilarski@fbmjlaw.com>; Hakala, Justin <JHakala@plunkettcooney.com>; Occhiuto, David <dOcchiuto@fbmjlaw.com>; O'Connor, Mina <MOConnor@plunkettcooney.com>
Cc: Andrea Cwiklinski <acwiklinski@mckeenassociates.com>
Subject: Serafini - Dep Dr. Fintel

Attached are the CV, W-9 and Fee schedule.

Thank you.

Sheila A. Manson
Assistant to David Tirella, Esq.
McKeen & Associates, P.C.
Penobscot Building
645 Griswold Street, Suite 4200
Detroit, MI 48226
(313) 961-4400
smanson@mckeenassociates.com
https://link.edgepilot.com/s/e3b95fed/yWCFGsG0ekW6nO0Hd2ym9g?u=http://www.mckeenassociates.com/

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

LAWANNA SMITH AS PERSONAL REPRESENTATIVE OFTHE ESTATE OF JACQUELINE HARRIS, DECEASED
Plaintiff,

vs.

No. 20-187353-NH
Hon. NANCI J. GRANT

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

Defendants.

BRIAN J. McKEEN (P34123)
STEVEN C. HURBIS (P80993)
McKEEN & ASSOCIATES, P.C.
Attorney for Plaintiff
645 Griswold St., Suite 4200
Detroit, MI 48226
(313) 961-4400
shurbis@mckeenassociates.com

PAUL J. DWAIHY (P66074)
Attorney for Defendant Beaumont Health
38777 Six Mile Rd., Suite 101
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(313) 964-4500
paul.dwaihy@tnmglaw.com

ENRICO G. TUCCIARONE (P52767)
SARAH T. BERARD (P70999)
Attorneys for Defendants,
Tri County Orthopedics P.C., and
Jack D. Lennox, D.O.
38777 Six Mile Rd., Suite 300
Livonia, MI 48152
(734) 742-1800/ Fax (734) 521-2379
etucciarone@fbmjlaw.com
sberard@fbmjlaw.com

PLAINTIFF'S WITNESS LIST

NOW COMES Plaintiff, Lawanna Smith as Personal Representative of the Estate of Jacqueline Harris, Deceased, by and through her attorneys, McKEEN & ASSOCIATES, PC, and for her Witness List hereby submits the following:

1. Lawanna Smith
2. Beaumont Health, Tri County Orthopedics, PC * (Adverse Witnesses)
3. Jack D. Lennox D.O. * (Adverse Witness)

McKeen & Associates, P.C. ● 645 Griswold Street, Suite 4200 ● Detroit, MI 48226 ● (313) 961-4400

4. Felicia M. Harris
5. Jonneka M. Harris
6. Perise J. Smith
7. Marjorie Finnie
8. Middlebelt Dermatology Center *
9. Beaumont Physical Medicine and Rehabilitation *
10. Ascension Providence Hospital *
11. Beaumont Commons *
12. Any and all physicians, nurses, therapists, technicians, assistants, aides, agents and/or employees, involved in the care and treatment of Jacqueline Harris at **Ascension Providence Hospital, Southfield Campus**, including but not limited to:
    a. Richard Haven Paul MD *
    b. Jennifer Dulbroo RN *
    c. Megan Gignac *
    d. Jennifer Jones *
    e. Duncan Dorsel *
    f. Jenell Jarbo *
    g. Any personnel whose signatures appear on Progress Notes.
    h. Any and all other health care providers who made entries in Jacqueline Harris's chart at **Ascension Providence Hospital, Southfield Campus** including individuals whose names have been misspelled or misinterpreted, or whose names are undecipherable in the medical records.
13. Any and all physicians, nurses, therapists, technicians, assistants, aides, agents and/or employees, involved in the care and treatment of Jacqueline Harris at the **Oakland County Michigan Medical Examiner's Office** including but not limited to:
    a. Ljubisa J. Dragovic, M.D. *

McKeen & Associates, P.C. ● 645 Griswold Street, Suite 4200 ● Detroit, MI 48226 ● (313) 961-4400

b. Any personnel whose signatures appear on Progress Notes.

c. Any and all other health care providers who made entries in Jacqueline Harris's chart at the **Oakland County Michigan Medical Examiner's Office** including individuals whose names have been misspelled or misinterpreted, or whose names are undecipherable in the medical records.

14. Any and all physicians, nurses, therapists, technicians, assistants, aides, agents and/or employees, involved in the care and treatment of Jacqueline Harris at **NMS Labs** including but not limited to:

a. Denice M. Teem BS, D-ABFT-FT *

b. Any personnel whose signatures appear on Progress Notes.

c. Any and all other health care providers who made entries in Jacqueline Harris's chart at **NMS Labs**, including individuals whose names have been misspelled or misinterpreted, or whose names are undecipherable in the medical records.

15. Any and all physicians, nurses, therapists, technicians, assistants, aides, agents and/or employees, involved in the care and treatment of Jacqueline Harris at **Beaumont Health** including but not limited to:

a. Kathy M. Borovicka MD *

b. Sarika Joshi MD *

c. Matteo Valenti DO *

d. Blake Fenkell DO *

e. Jack Lennox DO *

f. Eric Kovan DO *

g. Andrew Olswing DO *

h. Timothy McKnight DO *

i. Andrew V. Mizzi DO *

j. Joshua Berris DO *

k. Aaron Wood DO *

l. Aaron Jeremy Seidman DO *

m. Benjamin Main DO *

n. Eric J. Zuckerman DO *

o. Homer C. Linard DO *

p. Kristin Kamienecki DO *

q. Julia Hobson DO *

r. Nelly Summers MA *

s. Shannon Granning MA *

t. Erika C. Garris MA *

u. Shannon K. Louis MA *

v. Jamy Gerwatowski MA *

w. Karen Rotondo RN *

x. Rafil R. Yakupov RN *

y. Michelle Mach RN *

z. Michelle J. Filary Gutekunst RN *

aa. Halley Giordano RN *

bb. Steven Look RN *

cc. Nicole B. Green RN *

dd. Tiffany Lublin RN *

ee. Brian Rodgers RN *

ff. Jince J. Thanath PT *

gg. Hector Lacandazon PT *

hh. Shelly Przywara PTA *

ii. Karen Watson OT *

McKeen & Associates, P.C. ● 645 Griswold Street, Suite 4200 ● Detroit, MI 48226 ● (313) 961-4400

jj. Kimberly Colleran COTA *

kk. Soniya M Charian CRNA *

ll. David McCall CRNA *

mm. Harry Thomas Richardson *

nn. Sara J. Blackburn *

oo. Jeanette Carnacchi *

pp. Deborah Blaszczyk *

qq. Melanie Dalton *

rr. Terah Berlin *

ss. Kathy Noble *

tt. Dawn M. Toth *

uu. Kim Herman *

vv. Linda Cramer *

ww. Michael Abrash *

xx. Annette Aubuchon *

yy. Rebecca Martinez *

zz. Laura Caruso *

aaa. Zinab Chami *

bbb. Dorthea Crawford *

ccc. Carissa L. Kinczkowski *

ddd. Kenneth Baier *

eee. Kathy Jo Wheeler *

fff. Chris Clay *

ggg. Danyiel Bell *

hhh. Elantra Evans *

McKeen & Associates, P.C. ● 645 Griswold Street, Suite 4200 ● Detroit, MI 48226 ● (313) 961-4400

iii. Dashonna Andrews *

jjj. Denise Solomon *

kkk. James S. Smith *

lll. Any personnel whose signatures appear on Progress Notes.

mmm. Any and all other health care providers who made entries in Jacqueline Harris's chart at **Beaumont Health** including individuals whose names have been misspelled or misinterpreted, or whose names are undecipherable in the medical records.

16. Any and all physicians, nurses, therapists, technicians, assistants, aides, agents and/or employees, involved in the care and treatment of Jacqueline Harris at **Botsford Continuing Health Care** including but not limited to:

a. Jack D. Lennox DO *

b. Matteo Valenti DO *

c. David Susser DO *

d. Dr. Andrew Cykiert *

e. Mitchell S. Wayne DPM *

f. Elizabeth Robertson RN *

g. Johanna Bulinda RN *

h. Kelli O'Halloran RN *

i. Karrie Sobiesiak RN *

j. Kayla A. Wesolowski RN *

k. Radhika Kashikar PT *

l. Jacquelyn Jaqua OT *

m. Linda Jackson COTA *

n. C. Smith LLMSW *

o. Kim Stinnett *

McKeen & Associates, P.C. ● 645 Griswold Street, Suite 4200 ● Detroit, MI 48226 ● (313) 961-4400

p. Andrea Sparks *

q. Eleanor Prince *

r. Suzanne Lipar *

s. Karen Parker *

t. Sandra Russel *

u. Any personnel whose signatures appear on Progress Notes.

v. Any and all other health care providers who made entries in Jacqueline Harris's chart at **Botsford Continuing Health Care** including individuals whose names have been misspelled or misinterpreted, or whose names are undecipherable in the medical records.

17. Any and all physicians, nurses, therapists, technicians, assistants, aides, agents and/or employees, involved in the care and treatment of Jacqueline Harris at **Tri County Orthopedics, P.C.,** including but not limited to:

a. Jack D. Lennox D.O. *

b. Homer C. Linard III DO *

c. Matteo Valenti DO *

d. Any personnel whose signatures appear on Progress Notes.

e. Any and all other health care providers who made entries in Jacqueline Harris's chart at **Tri County Orthopedics, P.C.,** including individuals whose names have been misspelled or misinterpreted, or whose names are undecipherable in the medical records.

18. Any and all physicians, nurses, therapists, technicians, assistants, aides, agents and/or employees, involved in the care and treatment of Jacqueline Harris at **Health Wise Post Surgery In-Home Services** but not limited to:

a. Jack Lennox DO *

b. Nicole Calhoun RN *

McKeen & Associates, P.C. ● 645 Griswold Street, Suite 4200 ● Detroit, MI 48226 ● (313) 961-4400

c. Anette Pines RN *

d. Suresh Kandasamy PT *

e. Matthew Chappus *

f. Any personnel whose signatures appear on Progress Notes.

g. Any and all other health care providers who made entries in Jacqueline Harris's chart at **Health Wise Post Surgery In-Home Services** including individuals whose names have been misspelled or misinterpreted, or whose names are undecipherable in the medical records.

19. Any and all physicians, nurses, therapists, technicians, assistants, aides, agents and/or employees, involved in the care and treatment of Jacqueline Harris at **Midwest International Medicine Associates** but not limited to:

a. Matteo Valenti DO *

b. Nelly Summers MA *

c. Regina Fortson MA *

d. Amy Dinkert *

e. Amy Otten *

f. Any personnel whose signatures appear on Progress Notes.

g. Any and all other health care providers who made entries in Jacqueline Harris's chart at **Midwest International Medicine Associates** but including individuals whose names have been misspelled or misinterpreted, or whose names are undecipherable in the medical records.

20. Any and all physicians, nurses, therapists, technicians, assistants, aides, agents and/or employees, involved in the care and treatment of Jacqueline Harris at **Botsford Hospital** but not limited to:

a. Matteo Valenti DO *

b. Andrew Mizzi DO *

McKeen & Associates, P.C. ● 645 Griswold Street, Suite 4200 ● Detroit, MI 48226 ● (313) 961-4400

c. Kristin Kamienecku DO *

d. Jenny Michaels *

e. Amy Dinkert, ACNP-BC

f. Any personnel whose signatures appear on Progress Notes.

g. Any and all other health care providers who made entries in Jacqueline Harris's chart at **Botsford Hospital** but including individuals whose names have been misspelled or misinterpreted, or whose names are undecipherable in the medical records.

21. **Experts:**

a. Sonny Bal, M.D., Expert in Orthopedic Surgery, Columbia, MO *

b. Ljubisa Dragovic M.D., Expert in Pathology, Pontiac, MI *

c. Kelty Baker M.D., Expert in Hematology, Huston, TX *

d. Willis Wagner, M.D., Expert in Vascular Surgery, CA *

e. Michael Thomson, PhD, Potential Expert in Economics/Damages, Bloomfield Hills, MI *

22. Custodians of Records, employees, and agents of:

a. Ascension Providence Hospital

b. Ascension Providence Hospital, Southfield Campus

c. Beaumont Physical Medicine and Rehabilitation

d. Botsford Beaumont

e. Beaumont Health

f. Tri County Orthopedics PC

g. Midwestern Internal Medicine Associates

h. Botsford Hospital

i. NMS Labs

j. Oakland County Medical Examiner's Office

k. Health Wise Post Surgery In-Home Services

l. Botsford Continuing Health Care

m. Livonia Public Schools

n. Centers for Medicare & Medicaid Services

o. Massive, LLC, f/k/a Med Lien Solutions

p. Blue Cross Blue Shield Blue Care Network of Michigan

q. Social Security Administration

r. United States Department of Treasury

s. State of Michigan Department of Community Health

t. Michigan Department of Health and Human Services

23. Any and all witnesses identified by Defendants, including experts.

24. Any and all individuals identified in medical records and pleadings.

25. Any and all necessary rebuttal witnesses, or any witnesses listed, but not called by Defendants.

26. Plaintiff reserves the right to amend her witness list should discovery and/or subsequent testimony dictate same.

Witnesses designated with an asterisk (*) may be called upon to render opinion or other expert testimony.

Respectfully Submitted:

McKEEN & ASSOCIATES, P.C.

/S/STEVEN C. HURBIS
BRIAN J. McKEEN (P34123)
STEVEN C. HURBIS (P80993)
Attorney for Plaintiff
645 Griswold St., Suite 4200
Detroit, MI 48226
(313) 961-4400

DATED: April 25, 2022

McKeen & Associates, P.C. ● 645 Griswold Street, Suite 4200 ● Detroit, MI 48226 ● (313) 961-4400

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

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

Plaintiff,

Case No. 21-187353-NH
HON. NANCI J. GRANT

v

BEAUMONT HEALTH;
TRI COUNTY ORTHOPEDICS, P.C.; and
JACK D. LENNOX, D.O.,
Jointly and Severally,

Defendants.

BRIAN J. McKEEN (P34123)
STEVEN C. HURBIS (P80993)
Attorneys for Plaintiff
645 Griswold Street, Suite 4200
Detroit, Michigan 48226
(313) 961-4400
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PAUL J. DWAIHY (P66074)
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paul.dwaihy@tnmglaw.com

ENRICO G. TUCCIARONE (P52767)
SAULIUS D. POLTERAITIS (P68840)
Attorneys for Defendants
Tri County Orthopedics, P.C.
and Jack D. Lennox, D.O.
38777 Six Mile Road, Suite 300
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etucciarone@fbmjlaw.com
spolteraitis@fbmjlaw.com

PLAINTIFF'S RESPONSE TO DEFENDANTS' INTERROGATORIES AND REQUESTS TO PRODUCE TO PLAINTIFF REGARDING EXPERT WITNESSES AND PROOF OF SERVICE

NOW COMES the Plaintiff Lawanna Smith as Personal Representative of the Estate of Jacqueline Harris, deceased, by and through her attorneys McKeen & Associates P.C., and for

Plaintiff's Response to Defendants' Interrogatories and Requests to Produce to Plaintiff Regarding Expert Witnesses states the following:

INTERROGATORIES

1. With respect to each of Plaintiff's experts, please state in detail:

   a. The substance of the facts and opinions on which he/she will testify;

   b. A summary of the grounds for each opinion of each expert;

   c. His/her experience in the area of similar or comparable medical occurrences, injuries, illnesses, or disabilities.

ANSWER:

Please reference the attached Affidavit of Meritorious Claim of B. Sonny Bal M.D., and the Preliminary report of Dr. Michael Thomson PhD. Dr. Kelty Baker, and Dr. Willis Wagner will testify on causation and damages.

2. State the date Plaintiff's attorney first contacted each of Plaintiff's experts in this litigation, and identify all documents, pleadings, records and materials provided to said experts.

ANSWER:

Plaintiff's expert witnesses were provided with medical records and billings, tax documents, income documents, social security earnings statements. Any additional information would best be sought via deposition of Plaintiff's expert witnesses.

REQUESTS FOR PRODUCTION

1. Please produce the curriculum vitae of all expert witnesses you intend to call at the time of trial.

RESPONSE:

Please see the attached curriculum vitae of Plaintiff's expert witnesses.

2. Please produce any reports, notes and other documents each expert has generated in regard to review of this matter.

RESPONSE:

Please reference the attached Affidavit of Meritorious Claim of B. Sonny Bal M.D., and the Preliminary report of Dr. Michael Thomson PhD. Any additional documents or notes would best be sought via deposition of Plaintiff's expert witnesses.

3. Please produce a list of all cases in which each expert has testified in matters dealing with the same or similar medical issues as in this case, to include case name, jurisdiction, court number, Plaintiff's counsel, and defense counsel.

RESPONSE:

Such information would best be obtained via deposition of Plaintiff's expert witnesses.

Respectfully Submitted:

McKEEN & ASSOCIATES, P.C.

/S/ Steven C. Hurbis

Steven C. Hurbis (P80993)
Attorneys for Plaintiff
645 Griswold St., Suite 4200
Detroit, MI 48226
(313) 961-4400

DATED: May 9, 2022

PROOF OF SERVICE

The undersigned hereby declares that she served a true copy of the foregoing document upon all attorneys of record at their respective addresses on file via M-File/E-File on May 9, 2022.

Sarah Schimitschek

Sarah Schimitschek

INITIAL SCHEDULING ORDER

STATE OF MICHIGAN
6th JUDICIAL CIRCUIT COURT
1200 N. TELEGRAPH ROAD
PONTIAC, MICHIGAN 48341

SO-07-2021-187353-NH

SMITH,LAWANNA,, V BEAUMONT HEALTH

IT IS ORDERED THAT:

- A PARTY THAT FILES A COMPLAINT, COUNTERCLAIM, CROSS-CLAIM, OR THIRD-PARTY COMPLAINT MUST SERVE ITS INITIAL DISCLOSURES WITHIN 14 DAYS AFTER ANY OPPOSING PARTY FILES AN ANSWER TO THAT PLEADING. A PARTY ANSWERING A COMPLAINT, COUNTERCLAIM, CROSS-CLAIM, OR THIRD-PARTY'S COMPLAINT MUST SERVE ITS INITIAL DISCLOSURES WITHIN THE LATER OF 14 DAYS AFTER THE OPPOSING PARTY'S DISCLOSURES ARE DUE OR 28 DAYS AFTER THE PARTY FILES ITS ANSWER. A PARTY SERVING DISCLOSURES NEED ONLY SERVE PARTIES THAT HAVE APPEARED. THE PARTY MUST SERVE LATER-APPEARING PARTIES WITHIN 14 DAYS. PER MCR 2.302(A)(5)(b).

- ALL PARTIES SHALL NAME THEIR EXPERTS BY 05/06/2022.

- THIS CASE SHALL BE EVALUATED ON OR ABOUT JULY OF 2022. THE COURT WILL SEND A CASE EVALUATION NOTICE IN ACCORDANCE WITH MCR 2.403(G)(1).

- EACH PARTY SHALL SUBMIT ITS WITNESS LIST AND A LIST OF PROPOSED EXHIBITS TO OPPOSING COUNSEL AND THE COURT BY 05/06/2022.

- ALL DISPOSITIVE MOTIONS SHALL BE FILED BY 07/07/2022; OTHERWISE, SUCH MOTIONS WILL BE DEEMED WAIVED.

- MOTIONS IN LIMINE SHALL BE HEARD NO LATER THAN 30 DAYS PRIOR TO THE SCHEDULED TRIAL DATE.

- DISCOVERY SHALL BE COMPLETED BY 06/07/2022. ANY DISCOVERY ISSUE REGARDING ELECTRONICALLY STORED INFORMATION IS GOVERNED BY MCR 2.401(B)(2)(c) AND MUST BE BROUGHT TO THE COURT'S ATTENTION NO LATER THAN 90 DAYS BEFORE THE CLOSE OF DISCOVERY; OTHERWISE, THOSE DISCOVERY ISSUES WILL BE DEEMED WAIVED.

- THIS CASE IS SET FOR TRIAL ON 09/20/2022, AT 8:30 A.M.

- ALL DEPOSITIONS TO BE USED AT TRIAL SHALL BE PURGED NOT LATER THAN TWO WEEKS BEFORE THE TRIAL OR THE OBJECTIONS SHALL BE DEEMED WAIVED.

- IN JURY CASES, PROPOSED JURY INSTRUCTIONS SHALL BE SUBMITTED IN WRITING TO THE COURT NOT LESS THAN 7 DAYS PRIOR TO THE SCHEDULED TRIAL DATE. IN NON-JURY CASES, TRIAL BRIEFS SHALL BE SUBMITTED ONE WEEK BEFORE THE TRIAL DATE.

- THE APPEARANCE OF COUNSEL UPON A PLEADING SHALL BE DEEMED TO BE THE APPEARANCE OF EVERY MEMBER OF HIS/HER LAW FIRM. ADJOURNMENTS OF CASE EVALUATION OR TRIAL MUST BE REQUESTED BY MOTION. ANY ADJOURNMENTS AFTER THE FIRST REQUEST SHALL REQUIRE THE SIGNATURES OF THE LITIGANTS.

- OBJECTIONS TO THIS SCHEDULE MUST BE MADE WITHIN 14 DAYS OF THE DATE OF THIS ORDER OR THEY ARE DEEMED WAIVED. OBJECTIONS SHALL BE ACCOMPANIED BY A GOOD CAUSE SHOWING AND A PROPOSED ALTERNATIVE SCHEDULING ORDER AGREED TO BY ALL THE PARTIES.

DATE: 06/19/2021

/s/NANCI J. GRANT
NANCI J. GRANT
CIRCUIT JUDGE

ANY QUESTIONS CONCERNING THIS ORDER SHOULD BE DIRECTED TO THE ASSIGNED JUDGE'S CLERK. JUDICIAL PROTOCOLS ARE AVAILABLE AT HTTPS://WWW.OAKGOV.COM/COURTS/CIRCUIT/JUDGES

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

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

Plaintiff,

Case No. 21-187353-NH
HON. NANCI J. GRANT

v

BEAUMONT HEALTH;
TRI COUNTY ORTHOPEDICS, P.C.; and
JACK D. LENNOX, D.O.,
Jointly and Severally,

Defendants.

BRIAN J. McKEEN (P34123)
STEVEN C. HURBIS (P80993)
Attorneys for Plaintiff
645 Griswold Street, Suite 4200
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(313) 961-4400
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PAUL J. DWAIHY (P66074)
CHARLES FISHER (P82248)
Attorney for Defendant Beaumont Health
38777 Six Mile Road, Suite 101
Livonia, Michigan 48152
(313) 964-4500
paul.dwaihy@tnmglaw.com

ENRICO G. TUCCIARONE (P52767)
SAULIUS D. POLTERAITIS (P68840)
Attorneys for Defendants
Tri County Orthopedics, P.C.
and Jack D. Lennox, D.O.
38777 Six Mile Road, Suite 300
Livonia, MI 48152
(734) 742-1800/ Fax (734) 521-2379
etucciarone@fbmjlaw.com
spolteraitis@fbmjlaw.com

STIPULATED ORDER TO ADJOURN SCHEDULING ORDER DATES

At a session of said Court held in the
County of Oakland, State of Michigan, on
June 23, 2022

PRESENT: HON. NANCI J. GRANT
Circuit Court Judge

The Court, having considered the stipulation and agreement of the parties, through their respective counsel, to the entry of the following Order, and otherwise being fully informed that the parties having agreed to facilitate this matter with Michael Dolenga on December 12, 2022;

IT IS ORDERED that the Scheduling Order Dates are adjourned as follows:

Discovery Cut-Off of 6/7/22 is adjourned until December 12, 2022, the facilitation date agreed upon by the parties.

Facilitation Deadline of 7/20/2022 is adjourned to **01/01/23.**

Motion for Summary Disposition Filing date of 9/15/22 is adjourned to **11/04/22**.

Trial of 9/20/2022 is adjourned to a date to be set by the court **after 01/2023.**

IT IS SO ORDERED.

Trial in this matter is set for Tuesday, February 7, 2023 at 8:30 AM.

/s/ Nanci J. Grant
June 23, 2022
CIRCUIT COURT JUDGE
Nanci J. Grant NC

I hereby stipulate to entry of the above order:

/s/ Steven C. Hurbis
STEVEN C. HURBIS (P80993)
Attorney for Plaintiff

/s/ Saulius D. Polteraitis
ENRICO G. TUCCIARONE (P52767)
SAULIUS D. POLTERAITIS (P68840)
Attorneys for Defendants
Tri County Orthopedics, P.C.
and Jack D. Lennox, D.O.

/s/ Charles Fisher
PAUL J. DWAIHY (P66074)
CHARLES FISHER (P82248)
Attorney for Defendant Beaumont Health

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

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

Plaintiff,

Case No. 21-187353-NH
HON. NANCI J. GRANT

v

BEAUMONT HEALTH;
TRI COUNTY ORTHOPEDICS, P.C.; and
JACK D. LENNOX, D.O.,
Jointly and Severally,

Defendants.

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645 Griswold Street, Suite 4200
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spolteraitis@fbmjlaw.com

PLAINTIFF'S RESPONSE TO DEFENDANTS TRI COUNTY ORTHOPEDICS, P.C. AND JACK D. LENNOX, D.O.'S DEFENDANTS' INTERROGATORIES TO PLAINTIFF REGARDING EXPERTS

NOW COME the Plaintiff LAWANNA SMITH, as Personal Representative of the Estate of JACQUELINE HARRIS, Dec'd. by and through her attorneys McKeen & Associates P.C. and for Plaintiff's Response to Defendants Tri County Orthopedics, P.C.

And Jack D. Lennox, D.O.'S Defendants' Interrogatories to Plaintiff Regarding Experts states the following:

INTERROGATORIES

1. With respect to each of Plaintiff's experts, please state in detail:

   a. The substance of the facts and opinions on which he/she will testify;

   b. A summary of the grounds for each opinion of each expert;

   c. His/her experience in the area of similar or comparable medical occurrences, injuries, illnesses, or disabilities.

ANSWER:

- **Sonny Bal, M.D., is anticipated to testify about the following: standard of care, breach of that care, proximate causation, and damages as set forth in his affidavit of merit.**
- **Ljubisa Dragovic M.D., and such other experts as may be necessary based on fact discovery has information about the following: proximate causation and damages.**
- **Kelty Baker M.D., and such other experts as may be necessary based on fact discovery has information about the following: proximate causation and damages.**
- **Willis Wagner, M.D., and such other experts as may be necessary based on fact discovery has information about the following: proximate causation and damages.**

- **Michael H. Thompson PhD, to testify about the following: loss of earning capacity, loss of household services, and inflation, including for health care.**

Additional information would best be sought by deposition of Plaintiff's Expert Witnesses.

2. State the date Plaintiff's attorney first contacted each of Plaintiff's experts in this litigation, and identify all documents, pleadings, records and materials provided to said experts.

ANSWER:

Such information would best be obtained by deposition of Plaintiff's expert witnesses.

REQUESTS FOR PRODUCTION

1. Please produce the curriculum vitae of all expert witnesses you intend to call at the time of trial.

RESPONSE:

Please reference the attached curriculum vitae of Plaintiff's expert witnesses.

2. Please produce any reports, notes and other documents each expert has generated in regard to review of this matter.

RESPONSE:

Please see the attached Preliminary report of Dr. Michael Thomson and the Affidavit of Meritorious Claim of Dr. Sonny Bal.

3. Please produce a list of all cases in which each expert has testified in matters dealing with the same or similar medical issues as in this case, to include case name, jurisdiction, court number, Plaintiff's counsel, and defense counsel.

RESPONSE:

Such information would best be obtained by deposition of Plaintiff's expert witnesses.

Respectfully Submitted:

McKEEN & ASSOCIATES, P.C.

/S/ Steven C. Hurbis
BRIAN J. McKEEN (P34123)
STEVEN C. HURBIS (P80993)
Attorney for Plaintiff
645 Griswold St., Suite 4200
Detroit, MI 48226
(313) 961-4400

DATED: June 23, 2022

PROOF OF SERVICE

The undersigned hereby declares that she served a true copy of the foregoing document upon all attorneys of record at their respective addresses on file via M-File/E-File and/or E-Mail on June 23, 2022.

Sarah Schimitschek

Sarah Schimitschek

B. SONNY BAL; MD, MBA, JD, Ph.D

CURRICULUM VITAE

CONTACT :

Mailing: 2000 E. Broadway, # 251
Columbia, MO 65201

Telephone: (573) 808 4512
Email: balb@missouri.edu

PRESENT POSITION:

Chief Executive Officer and President
SINTX Technologies
1885 W. 2100 South
Salt Lake City, UT 84119

PROFESSIONAL HIGHLIGHTS:

1. **MEDICAL:**
   a. Jackson County Orthopaedics, Blue Springs, MO: Private practice in general orthopaedic surgery as partner in 4-physician group; 1994-1999.
   b. University of Missouri-Columbia: Academic practice in arthroplasty surgery; 1999-2017
   c. Chief Clinical Advisor, CTL-Amedica Inc., Dallas TX; August 2019 – present

2. **LEGAL**:
   a. Contributing Editor: "Orthopaedic Medico-Legal Advisor" Column in *Orthopedics Today* newsletter; 2005-present
   b. Contributing Editor: "MedicoLegal Sidebar" quarterly column in peer-reviewed *Clinical Orthopaedics and Related Research;* 2012-present
   c. Assisted law firms nationwide in medical malpractice, product liability, and intellectual property litigation.

3. **CORPORATE**:
   a. President, and CEO of SINTX Technologies (Nasdaq: SINT); 2014-present
   b. Chairman, Board of Directors SINTX Technologies; 2014-present
   c. Financing milestones:
      i. Dawson James Securities (Agent): Public offering of stock and warrants, $13 million, December 2014.
      ii. Ladenburg-Thalmann (Agent): Registered Direct/Private Placement $15

million in Common Stock and Warrants, September 2015

iii. Ladenburg-Thalmann (Agent): Follow-on Offering, $12.7 million in Common Stock & Warrants, and Convertible Preferred Stock & Warrants, July 2016

iv. Maxim Group New York (Agent): Follow on Offering in Common Stock and Warrants, $4.5 million, January 2017

v. Maxim Group New York (Agent): Preferred Stock and Warrants Offering; $15 million, May 2018

EDUCATION:

Engineering:

Kyoto Institute of Technology (Ph.D) — 10/15/2014 to 9/26/2016
Kyōto Kōgei Sen'i Daigaku, Kyoto, Japan

Law:

University of Missouri School of Law (JD) — 8/27/2002 to 5/16/2009
Columbia, Missouri

Business Management:

Kellogg Graduate School of Management (MBA) — 09/1/1997 to 6/30/1999
Northwestern University
Evanston, Illinois

Medical School:

Cornell University Medical College (MD) — 8/1/1983 to 5/27/1987
New York, New York

College:

University of California (MS-Genetics) — 7/1/1982 to 6/30/1983
Davis, California

University of California (BS-Genetics) — 3/1/1981 to 6/30/1982
Davis, California

San Joaquin Delta College (AA-Biology) — 1/16/1979 to 2/28/1981
Stockton, California

POST GRADUATE MEDICAL TRAINING

Fellowships:

Research Assistant — 8/1/1994 to 7/31/1995
Orthopaedic Biomechanics Laboratory
William H. Harris, M.D.
Massachusetts General Hospital
Boston, Massachusetts

Hip and Implant Surgery, Post-graduate year 7 — 8/1/1993 to 7/31/1994
William H. Harris, M.D.
Massachusetts General Hospital
Harvard Medical School
Boston, Massachusetts

Internship & Residency:

Orthopaedic Surgery, Post-graduate years 3-6 — 7/1/1989 to 6/30/1993
Department of Orthopaedic Surgery
University of Missouri School of Medicine
Kansas City, Missouri

General Surgery, Post-graduate years 1-2 — 7/1/1987 to 6/30/1989
Department of General Surgery
University of California Hospitals and Clinics
San Francisco, California

ACADEMIC APPOINTMENTS

Professor (with Tenure) — 9/1/2013 to 11/6/2017
Department of Orthopaedic Surgery
University of Missouri Health System-Columbia

Adjunct Faculty — 8/1/2012 to 7/30/2015
Executive MBA Medicine Program
University of Malaysia

Interim Chairman — 12/15/2008 to 8/30/2009
Department of Orthopaedic Surgery
University of Missouri Health System-Columbia

Chief of Adult Reconstruction — 9/1/2007 to 8/31/2013
Department of Orthopaedic Surgery
University of Missouri Health System-Columbia

Associate Professor — 9/1/2007 to 8/31/2013
Department of Orthopaedic Surgery
University of Missouri Health System-Columbia

Adjunct Professor — 9/1/2013 to 11/6/2017
Department of Materials Science and Engineering
Missouri Science & Technology University -Rolla

Assistant Professor — 9/1/1999 to 8/31/2007
Department of Orthopaedic Surgery
University of Missouri Health System-Columbia

Assistant in Orthopaedic Surgery 8/1/1993 to 7/30/1995
Cambridge Hospital/Harvard Medical School
Cambridge, Massachusetts

BOARD CERTIFICATION

American Board of Orthopaedic Surgery, July 1997
American Board of Orthopaedic Surgery, Recertified July 2016.
Licensed to practice law in Missouri since 2009

PROFESSIONAL MEMBERSHIPS & APPOINTMENTS

Orthopaedic Research & Education Foundation (OREF), Board of Trustees 2016-2022
CEO and President; Amedica Corp. (NASDAQ: AMDA, now SINT) 9/30/14 to present.
Chairman, Board of Directors, Amedica Corp. (above) August 21, 2014 to present.
MU Department of Radiology Promotion and Tenure Committee; July 2014 to present.
Amedica Corporate Board of Directors (above); January 1 2013 to present.
Amedica Corporate Audit Committee; January 1 2013 to present.
Amedica Corporate Compensation Committee; January 1 2013 to present.
Lifetime Member: International Soc. for Tech. in Arthroplasty; January 1, 2013 to present.
Professional Liability and Compliance Committee; March 1, 2012-October 30, 2015.
American Bar Association; 2009 to present.
The Missouri Bar Association; 2009 to present.
Florida Expert Witness Certificate since March 2014
University of Missouri Graduate Faculty; 2009.
University Physicians Professional Liability Committee; 2006 to 2008.
Clinical Orthopaedic Society; 2005 to present.
Jefferson Club, University of Missouri-Columbia; 2005 to present.
The Library Society, University of Missouri-Columbia; 2005 to present.
The McAlester Society, University of Missouri-Columbia; 2005 to present.
McMaster University Evidence-Based Journal Reviewing System; 2003 to 2006.
Missouri State Orthopaedic Association; 2003 to 2013.
American Association of Hip and Knee Surgeons; 2001 to present.
Mid-America Orthopaedic Association; 2000 to 2013.
Orthopaedic Research Society; 2000 to present.
Society for Biomaterials; 2000 to present.
American Academy of Orthopaedic Surgeons.
Shareholder/Partner, Jackson Country Orthopaedics, Inc., Blue Springs, MO; 1995 to 1999

HOSPITAL AFFILIATIONS

University of Missouri Hospital and Clinics; 6/21/1999 to 11/06/2017
Women's and Children, known as Columbia Regional Hospital; 8/16/2000 to present. (Active)
Boone Hospital Center; 6/2000 to 2/13/2014. (Courtesy)
Capital Region Medical Center; 11/15/2005 to present. (Active)

Harry S. Truman Veterans' Memorial Hospital; 12/12/1999 to present. (WOC)
St. Mary's Hospital, Blue Springs, MO; 7/1995 to 8/1999.
Centerpoint Medical Center of Independence, Independence, MO; 1995 to 1999.
Cambridge Hospital, Cambridge, MA; 1994 to 1995.

OUTPATIENT CENTER AFFILIATIONS

The Institute for Outpatient Surgery; 7/1/2002 to present.
HealthSouth Rusk Rehabilitation Center; 6/8/2006 to present.

HONORS AND AWARDS

Orthopaedic Research Society Best Poster Award: ORS Ambassadors Symposium July 20, 2017
Examiner, American Board of Orthopaedic Surgeons Part II: July 2009, 2011, 2012, 2017.
Missouri Hospitals Association Award for Exceptional Care, May 2017
Elite Reviewer for the Journal of Arthroplasty and 2014 "Wall of Fame"
AAOS Achievement Award, March 12, 2013.
Certificate of Editorial Achievement, Guest Editor for Composite Materials in Skeletal Engineering for Open Access Journal. December 2012.
AAOS Achievement Award for Volunteer Service. January 27, 2012.
Missouri Life Sciences Research Award. The Evaluation of a Synthetic Bioactive Biomaterial Scaffold for the Tissue Engineering of Cartilage. P Jayabalan, MN Rahaman, BS Bal, HJ Sims, JL Cook. July 18 – 21, 2011.
2nd Place Phi Zeta Research Day Poster Presentation, University of Missouri. July 18 – 21, 2011.
University of Missouri President's Intercampus Collaboration Award. March 4, 2011.
University of Missouri, Research and Creativities Forum 2010: 1st Place Award Bioactive Glass 13-93 as a subchondral substrate for tissue engineered osteochondral constructs *P Jayabalan, AR Tan, MN Rahaman, BS Bal, CT Hung, JL Cook*.
Appointed to Elwood L. Thomas Inn of Court, MU School of Law; 2008 to 2009.
American Board of Orthopaedic Surgeons: Invited examiner for oral examination of candidates taking Part II of ABOS Certification Examination, July 14-17, 2008, July 2017.
COL Making a Difference Award, 2008.
Paul "HAP" Award for Outstanding Scientific Paper, International Society of Technology in Arthroplasty (ISTA), August 2007.
American Academy of Orthopaedic Surgeons, Clinician-Scientist Travel Fellowship Award, December 2006.
American Academy of Orthopaedic Surgeons, Leadership Fellows Program, Class of 2007 (elected 2006).
University of Missouri Health Care Service Quality Award for July 2005.
Columbia Chamber of Commerce Leadership Certificate may 29, 2001
Department of Radiology-Chair Search Committee, University of Missouri Health Care, 2001.
St. Luke's Hospital House Staff Research Award, University of Missouri School of Medicine 1991.
Rex L. Diveley Orthopaedic Research Award, University of Missouri–Kansas City School of Medicine 1990, 1992, and 1993.
Department of Orthopaedic Surgery Prize, University of Missouri - Kansas City School of Medicine 1990, 1991, 1992, and 1993.

Richard H. Kiene Orthopaedic Award, University of Missouri - Kansas City School of Medicine 1990, 1991, and 1992.
Honors in Research with M.D. degree, Cornell University Medical College 1987.
Dept. of Physiology Basic Science Research Prize, Cornell University Medical College 1987.
Teaching Assistantships, Genetics and Biochemistry, University of California-Davis 1982 to 1983.
Alpha Zeta Honor Society, University of California-Davis 1982.
B.S. degree with High Honors, University of California-Davis 1982.
A.A. degree with High Honors, San Joaquin Delta College 1981.
Teaching Assistantships, Chemistry and Physics, San Joaquin Delta College 1980 to 1981.
Alpha Gamma Sigma Honor Society, San Joaquin Delta College 1980.

STUDENT RESEARCH ADVISOR, SPONSOR, MENTOR

"Design of a Cable Tensioning Tool For Reattachment of the Greater Trochanter." Undergraduate thesis, Mechanical & Aerospace Engineering, MU MAE 350 Honors Research, December 2002, Jonathan T. Brown. Sherif El-Gizawy, PhD, Honors Advisor and **B. Sonny Bal, MD**, Research Advisor.

"Finite Element Analysis of Proximal Femoral Loading In Minimally Invasive Total Hip Replacement." MS Thesis, October 2005, Aaron Xavier Molina Martell. Sherif El-Gizawy, PhD, Thesis Supervisor and **B. Sonny Bal, MD**, Thesis Co-Supervisor.

"Alternative Avenues for MedicoLegal Dispute Resolution." Program mentor and graduate advisor, 2005-2006, Sukhsimranjit Singh, LLM degree, University of Missouri Law School.

"Fabrication of Functional Gradient Composite Ceramic Materials for Orthopaedic Bearings." Hrishikesh Keshavan, 2002-2003. MS thesis, MU Aerospace and Mechanical Engineering. Graduate student advisors: Khaled Morsi, PhD, and **B. Sonny Bal, MD**.

"Response of primary human blood monocytes and the U937 human monocytic cell line to alumina ceramic particles." Efrat Yagil, MS thesis, MU School of Veterinary Immunobiology. Graduate Advisors: D. Mark Estes, PhD, and **B. Sonny Bal, MD.**

"Tissue-engineered osteochondral constructs." Post Graduate fellowship advisor: Dr. Wenhai Huang, PhD. January 1, 2005 to June 30, 2006. Mohamed Rahaman, PhD, and **B. Sonny Bal, MD.**

"Alumina/polyethylene acetabular cups and alumina-niobium bearings for total hip arthroplasty." Post Graduate fellowship advisor: Yadong Li, PhD, April 1, 2005 to July 31, 2006. Co-Advisors: Mohamed Rahaman, PhD, and **B. Sonny Bal, MD.**

"Interaction of cells with bioactive glasses." Undergraduate fellowship; Second Prize in the UM-Rolla annual undergraduate research competition, Agatha Dwilewicz, April 2006. Advisors: Mohamed Rahaman, PhD, and **B. Sonny Bal, MD.**

"Fabrication of hydroxyapatite and bioactive glass scaffolds for bone repair and regeneration." Qiang Fu, PhD, August 2005. Advisor: Mohamed Rahaman, PhD, and **B. Sonny Bal, MD.**

"Composite Ceramic THA Bearings." Post Graduate fellowship Dr. Aihua Yao, Visiting Scientist, July 15, 2006 to present. Advisors: Mohamed Rahaman, PhD, and **B. Sonny Bal, MD.**

"Nanomechanical Property Characterization of Femoral Heads." Masters of Science thesis presented to the Faculty of the Graduate School, University of Missouri-Columbia, Prashanthi Tirunagari 2006. Sanjeev Khanna, PhD, Thesis Supervisor and **B. Sonny Bal, MD**, Research Advisor.

"Freeze casting of bioactive ceramics and glass scaffolds for engineering bone tissue." PhD/DE Advisory and Thesis Defense Committee. Qiang Fu August 15, 2005 to May 28, 2009. Mohamed Rahaman, PhD, Faith Dogan, PhD, Roger Brown, PhD, Delbert Day, PhD and **B. Sonny Bal, MD**.

"Serum Amyloid Factor and Osteophyte Formation in Degenerative Joint Disease." Srijita Dhar, student May 2008 to present. Master's thesis committee.

Doctoral Dissertation and Advisory Committee member, PhD degree, Graduate Student Xin Liu, January 2010-August 2012, Missouri S&T University, Rolla, MO. Dissertation: Bioactive Glass Scaffolds for the Regeneration of Load-Bearing Bone.

"Bioactive Glass (13-93) as a subchondral substrate for tissue-engineered osteochondral constructs." Prakash Jayabalan, Andrea Tan, Mohammed N Rahaman, **B Sonny Bal**, Hannah J Sims, Clark T Hung and James L Cook. Prakash won 2010 MU Post-Doctoral Association Travel Award Grant.

Faculty Mentor: MU Discovery Fellow Research Student (Darby Provance); 2011 to 2012.

"A New Standard for Measuring Professional Conduct of the Physician in Training." *Publication in preparation* Faculty Advisor: Haden Ross Compton, 2nd year law student, University of Missouri-Columbia.

Advisor to Missouri Law Review Associate Member, fall 2011 academic semester, University of Missouri, Columbia.

Advisor to Clint Mathews. A class ran by Jake Holliday of the Missouri Innovation Center - Starting a High Growth Venture - The Business Plan.

Supported seven (7) post-graduate fellows at Comparative Orthopaedic Laboratory, 2003-2012.

PhD Advisory Committee; Wei Xiao. Bioactive glass scaffolds for structural bone repair. 2016

Pre-Clerkship Advisor to first year medical students and Clinical Advisor to students early in the M3 year.

Faculty Mentor: Student Research Fellowship (Mitchell Tarka); 2014-2015.

Committee Member for Yinan Lin for work on 13-93 bioactive glass doped with Cu in rat calvarial defect model and segmental model; 2014.

Clinical Risk and Judicial Reasoning –How to Make Legally Sound Clinical Decisions. Mentor: Caroline Poma, Class of 2017, University of North Carolina School of Law.

Faculty Mentor: Student Research Samuel Thompson and Dominic Zanaboni; A Comparison of Cost and Hospital Outcomes in Patients Receiving the ConforMIS iTotal TKA vs. an off the shelf brand; 2015.

Thesis advisory committee member for Yinan Lin: Healing of Bone Defects in a Rodent Calvarial Defect Model Using Strong Porous Bioactive Glass (13-93) Scaffolds; 2015.

ASC Preclerkship Advisor: Kenny Weith; August 2015-July 2016.

Mentor and Pre-clerkship Advisor: Medical Student John Welsh, University of Missouri 2017.

COMMITTEE SERVICE

National/International:

At-Large Legal Advisor for Health Policy Committee, American Association of Hip and Knee Surgeons, January 2010 to present.

Contributing Author to the Interactive Educational Program (IEP) for Total Joint, 2010 to present.

Orthopaedic Research & Education Foundation (OREF), Orthopaedic Partners Committee. Appointment, June 2010 to present.

Medical Liability Committee, American Academy of Orthopaedic Surgeons, March 2008 to March 2010.

Honorary One Health Initiative Website Advisory Board, July 2009 to present.

Hip, Knee, and Adult Reconstruction Evaluation Subcommittee, American Academy of Orthopaedic Surgeons, 2007 to March 2013.

American Academy of Orthopaedic Surgeons, Leadership Fellows Program, 2007 to 2008.

Legal Advisory Committee, American Association of Hip and Knee Surgeons, July 2005 to present; Vice-Chairman, November, 2005, Chairman elect 2007 to 2010.

American Legal Forum and Orthopaedic Medical Legal Advisor Bulletin, Founding Member, and Board of Directors, Chapel Hill, NC, 2005 to present.

Medical Liability Committee, American Academy of Orthopaedic Surgeons,
Academic Business and Practice Management Committee, American Academy of Orthopaedic Surgeons, 2002 to 2005.

Foundation for the Advancement of Research in Medicine, Board of Directors, California, 2002

to present.

ECRI-Health Technology Forecast Advisory Board, 2003 to 2005.

Orthopaedic Research & Education Foundation (OREF), Finance Committee. Appointment, August 2012 to present.

American Bar Association Advisory Panel, appointed March 2012 to present.

Advisory Board for *Physicians' Life* magazine, November 2014 to present.

Orthopaedic Research & Education Foundation (OREF), Visionary Research Society, August 2014-present.

Orthopaedic Research & Education Foundation (OREF) Board of Trustees, February 29, 2016-February 29, 2019.

Industry:

Board of Directors, Amedica US Spine Inc., Salt Lake City, UT. Appointed January 2012.

Board of Directors, OrthoMind Inc. Social Media website for Orthopaedic Surgeons. Appointed August 2011.

Hip and Knee Implant Designer Surgeon Panel, Zimmer Inc., Warsaw, Indiana, 2002-2011.

Total Joint Reconstruction Clinical Advisory Panel, Amedica Inc., Salt Lake City, UT, 2005 to present.

Board of Directors, BoneSmart.org and FARMortho LLC.

Scientific Advisory Board for the ConforMIS iTotal Hip Implant, May 2013 to present.

University of Missouri:

MU Discovery Fellows Program for the 2011 to 2012 academic year.

MU Orthopaedic Transitional Leadership Advisory Committee, 2008 to 2009.

Member; Board of Directors and Executive Committee, Missouri Orthopaedic Institute, University of Missouri.

Promotion & Tenure Committee of the Department of Orthopaedic Surgery, University of Missouri, Columbia.

University Physicians Medical Malpractice Committee.

EDITORIAL BOARDS/PEER REVIEWER

Peer reviewer for the Hip, Knee & Adult Reconstruction questions for the new Self-Assessment Examination based on the AAOS Orthopaedic Knowledge Online, April 27, 2012 to present.

Editorial Manager, Adult Reconstruction OKO Self-Assessment Exam: Adult Reconstruction, April 2011.

Editorial Board, *World Journal of Orthopedics* (WJO), March 2011 to present.

Peer reviewer, *Journal of Knee Surgery*, April 2010 to present.

Editorial Board member of *Orthopedics Today*, April 2010 to present.

Editorial Board of *Global Journal of Surgery*, February 2010 to June 30, 2012.

Dove Medical Press, Honorary Editorial Board, 2008 to present.

Editorial Board, *Journal of Orthopaedic Surgical Advances*, October 2007 to present.

Peer reviewer for *Journal of the American Academy of Orthopaedic Surgeons*.

Editorial Board for the *International Journal Medicine and Law*, January 1, 2014 to present.

Peer Reviewer, "Patient-Specific Rehabilitation in Knee Osteoarthritis"; PI – Stephen Sayers; University of Missouri Research Board Grant; May 2014.

Editorial Board, *Arthroplasty Today*, October 2014 to present.

PEER REVIEWED PUBLICATIONS

1. Fantini GA, Shiono S, **Bal BS**, Shires GT. Adrenergic mechanism contribute to alterations in regional perfusion during normotensive E. coli bacteremia. *J Trauma.*1989 Sep;29(9):1252-7.

2. **Bal BS**, Gurba DM. Coumadin-induced necrosis of the skin after total knee replacement. A case report. *J Bone Joint Surg Am.* 1991 Jan;73(1):129-30.

3. Chen Y, **Bal BS**, Gorski JP. Calcium and collagen binding properties of osteopontin, bone sialoprotein, and bone acidic glycoprotein-75 from bone. *J Biol Chem.* 1992 Dec 5;267(34):24871-8.

4. **Bal BS**, Jones L Jr. Arthroscopic resection of a chondroblatoma in the knee. *Arthroscopy.* 1995 Apr;11(2):216-9.

5. **Bal BS**, Sampath SAC, Burke DW. A technique for cementing the patella component in total knee arthroplasty. *Am J Orthop.* 1995 Apr;24(4):358.

6. **Bal BS**. A technique for comparison of leg lengths during total hip arthroplasty. *Am J Orthop.* 1996 Jan;25(1):61-2.

7. McGrory BJ, **Bal BS**, Harris WH. Current concepts of six trochanteric osteotomies for total hip arthroplasty. *J Am Acad Orthop Surgeons.* 1996;4:258-67.

8. **Bal BS**, Sandow T. Bilateral femoral neck fractures with negative bone scans. A case report. *Orthopaedics.* 1996 Nov;19(11):974-6.

9. **Bal BS** , Jiranek W, Harris WH. Periprosthetic osteolysis around an uncemented endoprosthesis. A Case Report. *J Arthroplasty.* 1997;12(3):346-9.

10. **Bal BS**, Maurer B, Harris W. Trochanteric union following revision total hip arthroplasty. *J Arthroplasty.* 1998 Jan;13(1):29-33.

11. **Bal BS**, Vandelune D, Gurba DM, Jasty M, Harris WH. Polyethylene wear in cases using femoral stems of similar geometry, but different metals, porous layer, and modularity. *J Arthroplasty.* 1998 Aug;13(5):492-9.

12. **Bal BS**, Maurer T, Harris W. Revision of the acetabular component without cement after a previous acetabular reconstruction with use of a bulk femoral head graft in patients who had congenital dislocation or dysplasia. *J Bone Joint Surg Am.* 1999 Dec;81(12):1703-6.

13. Ray A, Kuroki K, Cook JL, **Bal BS**, Kenter K, Aust G, Ray BK. Induction of matrix metalloproteinase 1 gene expression is regulated by inflammation-responsive transcription factor SAF-1 in osteoarthritis. *Arthritis Rheum.* 2003 Jan;48(1):134-45.

14. Oonishi H, Kim SC, Clarke I, Asano T, **Bal BS**, Kyomoto M, Masuda S. Retrieved ceramic total knee prosthesis in clinical use for 23 years. *Key Eng Mater* Vols. 240-242, pp. 797-800, 2003.

15. Keshavan H, **Bal BS**, Morsi K. Preliminary investigation into the production of grain-size functionally gradient materials for artificial hip implant applications, TMS Annual Meeting, Symposium: Surface Engineering: In *Materials Science* II, Mar 2-6 2003, San Diego, CA, United States, 2003, p 233-41.

16. Morsi K, Keshavan H, **Bal BS**. Processing of grain-size functionally gradient bioceramics for implant applications. *J Mater Sci MaterMed.* 2004 Feb;15(2):191-7.

17. Cook JL, Kuroki K, Kenter K, Marberry K, Brawner T, Geiger T, Jayabalan P, **Bal BS**. Bipolar and monopolar radiofrequency treatment of osteoarthritic knee articular cartilage: acute and temporal effects on cartilage compressive stiffness, permeability, cell synthesis, and extracellular matrix composition. *J Knee Surg.* 2004 Apr;17(2):99-108.

18. Yagil-Kelmer E, Kazmier P, Rahaman MN, **Bal BS**, Tessman RK, Estes DM. Comparison of the response of primary human blood monocytes and the U937 human monocytic cell line to two different sizes of alumina ceramic particles. *J Orthop Res.* 2004 Jul;22(4):832-8.

19. Morsi K, Keshavan H, **Bal BS**: Hot Pressing of Graded Ultrafine-Grained Alumina Bioceramics. *Mater Sci Eng A*386: 384-389, September 2004.

20. Ray A, **Bal BS**, Ray BK. Transcriptional induction of matrix metalloproteinase-9 in the chondrocyte and synoviocyte cells is regulated via a novel mechanism: evidence for functional cooperation between serum amyloid A-activating factor-1 and AP-1. *J Immunol.* 2005 Sep 15;175(6):4039-48.

21. **Bal BS**, Aleto TJ, Garino JP, Toni A, Hendricks K. Ceramic-on-ceramic versus ceramic-on-polyethylene bearings in total hip arthroplasty: results of a multicenter prospective randomized study and update of modern ceramic total hip trials in the U.S. *Hip Int.* 2005 July-September;15:129-35.

22. Aleto T, Garino JP, Hendricks KJ, **Bal BS**. A comparison of ceramic-on-ceramic with ceramic-on-polyethylene bearings in total hip arthroplasty: early results of a prospective randomized trial. *U Penn Orthop J.* 2005;17:1-5.

23. **Bal BS**, Haltom D, Aleto TJ, Barrett MO. Early complications in eighty-nine primary total hip replacements performed with a two-incision minimally invasive technique. *J Bone Joint Surg Am.* 2005 Nov;87(11):2432-8.

24. **Bal BS**, Barrett MO. Acute sepsis complicating degenerative arthritis of the hip joint: a report of three cases. *J Surg Orthop Adv.* 2005 Winter;14(4):190-2.

25. **Bal BS**, Barrett MO, Lowe J. A modified two-incision technique for primary total hip replacement. *Seminars in Arthroplasty.* September 2005;16(3):198-207.

26. **Bal BS**, Kazmier P, Burd T, Aleto TJ. Anterior trochanteric slide osteotomy for primary total hip replacement. Review of nonunion and complications. *J Arthroplasty.* 2006 Jan;21(1):59-63.

27. **Bal BS**, Greenberg D, Buhrmester L, Aleto TJ. Primary total knee replacement with a zirconia ceramic femoral component. *J Knee Surg.* 2006 Apr;19(2):89-93.

28. **Bal BS**, Aleto TJ. A method to remove the polyethylene liner during hip revision surgery. *Am J Orthop.* 2006 May;35(5):242.

29. **Bal BS**, Haltom D, Aleto T, Barrett M. Early complications of primary total hip replacement performed with a two-incision minimally invasive technique. Surgical Technique. *J Bone Joint Surg Am.* 2006 Sep;88 Suppl 1 Pt 2:221-33.

30. **Bal BS**, Garino J, Ries M, Rahaman MN. Ceramic materials in total joint arthroplasty. *Seminars in Arthroplasty*. September/December 2006;17(3/4):94-101.

31. Rahaman MN, Brown RF, **Bal BS**, Day DE. Bioactive glasses for nonbearing applications in total joint arthroplasty. *Seminars in Arthroplasty*. September/December 2006;17(3/4):102-12.

32. Garino J, Rahaman MN, **Bal BS**. The reliability of modern alumina bearings in total hip

arthroplasty. *Seminars in Arthroplasty*. September/December 2006;17(3/4):113-9.

33. **Bal BS**, Rahaman MN, Aleto TJ, Miller FS, Traina F, Toni A. The significance of metal staining on alumina femoral heads in total hip arthroplasty. *J Arthroplasty*. 2007 Jan;22(1):14-9.

34. **Bal BS**, Greenberg DD, Lowe J, Aleto TJ. Primary total knee arthroplasty performed with a MIS subvastus approach. *Tech Knee Surg.* 2007 March;6(1):60-7.

35. **Bal BS**, Greenberg D. Failure of a metal-reinforced tibial post in TKA. A case report. *J Arthroplasty*. 2007 Apr;22(3):464-7.

36. **Bal BS**, Garino J, Ries M, Rahaman MN. A review of ceramic bearing materials in total joint arthroplasty. *Hip Int.* 2007 Jan-Mar;17(1):21-30.

37. Barrett MO, **Bal BS**. Septic arthritis of the hip joint in an immune competent adult: the significance of the differential diagnosis. *J Am Board Fam Med*. 2007 May-Jun;20(3):307-9.

38. Fu Q, Rahaman MN, Bal BS, Huang W, Day DE. Preparation and bioactive characteristics of a porous 13-93 glass, and fabrication in the articulating surgace of a proximal tibia. *J Biomed Mater Res A*. 2007 Jul;82(1):222-9.

39. Rahaman MN, **Bal BS**, Garino J, Ries M, Yao J. Ceramics for prosthetic hip and knee joint replacement. *J Am Ceram Soc.* 2007;90(7):1965–88.

40. Yoon RS, Lloyd EW, McGrory B, **Bal BS**, Macaulay W. Studies presented in poster format at the annual Meetings of the American Association of Hip & Knee Surgeons: how do they fare in the peer review process? *J Arthroplasty.* 2007 Sept;22(6 Suppl 2):17-20.

41. Upadhyay A, York S, Macaulay M, McGrory B, Robbennolt J, **Bal BS**. Medical malpractice in hip and knee arthroplasty. *J Arthroplasty.* 2007 Sept;22(6 Suppl 2):2-7.

42. **Bal BS**, Garino J, Ries M, Oonishi H. Ceramic bearings in total knee arthroplasty. *J Knee Surg.* 2007 Oct;20(4):261-70.

43. Fu Q, Rahaman MN, Dogan F, **Bal BS**. Freeze casting of porous hydroxyapatite scaffolds. I. Processing and general microstructure. *J Biomed Mater Res B Appl Biomater.* 2008 Jul;86(1):125-35.

44. Fu Q, Rahaman MN, Dogan F, **Bal BS**. Freeze casting of porous hydroxyapatite scaffolds. II. Sintering, microstructure, and mechanical behavior. *J Biomed Mater Res B Appl Biomater.* 2008 Aug;86(2):514-22.

45. **Bal BS**, Lowe J, Hillard A. Muscle damage in minimally invasive total hip replacement: MRI evidence that it is not significant. *Instr Course Lect.* 2008 Jan 15;57:223-29.

46. Li, Y, Rahaman MN, **Bal BS**, Day DE, Fu Q. Early stages of calcium phosphate

formation on bioactive borosilicate glass in aqueous phosphate solution. *J Am Ceram Soc.* 2008 May;91(5);1528–33.

47. Rahaman MN , Li Y, **Bal BS**, Huang W. Functionally graded bioactive glass coating on magnesia partially stabilized zirconia (Mg-PSZ) for enhanced biocompatibility. *J Mater Sci Mater Med.* 2008 Jun;19(6):2325-33.

48. Brown A, Matta J, **Bal BS**. Evolution and experience with minimally invasive anterior total hip arthroplasty performed on an orthopaedic table. *Seminars in Arthroplasty.* 2008;19(2):209-14.

49. **Bal BS**. From two incisions to one: the technique of minimally invasive total hip arthroplasty with the anterior approach. *Seminars in Arthroplasty* 2008;19(2):215-24.

50. **Bal BS**, Vallurupalli S. A modified two-incision technique for primary total hip arthroplasty. *Indian J Orthop.* 2008 Jul;42(3):267-74.

51. **Bal BS**, Vallurupalli S. Minimally invasive total hip arthroplasty with the anterior approach. *Indian J Orthop.* 2008 Jul;42(3):301-8.

52. Fu Q, Rahaman MN, Dogan F, **Bal BS**. Freeze-cast hydroxyapatite scaffolds for bone tissue engineering applications. *Biomed Mater.* 2008 Jun;3(2):025005.

53. **Bal BS**, Greenberg DD, Li S, Mauerhan D, Schultz L, Cherry K. Tibial post failures in a condylar posterior cruciate substituting total knee replacement. *J Arthroplasty.* 2008 Aug;23(5):650-5.

54. Lima EG, Chao GP, Ateshian GA, **Bal BS**, Cook, JL, Vunjak-Novakovic G, Hung CT. The effect of devitalized trabecular bone on the formation of osteochondral tissue-engineered constructs. *Biomaterials.* 2008 Nov;29(32):4292–9.

55. Huo MH, Parvizi J, **Bal BS**, Mont MA. Council of Musculoskeletal Specialty Societies (COMSS) of the American Academy of Orthopaedic Surgeons. What's new in total hip arthroplasty. *J Bone Joint Surg Am.* 2008 Sep;90(9):2043-55.

56. Jayabalan P, **Bal BS**. Review of biomaterials in total knee arthroplasty. *Minerv Ortop Traumatol.* 2008;59:241-52.

57. **Bal BS**. A technique to direct and retrieve a free-hand interlocking screw. *J Surg Ortho Adv.* 2008 Winter;17(4):282-3.

58. **Bal BS**, Khandkar A, Lakshminarayanan R, Clarke I, Hoffman AA, Rahaman MN. Fabrication and testing of silicon nitride bearings in total hip arthroplasty: winner of the 2007 "HAP" PAUL Award. *J Arthroplasty.* 2009 Jan;24(1):110-6.

59. Fu Q, Rahaman MN, **Bal BS**, Brown RF, Day DE. Mechanical and in vitro performance of 13-93 bioactive glass scaffolds prepared by a polymer foam replication technique. *Acta Biomater.* 2008 Nov;4(6):1854-64.

60. **Bal BS**, Brenner L. Clinical risk and judicial reasoning: editorial comment. *Clin Orthop Relat Res.* 2009 Feb;467(2):323–4.

61. **Bal BS**, Brenner L. An introduction to medical malpractice in the United States. *Clin Orthop Rel Res.* 2009 Feb;467(2):339–47.

62. McGrory BJ, **Bal BS**, York S, Macaulay W, McConnell DB. Surgeon demographics and medical malpractice in adult reconstruction. *Clin Orthop Rel Res.* 2009 Feb;467(2):358-66.

63. **Bal BS**. The expert witness in medical malpractice litigation. *Clin Orthop Rel Res.* 2009 Feb;467(2):339–47.

64. Brown RF, Rahaman MN, Dwilewicz AB, Huang W, Day DE, Li Y, **Bal BS**. Effect of borate glass composition on its conversion to hydroxyapatite and on the proliferation of MC3T3-E1 cells. *J Biomed Mater Res A.* 2009 Feb;88(2):392-400.

65. **Bal BS**, Khandkar A, Lakshminarayanan R, Clarke I, Hoffman AA, Rahaman MN. Testing of silicon nitride ceramic bearings for total hip arthroplasty. *J Biomed Mater Res B Appl Biomater.* 2008 Nov;87(2):447-54.

66. Fu Q, Rahaman MN, **Bal BS**, Brown RF. Proliferation and function of MC3T3-E1 cells on freeze-cast hydroxyapatite scaffolds with oriented pore architectures. *J Mater Sci Mater Med.* 2009 May;20(5):1159-65.

67. **Bal BS**. Medical malpractice and arthroplasty surgery. *Curr Orthpo Prac.* 2009 Jan/Feb;20(1):20-24.

68. Huang TS, Rahaman MN, **Bal BS**. Alumina–tantalum composite for femoral head applications in total hip arthroplasty. *Mater Sci Eng C.* 2009;29(6):1935-41.

69. Furmanski J, Anderson M, **Bal S**, Greenwald AS, Halley D, Penenberg B, Ries M, Pruitt L. Clinical fracture of cross-linked UHMWPE acetabular liners. *Biomaterials.* 2009 Oct;30(29):5572-82.

70. **Bal BS**, Lowe J, Gietler A, Aleto TJ. Heterotopic ossification after two-incision total hip arthroplasty. *J Arthroplasty.* 2010 Jun;25(4):538-40.

71. Rahaman MN, Huang T, **Bal BS**, Li Y. In vitro testing of Al(2)O(3)Nb composite for femoral head applications in total hip arthroplasty. *Acta Biomater.* 2010 Feb;6(2):708-14.

72. Rahaman MN, Qiang F, **Bal BS**, Kuroki K, Brown R. In vivo evaluation of 13-93 bioactive glass scaffolds with trabecular and oriented microstructures in a subcutaneous rat implantation model. *J Biomed Mater Res A.* 2010 Oct;95(1):235-44.

73. Fu Q, Rahaman MN, **Bal BS**, Brown RF. Preparation and in vitro evaluation of bioactive glass (13-93) scaffolds with oriented microstructures for repair and regeneration of load-bearing bones. *J Biomed Mater Res A.* 2010 June;93(4):1380-90.

74. Rahaman MN, **Bal BS,** Huang T, Yao A, Li Y. SiC Nanoparticle-reinforced Al2O3-Nb Composite as a Potential Femoral Head Material in Total Hip Arthroplasty. *Mater Sci Eng C.* 2010;30:197-210.

75. Fu Q, Rahaman MN, **Bal BS**, Bonewald LF, Kuroki K, Brown RF. Silicate, borosilicate, and borate bioactive glass scaffolds with controllable degradation rate for bone tissue engineering applications, II: in vitro and in vivo biological evaluation. *Biomed Mater Res A.* 2010 Oct;95(1):172-9.

76. Jayabalan P, Tan AR, Rahaman MN, **Bal BS**, Hung CT, Cook JL. Bioactive glass 13-93 as a subchondral substrate for tissue-engineered osteochondral constructs: a pilot study. *Clin Orthop Relat Res.* 2011 Oct;469(10):2754-63.

77. **Bal BS**, Brenner L. Medical-legal issue: healthcare provider liability related to defective implants. *Curr Orthop Prac.* 2011;22(3):227–30.

78. **Bal BS**, Rahaman MN, Jayabalan P, Kuroki K, Cockrell MK, Yao JQ, Cook JL. In vivo outcomes of tissue-engineered osteochondral grafts. *J Biomed Mater Res B Appl Biomater.* 2010 Apr;93(1):164-74.

79. Rahaman MN, Day DE, **Bal BS**, Fu Q, Jung SB, Bonewald LF, Tomsia AP. Bioactive glass in tissue engineering. *Acta Biomater.* 2011 Jun;7(6):2355-73.

80. Pegalis SE, **Bal BS**. Closed medical negligence claims can drive and reduce litigation. *Clin Orthop Relat Res.* 2012 May;470(5):1398-404.

81. Wegman B, Stannard JP, **Bal BS**. Medical liability of the physician in training. *Clin Orthop Relat Res.* 2012 May;470(5):1379-85.

82. Sohn DH, **Bal BS**. Medical malpractice reform: the role of alternative dispute resolution. *Clin Orthop Relat Res.* 2012 May;470(5):1370-8.

83. **Bal BS**, Choma T. What to disclose? Revisiting informed consent. *Clin Orthop Relat Res.* 2012 May;470(5):1346-56.

84. **Bal BS**, Brenner LH. Evolving medicolegal concepts. Editorial comment. *Clin Orthop Relat Res.* 2012 May;470(5):1344-5.

85. Huang TS, Rahaman MN, Doiphode ND, Leu MC, **Bal BS**, Dey DE, Liu X. Porous and strong bioactive glass (13-93) scaffolds fabricated by freeze extrusion technique. *Mater Sci Eng C.* 2011;31:1482-89.

86. Jayabalan P, Tan AR, Rahaman MN, **Bal BS**, Hung CT, Cook JL. Bioactive glass 13-93 as a subschondral substrate for tissue-engineered osteochondral constructs. *Clin Orthop Relat Res.* 2011 Oct;469(10):2754-63.

87. Franklin SP, Franklin AL, Wilson H, Schultz L, **Bal S**, Cook JL. The relationship of the canine femoral head to the femoral neck: an anatomic study with relevance for hip

arthroplasty implant design and implantation. *Vet Surg*. 2012 Jan;41(1):86-93.

88. Franklin SP, Stoker AM, Cockrell MK, Pfeiffer FM, **Bal BS**, Cook JL. Effects of low-temperature hydrogen peroxide gas plasma sterilization on in vitro cytotoxicity of poly(ε-Caprolactone) (PCL). *J Biomater Sci Polym Ed*. 2011 Nov 25 [Epub ahead of print].

89. **Bal BS**, Rahaman MN. Orthopaedic applications of silicon nitride ceramics. *Acta Biomater*. 2012 Aug;8(8):2889-98.

90. Gorth D, Puckett S, Ercan B, Webster TH, Rahaman MN, **Bal BS**. Decreased bacteria activity on Si3N4 surfaces compared to PEEK or titanium. *Int J Nanomedicine*. 2012;7:4829-40.

91. Webster TJ, Patel AA, Rahaman MN, **Bal BS**. Anti-infective and osteointegration properties of silicon nitride, poly(ether ether ketone), and titanium implants. *Acta Biomater*. 2012 Dec;8(12):4447-54.

92. **Bal BS**, Brenner LH. Corporate malfeasance, off-label use, and surgeon liability. Invited Comment. *Clin Orthop Relat Res*. 2013 Jan;471(1):4-8.

93. Liu Y, Rahaman MN, **Bal BS**. Generation of notochordal cell-like cells from human induced pluripotent stem cells. *Stem Cells*. Submitted.

94. **Bal BS**, Brenner LH. Medicolegal sidebar: corporate relationships and increased surgeon liability risk. *Clin Orthop Relat Res*. 2013 Apr;471(4):1092-6.

95. Rahaman MN, Xiao W, Fu H, Liu Y, **Bal BS**. Hollow hydroxyapatite microspheres: a novel bioactive and osteoconductive carrier for controlled release of bone morphogenetic protein-2 in bone regeneration. *Acta Biomater* Manuscript submitted.

96. Rahaman MN, Xin L, Hilmas GE, **Bal BS**. Mechanical properties of bioactive glass (13-93) scaffolds fabricated by robotic deposition for structural bone repair. *Acta Biomater*. 2013 Feb 21. [Epub ahead of print]

97. **Bal BS**, Brenner LH. Care of the Professional Athlete: What Standard of Care? *Clin Orthop Relat Res*. 2013 Jul;471(7):2060-4.

98. **Bal BS**, Brenner L. The judgment defense in medical malpractice. *Clin Orthop Relat Res*. 2013 Nov;471(11):3405-3408.

99. Bal AK, **Bal BS**. Medicolegal Sidebar: State medical boards and physician disciplinary actions. *Clin Orthop Relat Res*. 2014 Jan;472(1):28-31.

100. Rahaman MN, **Bal BS**, Huang W. Review: Emerging developments in the use of bioactive glasses for treating infected prosthetic joints. *Mater Sci Eng C*. 2014;41:224-231.

101. **Bal BS**, Brenner LH. Physician competence and skill part I: the role of hospital corporate liability. *Clin Orthop Relat Res*. 2014 Apr;472(4):1089-95.

102. **Bal BS**, Brenner L. Medicolegal Sidebar: Physician competence and skill part II: Hospital corporate responsibility and new technologies. *Clin Orthop Relat Res*. 2014 May 8. [Epub ahead of print]

103. **Bal BS**. Clinical faceoff: anterior total hip versus mini-posterior: which one is better? *Clin Orthop Relat Res*. 2015 Apr;473(4):1192-6. Epub 2014 May 28.

104. Crist C, Ivie I, **Bal BS**. Total hip replacement with use of a direct anterior approach: a critical analysis review. *J Bone Joint Surg.* 2014;2(6):e4.

105. Liu Y, Fu S, Rahaman MN, Mao JJ, **Bal BS**. Native nucleus pulposus tissue matrix promotes notochordal differentiation of human induced pluripotent stem cells with potential for treating intervertebral disc degeneration. *J Biomed Mater Res A*. 2014 Jun 2. doi: 10.1002/jbm.a.35243. [Epub ahead of print]

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44. Jayabalan P, Tan AR, Rahaman MN, **Bal BS**, Sims HJ, Hung CT, Cook JL. "Bioactive glass (13-93) as a subchondral substrate for tissue-engineered osteochondral constructs." Orthopaedic Research Society, New Orleans, March 6-9, 2009

45. **Bal, BS**: "2010 Anterior approach total hip arthroplasty" for the round table discussion tip and tricks Q&A and "Learning the anterior approach my experience with technique (from 2–incision to anterior approach)" in Las Vegas, NV, October 22, 2010.

46. **Bal, BS**: "The anterior approach optimizes THA outcome" and "Ceramic-ceramic use in THA: comforts and caveats." 12th Annual Current Concepts in Joint Replacement Las Vegas, NV May 22 – 25, 2011.

47. **Bal BS**: "Anterior total hip replacement" 63rd Annual Meeting of The Association of Bone and Joint Surgeons in Dublin, Ireland, June 8-12, 2011.

48. **Bal BS**, Brenner LB: Symposium: "Contemporary medico-legal issues in orthopaedic surgery" in San Francisco, CA, February 6 - 10, 2012.

49. **Bal BS**: "Medico-legal issues in arthroplasty surgery," "Metal cones in TKR," "Fundamentals of revision TKA basic principles – case presentations and rapid fire discussions," "Bioactive glasses in skeletal reconstruction," "Infected TKR - case presentations and rapid fire discussions." 11th Anniversary of the Annual Advances in Arthritis, Arthroplasty and Trauma Course in St. Louis, MO, April 26-28, 2012.

50. **Bal BS**: "Current status of ceramic total hip bearings" and "Discussion panel: metal-on-metal total hips." 2012 Annual Missouri State Orthopaedic Association Meeting May 18 – 19, 2012.

51. **Bal BS** : "Ceramic Bearings in Total Hip Replacement", The 42nd Annual Advances in Arthroplasty Course, Harvard Medical School, Cambridge, MA, October 2–5, 2012.

52. **Bal BS**: 2013 Annual Meeting American Academy of Orthopaedic Surgeons, Instructional Course: "Contemporary medico-legal issues in orthpaedic surgery" in Chicago, IL, March 19-23, 2013.

53. **Bal BS**: 2013 Annual Meeting American Academy of Orthopaedic Surgeons, Symposium: "Medical-legal considerations in managing patients with musculoskeletal tumors" in Chicago, IL, March 19-23, 2013.

54. **Bal BS**: The Stevens Conference: The 2nd Conference on Bacteria – Material Interactions: "Silicon nitride – A unique antibacterial bioceramic" in Hoboken, NJ, June 6, 2013.

55. **Bal BS**: ISTA 26th Annual Congress: "Patient-specific implants and instruments improved outcomes of total knee replacement" in Palm Beach, Florida, October 18, 2013.

56. **Bal BS**: "A new generation of bioceramics: the case for silicon nitride." 2015 2nd Annual Pan Pacific Orthopaedic Congress, Big Island of Hawaii, July 22-25, 2015.

57. McEntire BJ, **Bal BS**, Rahaman MN, Pezzotti G. "The effect of accelerated aging on the material properties of ceramic femoral heads." ISTA 28th Annual Meeting, Vienna, Austria, September 30 - October 3, 2015.

58. Bock RM, McEntire BJ, **Bal BS**, Rahaman MN, Boffelli, M, Pezzotti G. "Surface modulation of silicon nitride ceramics for orthopaedic application." ISTA 28th Annual Meeting, Vienna, Austria, September 30 - October 3, 2015.

59. Pezzotti G, Puppulin L, Boffelli M, McEntire BJ, Rahaman MN, Yamamoto K, **Bal BS**. "The effect of ceramic femoral head material composition on polyethylene structure and oxidation in total hip bearings." ISTA 28th Annual Meeting, Vienna, Austria, September 30 - October 3, 2015.

60. **Bal BS**, McEntire BJ, Rahaman MN, Pezzotti G. "Debunking the myth that ceramics are bioinert: comparision of alumina versus silicon nitride." ISTA 28th Annual Meeting, Vienna, Austria, September 30 - October 3, 2015

61. McEntire BJ, Enomoto Y, Zhu W, Boffelli M, Marin E, **Bal BS**, Pezzotti G. "Differential effects of hydrothermal ageing on the surface fracture toughness of ceramics." 2016 Orthopaedic Research Society, Orlando, Florida, March 5-8, 2016.

62. McEntire BJ, Jones E, Ray D, Bock RM, **Bal BS**, Pezzotti G. "Differential bacterial expression on silicon nitride, PEEK, and titanium surfaces." 2016 Orthopaedic Research Society, Orlando, Florida, March 5-8, 2016.

SCIENTIFIC PRESENTATIONS (invited, not peer reviewed)

1. **Bal BS**. "Dorsal Capsulodesis of the Scaphoid for Scapholunate Dissociation." American Orthopaedic Association Residents' Conference, Kansas City, Missouri, 1991.

2. **Bal BS**. "Experience with Ceramic Knee Femur." Orthopedic Review Symposium, Vail Colorado, January 2002.

3. **Bal BS**. "Minimally Invasive Total Knee Technique & Results." Contemporary Topics in Orthopedics, Vail Colorado, January 2-3, 2003.

4. **Bal BS**. "Minimally Invasive Total Hip Replacement." Contemporary Topics in Orthopedics, Vail Colorado, January 2-3, 2003.

5. **Bal BS**. "Minimally Invasive Hip and Knee Replacement Surgery: Fact, Fiction, Reality and Myth. What the Patient Should Know." Columbia, MO, March 12, 2005.

6. **Bal BS**. "Ceramic Bearings in Prosthetic Hip and Knee Joints." University of Missouri-Rolla, Department of Materials Science and Engineering, December 1, 2005.

7. **Bal BS**. "Modified Two Incision Technique." 20th Annual Vail Orthopaedic Symposium, Total Hip & Knee Arthroplasty, Vail, Colorado, January 22-27, 2006.

8. **Bal BS**, Rahaman MN. "Tissue-Engineering of Cartilage on Bioactive Glass Scaffolds." 6th Annual Comparative Orthopaedics Day, Columbia, Missouri, April 14, 2006.

9. **Bal BS**, Aleto TJ. "Advances in Hip and Knee Replacement." Columbia Activity Recreation Center, September 15, 2006.

10. **Bal BS**. "The Outcomes of Two-Incision Total Hip Arthroplasty Performed Without Intraoperative Fluoroscopy." Minimally Invasive Surgery meets Computer Assisted Orthopaedic Surgical Technology (MIS meets CAOS) in Scottsdale, AZ, October 26-28, 2006.

11. **Bal BS**. "Subvastus Total Knee Arthroplasty Without Cement or Tourniquet." Minimally Invasive Surgery meets Computer Assisted Orthopaedic Surgical Technology (MIS meets CAOS) in Scottsdale, AZ. MIS-CAOS, October 26-28, 2006.

12. **Bal BS**. "Acetabular Reaming and Positioning." Anterior Approach Total Hip Arthroplasty, San Francisco, CA, March 1, 2013.

13. Tolias P, Marlow M, **Bal BS**, Phillips S. Panel Discussion: "How Can We More Quickly Bring New Materials-Based Infection-Control Strategies to Clinical Practice?" Matthew Libera, moderator. The Stevens Conference: The 2nd Conference on Bacteria – Material Interactions, Hoboken, NJ, June 6, 2013.

14. **Bal BS**: Panel Moderator: "Liability Exposure for New Orthopedic Technologies- All That Glitters May Not Be Gold!" 2014 Annual Meeting of Western Orthopaedic Association Scientific Program, The Fairmont Orchid, Big Island, HI, July 31-August 2, 2014.

15. **Bal BS**: Panel Moderator: "What a Difference a Year Makes." Ted Davis, moderator. 12th Annual Musculoskeletal New Ventures Conference, Memphis, TN, October 28-29, 2014.

16. **Bal BS,** Tarka M**:** "Design and Rationale of a Constrained Acetabular Component." MU Campus Fast Track 2015 Pitch Competition, April 13, 2015- May 8, 2015

17. **Bal BS**, Brenner LR. Symposium 4 – Medical Liability Update. 32nd Annual Southern Orthopaedic Association Annual Meeting, Asheville, NC, July 15-18, 2015.

18. **Bal BS**: "Why iTotal," "iTotal Cadaver Debrief" and "iTotal® Patient Indications & Selection." National Surgeon Training: iTotal CR, iTotal PS, and iUni G2 Knee Replacement Systems, Plano, TX, January 9, 2016.

19. **Bal BS**: "Clinical application of the silicon nitride for arthroplasty" 46th Annual Meeting of the Japanese Society for Replacement Arthroplasty. Congress Convention Center, Osaka, Japan, February 26-27, 2016.

ABSTRACTS/POSTERS (peer reviewed)

1. **Bal BS**, Cherry K, Edelstein D. "Prospective Randomized Study Comparing Ceramic/Ceramic and Ceramic/PE Bearing Surfaces in Total Hip Arthroplasty." The American Academy of Orthopaedic Surgeons 69th Annual Meeting in Dallas, Texas, February 2002.

2. Cook JL, Kuroki K, **Bal BS**. "Effects of Bipolar Radiofrequency Energy on Articular Cartilage Extracellular Matrix." Orthop Res Soc in Dallas, TX, February 10-14, 2002.

3. Kazmier P, Burd T, **Bal BS**. "Nonunion of the Greater Trochanter Following the Anterior Trochanteric Slide Osteotomy." The 35th Annual Residents Conference in Memphis, Tennessee, April 12-14, 2002.

4. Marberry KM, Cook JL, Kuroki K, Brawner T, Geiger T, Jayalaban P, Kenter K, **Bal BS**. "Effects of Radiofrequency Generated Heat on Human Degenerative Articular Cartilage." American Orthopaedic Association - 35th Annual Residents Conference in Memphis, TN, April 13-15, 2002.

5. Kazmier P, Burd T, **Bal BS. "**Nonunion of the Greater Trochanter Following the Anterior Trochanteric Slide Osteotomy." 12th Annual Meeting of the Mid-America Orthopaedic Association in Tucson, Arizona, April 24-28, 2002.

6. Marberry KM, Cook JL, Kuroki K, Kenter K, **Bal BS**. "In Vitro Assessment of Articular Cartilage Stiffness Following Treatment with Radiofrequency Generated Heat." 20th Annual Mid-America Orthopaedic Association Meeting in Tucson, AZ, April 25-28, 2002.

7. Kazmier P, **Bal BS**, Patil SK, Rahaman MN**.** "Microscopic Characterization of Alumina Bearing Surfaces in Total Hip Arthroplasty." The 49th Annual Meeting of the Orthopaedic Research Society in New Orleans, Louisiana, February 2-5, 2003.

8. Kazmier P, Gornowicz B, Crow B,Christensen G, **Bal BS**. "Bacterial Adhesion to Alumina Ceramic Versus Cobalt-Chrome Femoral Heads." The 49th Annual Meeting of the Orthopaedic Research Society, New Orleans, Louisiana, February 2-5, 2003.

9. Kuroki K, Ray A, Aust G, Cook JL, **Bal BS**, Ray B. "SAF-1 Regulates Matrix Metalloproteinase-1 in Osteoarthritis." Missouri Life Sciences Week in Columbia, MO, March 3-7,2003.

10. Roller BL, Cook JL, **Bal BS**, Stoker AM. "Correlation of Clinical Assessment of Meniscal Pathology to Biochemical and Molecular Analyses." University of Missouri Health Sciences Research Day in Columbia, MO, November 11, 2004.

11. Kumar D, Shakya A, Kuroki K, Cook JL, **Bal BS**, Ray A, Ray BK. "Induction of Matrix Metalloproteinases in Chondrocyte Cells of Osteoarthritic Cartilage is Mediated by Inflammation-Responsive Transcription Factors." The American Society For Biochemistry and Molecular Biology Meeting, 2004.

12. Hendricks KJ, Aleto TJ, **Bal BS**. "Early results of Modern Ceramic on Ceramic Total Hip Arthroplasty, A Prospective Randomized Study." 22nd Annual Mid-America Orthopaedic Association Meeting, 2004.

13. Roller BL, Cook JL, **Bal BS**, Stoker AM. "Correlation of Clinical Assessment of Meniscal Pathology to Biochemical and Molecular Analyses." 3rd Biology of the Meniscus Meeting in Washington, DC, February 23, 2005.

14. **Bal BS**, Kazmier P, Burd T, Aleto TJ. "Anterior Trochanteric Slide Osteotomy for Primary Total Hip Replacement. Review of Nonunion and Complications." American Academy of Orthopaedic Surgeons Annual Meeting in Washington, D.C. February 23-27, 2005.

15. **Bal BS**, Ray BK, Shakya A, Ray A. "Overexpression of MMP-14 in Human Osteoarthritic Joint Is Mediated by SAF-1." 52nd Annual Meeting of the Orthopaedic Research Society in Chicago, IL, March 19-22, 2006.

16. **Bal BS**, Evans R, Rahaman M, Ellingsen MD, Khanna, SK. "Comparison of Surface Characteristics and Prediction of Wear Properties between Alumina and Oxinium Femoral Heads." 52nd Annual Meeting of the Orthopaedic Research Society in Chicago, IL, March 19-22, 2006.

17. **Bal BS**, Rahaman M, Kuroki K, Cook JL. "In Vivo Comparison of Tissue Engineered Osteochondral Plugs Using Allograft Bone, Trabecular Metal and Bioactive Glass Substrates." Orthop Res Soc in San Diego, CA, February 11-14, 2007.

18. Roller BL, Stoker AM, Fox DB, **Bal BS**, Cook JL. "Characterization of Pathology of Knee Menisci: Correlation of Radiographic, Gross, Histologic, Biochemical and Molecular Measures of Disease." Orthop Res Soc in San Diego, CA, February 11-14, 2007.

19. **Bal BS**, Hillard A, Lowe J, Aleto TJ, Greenberg D. "Muscle Damage after Total Hip Arthroplasty with the Two-incision Technique." 24th Annual Mid-America Orthopaedic Association Meeting in Boca Raton, Florida, April 11-15, 2007.

20. **Bal BS**, Hughes M, Li S, Aleto TJ, Rahaman MN. "The Effect of Metal Staining on Alumina-Alumina Hip Simulation Wear." 24th Annual Mid-America Orthopaedic Association Meeting in Boca Raton, Florida, April 11-15, 2007.

21. **Bal BS**, Barrett MO, Greenberg DD, Lowe J, Aleto TJ. "Incidence of Heterotopic Ossification Following Primary Two-incision Total Hip Arthroplasty." 24th Annual Mid-America Orthopaedic Association Meeting in Boca Raton, Florida, April 11-15, 2007.

22. **Bal BS**, Aleto TJ, Lakshminarayanan RR, Khandkar A, Clarke I, Hoffman A. "The Wear of Silicon Nitride Ceramic Bearings in a Hip Simulator." 24th Annual Mid-America Orthopaedic Association Meeting in Boca Raton, Florida, April 11-15, 2007.

23. Rahaman MN, Li Y, Aleto TJ, **Bal BS**. "Alumina Ceramic Femoral Heads with a Metal Taper." 24th Annual Mid-America Orthopaedic Association Meeting in Boca Raton, Florida, April 11-15, 2007.

24. Cook JL, Lima EG, Ng KW, Kuroki K, Stoker AM, **Bal BS**, Ateshian GA, Hung CT. "Towards Biologic Osteochondral Resurfacing of the Canine Patella Using Tissue Engineered Anatomic Constructs." Orthop Res Soc in Las Vegas, NV, February 22-25, 2009.

25. Lima EG, Chao PH, Ateshian GA, Cook JL**, Bal BS**, Vunjak-Novakovic G, Hung CT. "Porous Tantalum Metal Outperforms Devitalized Bone as a Substrate for Osteochondral Tissue Engineering." Orthop Res Soc in Las Vegas, NV, February 22-25, 2009.

26. Tan AR, Barsi JM, Jayabalan P, Rahaman MN, **Bal BS**, Ateshian GA, Cook JL, Hung CT. "The Potential for 13-93 Bioglass as a Medium Supplement for Culturing Tissue Engineered Cartilage." 55th Annual Orthopaedic Research Society Conference in Las Vegas, NV, February 22 – 25, 2009.

27. Jayabalan P, Tan AR, Barsi JM, Rahaman MN, Ateshian GA, Hung CT, Cook JL, **Bal BS**. "In Vitro Optimization of Tissue Engineered Osteochondral Grafts." 9th Annual Comparative Orthopaedics Day in Columbia, MO, April 2009

28. Jayabalan P, Tan AR, Barsi JM, Rahaman MN, **Bal BS**, Ateshian AG, Hung CT, Cook JL. 'Bioactive Glass (13-93) as a Subchondral Substrate and Culture Media Supplement for Tissue Engineered Cartilage." International Cartilage Repair Society conference in Miami, Florida, May 2009.

29. Franklin SP, Hung C, Lima E, Ng K, Kuroki K, Stoker A, **Bal BS**, Ateshian G, Pfeiffer F, Cook JL. "Progression toward Biologic Joint Resurfacing in Dogs." Veterinary Orthopedic Society Conference in Breckenridge, CO, February 20-27, 2010.

30. Roller BL, Stoker AM, Marberry KM, White RA, **Bal BS**, Cook JL. "Characterization of Meniscal Pathology with Molecular and Proteomic Analyses." Orthop Res Soc in New Orleans, LA, March 6-9, 2010.

31. Roller BL, Stoker AM, Garner BC, **Bal BS**, Raghu DR, Cook JL. "Analysis of Synovial Fluid Biomarkers and Correlation with Radiography." Orthop Res Soc in New Orleans, LA, March 6-9, 2010.

32. Jayabalan P, Tan AR, Rahaman MN, **Bal BS**, Sims HJ, Hung CT, Cook JL. "Bioactive Glass (13-93) as a Subchondral Substrate for Tissue-engineered Osteochondral Constructs." Orthop Res Soc in New Orleans, LA, March 6-9, 2010.

33. **B.S. Bal,** Aleto TJ, Aggarwal A, Wegman B. "Primary Uncemented Total Knee Replacement with a Monoblock Tibial Component." American Academy of Orthopaedic Surgeons Annual Meeting in San Diego, CA, February 15-19, 2011.

34. **Bal BS**. "Informed Consent Law: How Much to Disclose?" 64th Annual Meeting of the Association of Bone and Joint Surgeons in Charleston, South Carolina, May 2–6, 2012.

35. Pfeiffer FM, **Bal BS**. "P51; Fabrication and Evaluation of Tissue Engineered Femoral Head Implants for Resurfacing of Osteoarthritic Joints." International Cartilage Repair Society conference in Montreal, Canada, May 12-15, 2012.

36. McEntire BJ, Lakshminarayanan A, **Bal BS**, Webster TJ. "An Overview of Silicon Nitride as a Novel Biomaterial." 2012 Innovations in Biomaterials Conference, American Ceramic Society in Raleigh, NC, September 11-13, 2012.

37. Franklin S, Pfeiffer FM, Cockrell M, Stoker A, **Bal BS**, Cook JL. "Effects of low temperature hydrogen peroxide gas plasma sterilization on in vitro cytotoxicity of poly-l-caprolactone (PCL)."

38. Ivie C, **Bal BS**. "Concerns and Limitations of Ceramic Total Hip Bearings." The Association of Bone and Joint Surgeons 65th Annual Meeting at Çirağan Palace Kempinski in Istanbul, Turkey, April 24-28, 2013.

39. Ivie C, Probst P, Bal A, Gallizzi M, Bal BS. "Patient-specific implants and instruments improved outcomes of total knee replacement." The Clinical Orthopaedic Society's 101st Annual Meeting in Niagara, NY, Sept. 19-21, 2013.

40. Rahaman MN, **Bal BS**, Huang T. "Porous titanium implants fabricated by a salt bath sintering process for bone repair applications." Materials Science & Technology 2013, Next Generation Biomaterials; Montreal, Quebec Canada, October 27-31, 2013.

41. **Bal BS,** Ivie C, Davis M, Crist B. "Patient-specific implants and instruments improved outcomes of total knee replacement." 2013;95B(34):86. Abstract published in Orthopaedic Proceedings, Dec. 31, 2013.

42. **Bal BS**, Liu X, Rahaman MN, Bi LX, Bonewald LF. "Strong porous bioactive glass implants for structural bone repair." 60th Annual Meeting of the Orthopaedic Research Society at the Hyatt Regency New Orleans, March 15-18, 2014.

43. **Bal BS**. "Silicon nitride bearings for total joint arthroplasty." 27th Annual Congress of the International Society for Technology in Arthroplasty (ISTA) to be held at the Hotel Okura in Kyoto Japan, September 24-27, 2014. *Lubricants*. 2016,4(4), 35.

44. **Bal BS**, McEntire BJ, Bock RM, Jones E, Rahaman M. "Surface modulation of silicon nitride ceramics for orthopaedic applications'. International Congress for Joint

Reconstruction -- Transatlantic Orthopaedic Congress, in New York, NY, Oct. 3-5, 2014. Winner of a 2014 Transatlantic Orthopaedic Congress Abstract Award.

45. Tarka M, **Bal BS**. "End of arm robotic tool design for automated cutting assistance during total hip arthroplasty." Health Sciences Research Day, University of Missouri School of Medicine, Columbia, MO, Nov. 16, 2014.

46. Cutler CS, Lattimer J, Kelsey J, Kuchuk M, O'Connor D, **Bal BS**, Katti KV. "Nano-radiosynovectomy for osteoarthritis treatment." 2015 Society of Nuclear Medicine and Molecular Imaging Annual Meeting, Baltimore, Maryland, June 6-10, 2015.

47. Peterson BE, Buchert G, Probst P, Aleto TJ, **Bal BS**, Crist BD. "The use of fluoroscopy in aiding acetabular cup position in direct anterior total hip arthroplasty." 2015 2nd Annual Pan Pacific Orthopaedic Congress, Big Island of Hawaii, July 22-25, 2015.

48. "Silicon nitride for orthopaedics – A bioactive and interactive non-oxide ceramic." 46th Annual Meeting of the Japanese Society for Replacement Arthroplasty, Osaka, Japan, February 26-27, 2016.

49. McEntire BJ, Zhu WL, Boffelli M, Marin E, Bal BS, Pezzotti G. "Effect of accelerated hydrothermal ageing on the surface fracture toughness of bioceramics." 46th Annual Meeting of the Japanese Society for Replacement Arthroplasty, Osaka, Japan, February 26-27, 2016.

50. Werner N, Stoker AM, Bozynski C, **Bal BS**, Cook JL. "Responses of osteoarthritic osteochondral tissue to cytokine stimulation *in vitro*." 2016 Orthopaedic Research Society, Orlando, Florida, March 5-8, 2016.

51. Werner N, Stoker AM, Stannard J, **Bal BS**, Cook JL. "Assessment of biomarker production by osteochondral tissue obtained from patients undergoing total knee arthroplasty." 2016 Orthopaedic Research Society, Orlando, Florida, March 5-8, 2016.

52. Werner N, Stoker AM, Pfeiffer F, Stannard J, Bozynski C, **Bal BS**, Cook JL. "Correlation of biomarker production of biomechanical, biochemical, and histological properties of osteoarthritic osteochondral tissue obtained from patients undergoing total knee replacement." 2016 Orthopaedic Research Society, Orlando, Florida, March 5-8, 2016.

53. Pezzotti G, Puppulin L, Boffelli M, McEntire BJ, Rahaman MN, Yamamoto K, **Bal BS**. "Do ceramic femoral heads contribute to polyethylene oxidation." 2016 Orthopaedic Research Society, Orlando, Florida, March 5-8, 2016.

54. Pezzotti G, Puppulin L, Boffelli M, McEntire BJ, Sugano N, **Bal BS**. "Metal ions contribute to the material instability of zirconia toughened alumina." 2016 Orthopaedic Research Society, Orlando, Florida, March 5-8, 2016.

55. Peterson BE, Buchert G, Probst P, Aleto TJ, **Bal BS**, Crist BD. "The use of fluoroscopy in aiding acetabular cup position in direct anterior total hip arthroplasty." 47th Annual Meeting Missouri State Orthopaedic Association, Kansas City, MO, April 1-2, 2016.

56. McEntire BJ, Enomoto Y, Zhu W, Boffelli M, Marin E, Bal BS, Pezzotti G. "Comparative evaluation of the surface fracture toughness of bioceramics." 68th Annual Meeting of The Association of Bone and Joint Surgeons, Auckland, New Zealand, April 5-9, 2016.

57. Pezzotti G, Puppulin L, Boffelli M, McEntire BJ, Rahaman MN, Yamamoto K, **Bal BS**. "The effect of ceramic femoral head material composition on polyethylene structure and oxidation in total hip bearings." Innovations in Biomedical Materials and Technologies, Rosemont Hyatt in Chicago, IL, July 29-31, 2016.

58. "In situ Monitoring of Porphyromonas Gingivalis on Chemistry-Modulated Silicon Nitride Bioceramics." Innovations in Biomedical Materials and Technologies, Rosemont Hyatt in Chicago, IL, July 29-31, 2016.

59. "Enhanced Osteoconductivity on Surface-Modulated Silicon Nitride Bioceramics Monitored by in situ Raman Spectroscopy." Innovations in Biomedical Materials and Technologies, Rosemont Hyatt in Chicago, IL, July 29-31, 2016.

60. "Engineering Bacteriostatic Behavior into Implantable Medical Devices." Innovations in Biomedical Materials and Technologies, Rosemont Hyatt in Chicago, IL, July 29-31, 2016.

61. Pezzotti G, McEntire BJ, Bock R, Zhu W, Vitale E, Puppilin L, Adachi T, Yamamoto T, Kanamura N, **Bal BS**. "Enhanced Osteoblast Proliferation and Hydroxyapatite Formation on Silicon Nitride." The 28th Symposium and Annual Meeting of the International Society for Ceramics in Medicine, Charlotte, NC, Oct. 18-21, 2016.

62. Zhu W, Pezzotti G, McEntire BJ, Zanocco M, Marin E, Sugano N, **Bal BS**. "Transition Metal Ions Accelerate the Polymorphic Phase Transformation in Zirconia-Toughened Alumina." The 28th Symposium and Annual Meeting of the International Society for Ceramics in Medicine, Charlotte, NC, Oct. 18-21, 2016.

63. Bal BS, Bock R, Rondinella A, Marin E, Zhu W, Adachi T, McEntire BM, Pezzotti G. "Osteoinductive Properties of Silicon Nitride, Alumina, and Titanium." Orthopaedic Research Society 2017 Annual Meeting at the San Diego Convention Center in San Diego, California, March 19-22, 2017.

64. **Bal BS**, McEntire BM, Pezzotti G, Oba N, Marin E, Rondinella A, Boschetto, Zhu W, Yamamoto K. "Investigation of the Osteointegration Characteristics of a Silicon Nitride Intervertebral Spinal Spacer: A Retrieval Study." 7th International Conference Advances in Orthopaedic Osseointegration, San Diego, CA, March 12-13, 2017.

65. **Bal BS**, Zhu W, McEntire BM, Pezzotti G. "Metal staining leads to instability of zirconia alumina femoral heads." AAOS 2017 Annual Meeting, San Diego, CA, March 14-18, 2017.

66. McEntire B, **Bal BS**, Ishikawa M, Bentley KL, Schwarz EM, Xie C. "Effect of Surface Topography on the bacteriostatic and osseointegration behavior of silicon nitride." Australian Spine Society, Adelaide, Australia, April 28, 2018

67. Assad M, McEntire B, Iacampo S, Trudel Y, **Bal BS**. Osseointegration and Biocompatibility Evaluation of Silicon Nitride Composite Using Ovine Distal Femoral Epiphyseal Insertion and Rabbit Paravertebral Muscle Implantation Models. Orthopaedic Research Society Annual Meeting, Feb 2-5 2019, Austin Texas

INVITED MODERATOR, KEYNOTE SPEAKER

Moderator. "Alternative Bearings and Minimally Invasive Surgery Techniques" at the University of Pennsylvania for The 7th Annual Symposium on Alternative Bearing Surfaces in Total Joint Replacement, Philadelphia, PA, October 14-15, 2004.

"Advances in Arthroplasty, an Emphasis on Treatment Options for the Young/Active Patient." Harvard University, Cambridge, MA, October 3-7, 2006.

Meeting Co-Chairman and Presenter. "Minimally Invasive Total Hip Surgery." Minimally Invasive Surgery meets Computer Assisted Orthopaedic Surgical Technology (MIS meets CAOS) in Scottsdale, AZ, October 26-28, 2006.

"MIS Total Joint Arthroplasty and other Factors Effecting Recovery." American Association of Hip & Knee Surgeons Meeting in Dallas, TX, November 3-5, 2006.

Keynote Speaker. "Hard-on-hard Bearings in THA." Moderator: "Mini-Smith Peterson and Head Damage: Hard on Hard." Hip and Knee Arthroplasty Continuing Education Course at Harvard University in Cambridge, MA, September 25-27, 2007.

Moderator. "Soft Tissue and Tachnology." Tissue Engineering of Articular Cartilage. Musculoskeletal Transplant Foundation in Vancouver, British Columbia, October 11-13, 2007.

Meeting Chairmen and Presenter. "Anterior Total Hip Arthroplasty Mini-Symposium." American Association of Hip & Knee Surgeons, November 2, 2007.

Orthopaedic Research Society in Las Vegas, NV, Feb 2009.

Regional Life Sciences Summit in Kansas City, MO, March 9, 2010.

The Anterior Approach Total Hip Arthroplasty Lab in Henderson, NV, October 21-22, 2010.

The Anterior Approach THA Cadaver Lab in Houston, TX, January 13-14, 2011.

Anterior Approach Total Hip Arthroplasty. "Anatomic Consideration and Patient Selection for the Anterior Approach" and "Learning the Anterior Approach – My Experience with the Technique (From 2-Incision to Anterior Approach)." Las Vegas, NV April 8, 2011.

"Filling the Gaps: Bone Deficiency and Treatment Options." Missouri Musculoskeletal Conference in Kansas City, MO, July 28, 2011.

Moderator and speaker for the 11th Anniversary of the Annual Advances in Arthritis, Arthroplasty and Trauma Course in St. Louis, Missouri, April 26-28, 2012.

"Custom Implants in Joint Replacement." Meeting of the Morgan-Stanley Investment Banking Group, Boston, MA, March 28, 2013.

"Closed Medical Negligence Claims Can Drive and Reduce Litigation." The 4th Annual Pegalis and Erickson Lectureship, New York, New York, April 9, 2013.

"Reducing Liability Risk and Improving Quality: Role of the Orthopaedic Executive." 2013 Annual American Association of Orthopaedic Executives, San Diego, CA, April 28-30, 2013.

Faculty Panel Presenter. "Perioperative Management THA. AAOS/AAHKS Challenges and Controversies in Total Joint Arthroplasty, Rosemont, IL. May 3, 2013.

Lab Faculty. "Primary THA (Direct THA/Mini Posterior)." AAOS/AAHKS Challenges and Controversies in Total Joint Arthroplasty, Rosemont, IL. May 3, 2013.

Lab Faculty. "Revision THA (Trochanteric Osteotomy, Augment, Cage)." AAOS/AAHKS Challenges and Controversies in Total Joint Arthroplasty, Rosemont, IL. May 3, 2013.

Lab Faculty. "Primary TKA." AAOS/AAHKS Challenges and Controversies in Total Joint Arthroplasty, Rosemont, IL. May 4, 2013.

Lab Faculty. "Revision TKA." AAOS/AAHKS Challenges and Controversies in Total Joint Arthroplasty, Rosemont, IL. May 4, 2013.

Informed Consent and Risk Awareness in the Operating room Environment given to the Operating Room staff on October 2, 2013.

Moderator: "Contemporary Medico-Legal Issues in Orthopaedic Surgery." 2014 AAOS Annual Meeting, in New Orleans, Louisiana, March 11-15, 2014.

Invited Faculty: "Integrating the Anterior Approach Into Practice: minimizing your learning curve." "History and Role of the Old and New Technology." Short Stems do we need them?" "Most Total Knees Have Same Geometry on Both Sides." "Smart Trials – Unnecessary?" State-of-the-Art Solutions in the Hip and Knee Reconstruction, in Chicago, IL, June 27-28, 2014.

Invited speaker: Avoidable complications in knee surgery that invite litigation; Resident liability in medical negligence claims; Joint medical and legal complications of total hip arthroplasty. 16th Annual Multispecialty Conference- Medical Negligence and Risk Management in Medicine, Surgery, Emergency Medicine, Radiology, and Family Medicine, in the Bahamans, January 5-8, 2016.

Moderator: "Panel Discussion: Collaborating with FDA to Ensure Medtech Approval." 7th Annual Life Science Chief Executive Officer Forum, in Atlanta, GA, January 25-26, 2016.

Invited Scholar: "Silicon nitride for orthopaedics – A bioactive and interactive non-oxide ceramic." Kyoto Institute for Technology Mini-Symposium, Sakyo-ku, Kyoto, Japan, February 22, 2016.

Invited speaker: "Bioactive silicon nitride: A new therapeutic material for osteoarthropathy." Texas A&M College of Dentistry "Pathways to Excellence" seminar on March 8, 2017.

MAJOR LECTURES AND VISITING PROFESSORSHIPS

Visiting Professor; University of Oklahoma, Dept. of Orthopaedic Surgery, September 29, 2017

Neumann Visiting Professorship; University of Rochester, Center for Musculoskeletal Research, New York, August 1-2, 2017

Visiting Professor: Collaborative research in silicon nitride ceramics. Kyoto Institute of Technology, Osaka, Japan. July 20-26, 2015.

Visiting Professor: Liability, Standards, and the Future of Medical Malpractice. University of South Alabama, Mobile, AL. August 8, 2014.

Visiting Professor: Legal Liability during Residency Training. University of Southern California, Los Angeles, CA. June 8, 2012.

Visiting Professor: Anterior Total Hip Replacement –Affirmative. Louisiana State University, Shreveport, LA. September 23, 2011.

Visiting Professor: Medical Liability of Physicians in Training. Louisiana State University, Shreveport, LA. September 22, 2011.

RESEARCH GRANT APPLICATIONS

Principal Investigator:

Arthritis Foundation: "Comparison of tissue-engineered osteochondral grafts fabricated with mesenchymal stem cells and trabecular metal or allograft bone." $199,997.00. 6/1/2005 to 5/31/2007.

Pfizer Inc.: "Comparison of tissue-engineered osteochondral grafts fabricated with mesenchymal stem cells and trabecular metal or allograft bone." $199,999.00. 7/1/2005 to 7/1/2007.

Musculoskeletal Transplant Foundation: "Comparison of tissue-engineered osteochondral grafts fabricated with mesenchymal stem cells and trabecular metal or allograft bone." $100,000.00. 7/1/2005 to 6/30/2007. (Awarded)

Aircast Foundation: "Development of osteoarthritis in transgenic mice with increased SAF-1 expression in articular cartilage." $99,998.00. 8/1/2005 to 7/31/2007.

National Health Institute: "Development of osteoarthritis in transgenic mice with increased SAF-1 expression in articular cartilage." $404,248.00. 10/1/2005 to 9/30/2007.

Zimmer Holdings, Inc.: "Comparison of tissue-engineered osteochondral grafts fabricated with mesenchymal stem cells and trabecular metal or allograft bone." $125,406.00. 5/25/2006 to 5/24/2007 (Awarded)

Orthopaedic Research and Education Foundation: "Comparison of tissue-engineered patellar osteochondral grafts fabricated from mesenchymal stem cells and bioactive glass or trabecular tantalum metal." $150,625.00. 7/1/2007 to 6/30/2010.

National Institute of Health: "Novel freeze-cast bioactive glass scaffolds for bone repair." $108,472.00. 1/1/2009 to 12/31/2010. (Awarded)

Missouri Life Science Research Board: "Missouri consortium for biomaterials research and commercialization." $292,287.00. 1/1/2009 to 12/31/2011.

Missouri Life Science Research Board: "Tissue engineered resurfacing of the hip joint." $198,459.00. 1/1/2009 to 12/31/2011.

Missouri Life Science Research Board: "Research on freeform fabrication of objects with graded bio-materials." $105,283.00. 1/1/2009 to 12/31/2011.

Orthopaedic Research and Education Foundation: "Bioactive glass scaffolds for bone repair." $131,328.00. 7/1/2009 to 6/30/2012.

Department of Health and Human Services: "Novel freeze-cast bioactive glass scaffolds." $108,482.00. 8/19/09 to 7/31/12.

National Institute of Health: "Functional tissue-engineered osteochondral composite constructs." $254,701.00. 10/15/2009 to 10/14/2011.

Missouri Life Science Research Board: "Research of freeform fabrication of objects." $105,284.00. 1/1/2010 to 12/31/2012.

Missouri Life Science Research Board: "Missouri consortium for biomaterials research and commercialization." $400,001.00. 1/1/2010 to 12/31/2012.

Missouri Life Science Research Board: "Ceramic-metal composite femoral head for total hip arthroplasty." $125,826.00. 2/1/2010 to 1/31/2012.

Missouri Life Science Research Board: "Development of a hybrid metal-bioactive glass material for skeletal repair." $123,955.00. 1/1/2011 to 12/31/2012.

National Institute of Health: "Bioengineering research partnership: bioactive glass in regenerative medicine." $719,725.00. 8/1/2011 to 7/31/2016.

Orthopedic Research Society: "Faculty career development through the orthopaedic research society's collaborative exchange award." $7,501.00. 10/1/2011 to 9/30/2012.

Musculoskeletal Transplant Foundation: "Fabrication and testing of a canine biological femoral head arthroplasty." $301.106.00. 1/1/2012 to 12/31/2014.

National Institute of Health: "Bioactive glass in osteochondral tissue engineering." $138,969.00. 1/1/2012 to 12/31/2013.

Musculoskeletal Transplant Foundation: "Bioactive glass in skeletal regeneration." $0.00. 1/1/2012 to 12/31/2014.

National Institute of Health: "Bioactive glass in regenerative medicine." $114,638.00. 5/1/2012 to 4/30/2017.

Orthopaedic Research and Education Foundation: "Fabrication and testing of a canine biological femoral head arthroplasty." $223,932.00. 7/1/2012 to 6/30/2015.

Department of Defense: "Bicompatible device for repairing segmental bone defects." $292,335.00. 7/1/2012 to 6/30/2014.

Consultant for a NIH SBIR research project "Silorane based bone cements" proposal by Nanova and UMKC. Grant pending.

Career Development Grant, Orthopaedic Research and Education Foundation: "Fabrication and testing of a biological femoral head arthroplasty." $224,995. 7/1/2014 to 6/30/2017.

University of Missouri Interdisciplinary Intercampus Research Program (IDIC): Healing Chronic Bone Infection Using Bioactive Glass. $145,000. 8/1/2014 to 7/31/2015. (Awarded)

Bal BS, Rahaman M, Tarka M. Constrained Ball-and-Socket Design for Total Hip Replacement University of Missouri FastTrack Initiative. 7/1/2015-6/30/2016; $50,000. (Awarded)

Bal BS, Rahaman M. Constrained Ball-and-Socket Design for Total Hip Replacement, Coulter Foundation Development Grant. 7/1/2017-6/30/2018; $100,000. (Awarded)

Co-Investigator:

National Science Foundation: "MRSEC interactions & transformation at membrance interfaces." $22,774,108.00. 9/1/2005 to 8/30/2011.

Musculoskeletal Transplant Foundation: "Characterization of pathology of the knee menisci for optimizing diagnosis and treatment of meniscal disorders." $56,252.00. 1/1/2007 to 12/31/2007.

Orthopaedic Research and Education Foundation: "Characterization of pathology of the knee menisci for optimizing diagnosis and treatment of meniscal disorders." 7/1/2007 to 6/30/2008.

Arthritis Foundation: "Analysis of regional chondrocyte metabolism in canine and human OA patients." $200,000.00. 7/1/2007 to 6/30/2009.

National Institute of Health: "Synovial fluid molecules pertaining to toll-like receptors as biomarkers of osteoarthritis followed by acute knee injury." $ 789,738.00. 10/1/2009 to 9/30/2011.

National Football League: "Characterization of pathology of the knee menisci for optimizing diagnosis and treatment of meniscal disorders." $119,252.00. 1/1/2010 to 6/30/2012.

Arthritis Foundation: "Synovial fluid derived biomarkers in osteoarthritis." $74,800.00. 6/1/2011 to 5/31/2012.

National Institutes of Health: "Center of research translation." $7,233,877.00. 7/1/2012 to 6/30/2017.

Coulter Foundation: "Nano-radiosynovectomy for osteoarthritis treatment" $41,976.00. 09/01/2012 to 08/31/2013.

Nutramax Lab, Inc. "Clinical pilot study assessing the structure/function efficacy in a knee OA patient cohort following consumption of a novel nutraceutical blend containing glucosamine, chondroitin sulfate, avocado/soybean unsaponifiables (ASU) and AKBA." $100,980 ($80,143 direct; $20,837 indirect). 1/1/2014 to 12/1/2016.

National Institutes of Health: "Structural bone repair using strong porous bioactive scaffolds with enhanced osteogenic capacity. $92,034. 9/21/2014 to 8/31/2017. *Submitted.*

Key Personnel on Grants:

AO Research Fund: "Characterizing knee menisci pathology for optimal diagnosis and treatment of meniscal disorders." $51,380.00. 8/1/2009 to 7/31/2009.

National Institute of Health: "Creation of new musculoskeletal engineering faculty position." $1,365,092.00. 10/1/2009 to 9/30/2011.

National Institute of Health: "Characterization of pathology of the knee menisci for optimizing diagnosis and treatment of meniscal disorders." $227,250.00. 4/1/2010 to 3/31/2013.

National Institute of Health: "Fabrication and testing of a canine biological femoral head arthroplasty." $218,495.00. 7/1/2012 to 6/30/2015.

ONLINE PUBLICATIONS:

1. **Bal BS**. Lateral Compartment Arthritis. eMedicine 2002; Section 1-11.

2. **Bal, BS**. Minimally Invasive Hip Replacement. eMedicine Consumer Health Journal [serial online], 2004.

3. **Bal, BS**. Minimally Invasive Knee Replacement. eMedicine Consumer Health Journal [serial online], 2004.

4. Cripps M, **Bal BS**, Yin L, and Calhoun J. Adult post-traumatic osteomyelitis. *UpToDate*; 2004.

5. Du Y, Simmons D, **Bal BS,** Yin L, and Calhoun J. Pathogenesis of osteomyelitis. UpToDate; 2004.

6. Shirtliff M, Cripps M, **Bal BS,** Yin L, and Calhoun J. Cierney-Mader staging and the treatment of long bone osteomyelitis. UpToDate; 2004.

7. Shirtliff M, Cripps M, **Bal BS**, Yin L, and Calhoun J. Staging systems for long bone osteomyelitis. *UpToDate*; 2004.

8. Calhoun JH, Yin L, and **Bal BS**. Clinical Features and Microbiology of Osteomyelitis. UpToDate, 2004.

9. **Bal BS.** Hip Resurfacing. eMedicine online May 4, 2012.

10. **Bal BS**, Vallurupalli S: Ceramic Bearings in Total Joint Arthroplasty. MedScape, Jan. 24, 2012. Available at: http://emedicine.medscape.com/article/1358242-overview

11. **Bal BS**, Ivie CB. Surgical Treatment of Lateral Compartment Arthritis. Medscape Reference. Updated August 15, 2013. Available at: http://emedicine.medscape.com/article/1251668-overview.

12. **Bal BS**, Brenner LB. Essential Legal Knowledge for the Orthopaedic Surgeon. Business, Policy, and Practice Management in Orthopaedics Lecture Series.

BOOKS

1. *The Direct Anterior Approach to Hip Reconstruction*. B. Sonny Bal, Lee E. Rubin, Kristaps I. Keggi. SLACK Incorporated, Thorofare, New Jersey. 2016
2. *Non-Oxide Bioceramics*. B. Sonny Bal, Bryan McEntire, Giuseppe Pezzotti –in preparation, completion 2020
3. *Legal Reasoning and Clinical Decision-Making*. B. Sonny Bal, Lawrence Brenner – in preparation, completion 2019

INVITED BOOK CHAPTERS

1. Jasty M, Bragdon C, **Bal BS**, Harris WH. Acetabular modularity. In: Galante JO, Rosenberg AG, Callaghan JJ (eds.), *Total hip revision surgery*, Bristol-Myers-Squibb/Zimmer Orthopaedic Symposium Series, Raven Press, New York, NY, Ch. 6:73-80, 1995.

2. **Bal BS**, Rahaman MN, Fu Q, Khanna S, Tinunagari P, Ellingsen MD. Nanoceramics and ceramic nanocomposites in prosthetic hip and knee joints. In: Tseng T-Y, Nalwa HS (eds.), *Handbook of nanoceramics and their based nanodevices*, Vol. 5. Valencia, Calif: American Scientific Publishers; 2009: 187-202.

2. **Bal BS**. Femoral Component Removal. In: Hozack WJ (ed.), *Surgical treatment of hip, arthritis: reconstruction, replacement, revision*. Philadelphia, Pa: Elsevier; 2010: 296-303.

3. **Bal BS**, Lowe JA, Hillard AE. Muscle damage in minimally invasive total hip arthroplasty: MRI evidence that it is not significant. Editor Paul J. Duwelius, MD. *AAOS*

Instructional Course Lectures 2008;57.

4. **Bal BS**, Matta J. Minimally invasive total hip arthroplasty with the anterior surgical approach. In: Scuderi GR, Tria AJ (eds.), *Minimally invasive surgery in orthopedics*. New York: Springer; 2009:163-4.

5. Rahaman MN, **Bal BS**. New ceramics and composites for joint replacement surgery. In: Lysaght M, Webster T (eds). *Biomaterials for artificial organs*. Cambridge, UK: Woodhead Publishing; 2010:185-206.

6. **Bal BS**, Rahaman MN. The rationale for silicon nitride bearings in orthopaedic applications. In: Sikalidis C (ed.), *Advances in ceramics - electric and magnetic ceramics, bioceramics, ceramics and environment*. Rijeka, Croatia: Intech; 2011;421-432.

7. **Bal BS.** Revision total knee arthroplasty with femoral bone loss: Distal femoral replacement. In: *Operative techniques in orthopaedic surgery*, edited by Dr. Sam W. Wiesel, Lippincott Williams & Wilkins publishers, Philadephia, PA. 2010; Chapter 23 in part 3 Adult Reconstruction.

8. Forward contributor for *Applying MBA knowledge and skills to healthcare*. Nassab R, Rajaratnam V, Loh M, authors. London, UK. Radcliffe Publishing Ltd., 2011.

9. Liu Y, Rahaman MN, **Bal BS**. Nano-bioceramics as coatings for orthopedic implants and scaffolds for bone regeneration. In: *Tissue regeneration: Where nano structure meets biology*. World Scientific Publishing Co. Pte. Ltd, North Brunswick, NJ. 2014; Chapter 8.

10. Morris CD, **Bal BS**, D'Elia EM, Benevenia J. Medical and legal considerations in managing patients with musculoskeletal tumors. *Instr Course Lect. 2014;63:421-30.*

11. **Bal BS**, Brenner LH. The Team Physician and Care of the Professional Athlete. *The Athlete's Hand and Wrist: A Master Skills Publication* Textbook publication of the American Society for Surgery of the Hand. Editors Michelle G. Carlson, MD and Charles A. Goldfarb, MD. 2014; 3-6.

12. Cook JL, **Bal BS**. Chapter 11: The clinical biomedical research advances achievable utilizing one health principles. *Confronting Emerging Zoonoses: The One Health Paradigm*. Textbook publication Springer. Editors Akio Yamada, Laura H. Kahn, Bruce Kaplan, Thomas P. Monath, Jack Woodall, Lisa Conti. 2014:233-9.

13. **Bal BS**, Rubin LE, Keggi K. *Direct Anterior Approach to Hip Reconstruction.* Textbook publication Slack Incorporated: Thorofare, NJ. 2016.

14. Pezzotti G, McEntire BM, Zhu W, **Bal BS**. Chapter 12: The scientific rationale for using silicon nitride in biomedical implants. *Biomedical Nanomaterials: From Design To Implementation*. Textbook publication The Institution of Engineering and Technology. Editors Dr Thomas J Webster and Dr Hilal Yazici (eds.). In press.

AUDIO PUBLICATIONS

1. **Bal, BS**. My 50 First Cases – Minimally Invasive Surgery: A Beginner's Guide to MIS for Total Hips. Audio-Digest Orthopaedics, Volume 28, Issue 03, March 28, 2005, ISSN 0271-132X.

2. **Bal, BS.** Advances in Total Hip Arthroplasty. Audio-Digest Orthopaedics, Volume 31 Issue 01, January 28, 2008, ISSN 0271-132X. Keynote address: Hard on Hard Bearings: An Overview. A Audio-Digest CME/CE program.

INVITED PUBLICATIONS (not peer reviewed)

1. Mahowald ML, **Bal BS**, Burkman RT, Jones KW, Killilea T, Guay DRP, Scherger JE (eds): The Role of Nonprescription Analgesics in Treating Mild to Moderate Pain: Clinical and Economic Considerations. A CME/CPE activity sponsored by the University of Minnesota, 2000.

2. **Bal BS**. Orthopaedic Resident Education in Academic Practice. *AAOS Academy Bulletin* 2004.

3. **Bal BS.** Orthopaedic educators vital to specialty's future. *AAOS Academy Bulletin*, June 2004.

4. **Bal BS**, Adams M. Ancillary services can attract physician educators. *AAOS Academy Bulletin*, 53(1):12-13, February 2005.

5. **Bal BS**. Risk Management Spotlight: Dealing with an Adverse Outcome – The Role of Documentation. *AAOS Orthopaedic Medical Legal Advisor*, Winter 2005.

6. Brenner LH, **Bal BS**. Establishing Medical Negligence Beyond the Standard of Care. *Orthopaedic Legal Medical Advisor* 2006;1(1):1-3.

7. Brenner LH, **Bal BS**. Department of Justice kickback settlement: How will it affect you? *Orthopedics Today* 2007; 27:46.

8. **Bal BS**, Brenner LH. Always ensure fair market value in transactions with the orthopedic industry. *Orthopedics Today* 2007; 27:34.

9. Brenner LH, **Bal BS**. Adverse outcome vs. "expected complication": Which is which? *Orthopedics Today* 2008; 28:28.

10. Brenner LH, **Bal BS**. Deferred prosecution agreement: Can it improve surgeon-patient communication? *Orthopedics Today* 2008; 28:34.

11. Brenner LH, **Bal BS**. Medical liability and loss-of-chance doctrine: Is failure to diagnose negligence? *Orthopedics Today* 2008; 28:64.

12. Brenner LH, **Bal BS**. Surgeon characteristics and medical malpractice: Are orthopedists at risk? *Orthopedics Today* 2008; 28:40.

13. **Bal BS**. Criminal vs. civil liability: What is the difference? *Orthopedics Today* 2008; 28:40.

14. **Bal BS**, Brenner L, Johanson NA. Never events: Future threat to physicians. *Orthopedics Today*. 2009 January.

15. **Bal BS**, Brenner L. Prosecutorial power of the federal government: The imbalance of the DOJ. *Orthopedics Today*. 2009 February.

16. **Bal BS**, Brenner L. Surgeons should know the legal liability of consenting to patient-demanded treatment. *Orthopedics Today*. 2009 March:29(3):24.

17. **Bal BS**. Peer oversight of expert testimony. *AAOS Now*. 2009 March:3(3):30.

18. **Bal BS**, Brenner L. Orthopedic malpractice: Cases in the news. *Orthopedics Today*. 2009 April:29(4):31.

19. **Bal BS**, Brenner L. The art of happiness: Communication and empowerment can keep patients content. *Orthopedics Today*. 2009 May.

20. **Bal BS**, Brenner L. Patient care vs. economics: How liable are physicians and facilities in this environment. *Orthopedics Today*. 2009 June.

21. **Bal BS**, Brenner L. Case report: Medicare fraud and abuse can open the door for other charges. *Orthopedics Today*. 2009 July.

22. **Bal BS**, Brenner L. Physician giving expert testimony are regulated by law, professional associations. *Orthopedics Today*. 2009 Aug:29(8):26.

23. **Bal BS**, Brenner L. Causation in medical liability: Determining who is at fault. *Orthopedics Today*. 2009 Sept:29(9):26.

24. **Bal BS**, Brenner L. Physician-patient relationships may blur during independent medical examinations. *Orthopedics Today*. 2009 October.

25. **Bal BS**, Brenner L. Orthopedic Surgeons should take a judicial view of their scope of practice. *Orthopedics Today*. 2009 November 29(11):31.

26. **Bal BS**, Brenner L. Rethinking informed consent: Tell your patients of all the treatment choices available to them. *Orthopedics Today*. 2009 December.

27. **Bal BS**, Brenner L. Medical negligence and breach of duty claims can be separated by the courts. *Orthopedics Today*. 2010 January.

28. **Bal BS**, Brenner L. Physician-patient arbitration agreements: Make sure they are understood by all. *Orthopedics Today*. 2010 March.

29. **Bal BS**, Brenner L. Beware of new trends in professional negligence litigation. *Orthopedics Today*. 2010 April.

30. **Bal BS**, Brenner L. Summary judgment in medical malpractice: The case of Hoard v. Roper Hospital. *Orthopedics Today*. 2010 June.

31. **Bal BS**, Brenner L. Doctor vs. device manufacturer: A case study in what not to do. *Orthopedics Today*. 2010 July.

32. **Bal BS**, Brenner L. Document to manage complications and avoid litigation. *Orthopedics Today*. 2010 August.

33. **Bal BS**, Brenner L. The time has come for health care criminal law reform. *Orthopedics Today*. 2010 November.

34. **Bal BS**, Brenner L. Professional duty created by patient consultations: Know for whom and when you are responsible. *Orthopedics Today*. 2010 December.

35. **Bal BS**, Brenner L. Avoiding orthopedic medical negligence claims: A plaintiff's attorney's perspective. *Orthopedics Today*. 2011 January.

36. **Bal BS**, Brenner L. Health care provider liability related to defective products. *Orthopedics Today*. 2011 February.

37. **Bal BS**, Brenner L. Maryland affirms physician self-referral prohibition. *Orthopedics Today*. 2011 May.

38. **Bal BS**, Brenner L. Conflicting perspectives arise in the search for justice. *Orthopedics Today*. 2011 June.

39. **Bal BS**. The exercise of court jurisdiction in the Internet age. *Orthopedics Today*. 2011 August.

40. **Bal BS**, Brenner L. Pushing drugs: Pharmaceutical industry and physician relationships explored. *Orthopedics Today*. 2011 November.

41. **Bal BS**, Brenner L. Pharmaceutical industry and physician relationships explored: Part 2. *Orthopedics Today*. 2011 December.

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43. **Bal BS**, Brenner L. Informed consent: What you need to know. *Orthopedics Today*. 2012 February.

44. **Bal BS**, Brenner L. Proper understanding and preparation are essential to effective deposition skills. *Orthopedics Today*. 2012 March.

45. **Bal BS**, Brenner L. A guide to understanding the elements of the standard of care. *Orthopedics Today*. 2012 April.

46. **Bal BS**. FDA Regulatory Status and Informed Consent. *AAOS Now*. 2012 May.

47. **Bal BS**, Brenner L. Supreme Court's decision will impact health care law. *Orthopedics Today*. 2012 May.

48. **Bal BS**, Brenner L. Risk management: Arguments for surgical complications explained. *Orthopedics Today*. 2012 June.

49. **Bal BS**, Brenner L. Supreme Court jurisprudence and the health care law explained. *Orthopedics Today*. 2012 July.

50. **Bal BS**. Exploring the implications of health care reform. *Orthopedics Today*. 2012 August.

51. **Bal BS**. A Wake-up Call on the Hazards of Regulatory Mandates in Orthopaedic Surgery: Commentary on an article by Zhong Wang, PhD, MPH, et al.: Compliance with Surgical Care Improvement Project Measures and Hospital-Associated Infections Following Hip Arthroplasty. *J Bone Joint Surg*. 2012 Aug 1;94(15):e1161-2.

52. **Bal BS**, Brenner L. Courts debate damage caps and their collateral effects. *Orthopedics Today*. 2012 September.

53. **Bal BS**, Brenner L. Regulation or innovation: United States v Regenerative Sciences. *Orthopedics Today*. 2012 October.

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55. **Bal BS**, Brenner L. The questions of off-label drug promotion vs free speech. *Orthopedics Today*. 2013 January.

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59. **Bal BS**, Bourne MH, Bradley GW, Carter AT, Crist B, Kregor P, Martin G. Surgeons discuss advantages, downsides of direct anterior total hip arthroplasty. *Orthopedics Today*. 2013 May.

60. **Bal BS**, Brenner L. Physician payments sunshine sct: A highlight of frequently. *Orthopedics Today*. 2013 May.

61. **Bal BS**, Brenner L. Custodial right of the criminally accused: Miranda v Arizona. *Orthopedics Today*. 2013 June.

62. **Bal BS**, Brenner L. "Physician duty to report danger: the case of Tatiana Tarasoff." *Orthopedics Today*. 2013 July.

63. **Bal BS**, Brenner L. "The impact of the US Supreme Court ruling on employment law." *Orthopedics Today*. 2013 August.

64. **Bal BS**, Brenner L. "Employing a mid-level provider differs from entering a collaborative agreement." *Orthopedics Today*. 2013 September.

65. **Bal BS**, Brenner L. "Mitigate the risk of excess judgment in malpractice litigation." *Orthopedics Today*. 2013 October.

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68. **Bal BS**, Brenner L. "Understanding non-compete employment clauses." *Orthopedics Today*. 2014 February.

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72. **Bal BS**, Brenner L. "Physician bias and cultural competence revisited." *Orthopedics Today*. 2014 June.

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75. **Bal BS**, Brenner L. "Residency training: New grounds for legal liability." *Orthopedics Today*. 2014 October.

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82. **Bal BS**, Brenner L. "Legal liability related to diagnostic difficulty: A case example." *Orthopedics Today*. 2015 June.

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86. **Bal BS**, Brenner L. "Differing perspectives on the goals of malpractice litigation" *Orthopedics Today*. 2015 October.

87. **Bal BS**, Brenner L. "Case of the month: Medical malpractice liability in a DVT case." *Orthopedics Today*. 2015 November.

88. **Bal BS**, Brenner L. "Pike v Honsinger was attempt to apply legal definitions to standard of care." *Orthopedics Today*. 2015 December.

89. **Bal BS**, Brenner L. "Liability: Courts judge resident conduct by same standards as those that apply to attending physicians." *Orthopedics Today*. 2016 January.

90. **Bal BS**, Brenner L. "Establish fair market value when dealing with industry." *Orthopedics Today*. 2017 June.

ONLINE COMMENTARIES

1. Perspective commentary for "Law professors claim academics 'guest authoring' ghostwritten medical journal articles should be charged with fraud," ORTHOSuperSite, August 2011.

2. Perspective commentary for "Questions loom regarding the future and the implementation of ACOs," ORTHOSuperSite, August 2011.

3. Perspective commentary for "FDA orders post-market surveillance studies for metal-on-

metal hip implants," ORTHOSuperSite, June 2011.

4. Perspective commentary for "Maryland court rules against physician self-referral of patients for radiation, advanced imaging," ORTHOSuperSite, March 2011.

5. Perspective commentary for "AMA report: 95 medical liability claims filed for every 100 physicians," ORTHOSuperSite, August 2010.

EDITOR/INVITED REVIEWER

Guest Editor, Minimally Invasive Total Joint Replacement. *Seminars in Arthroplasty*. September 2005;16(3).

Guest Editor, Ceramics in Total Joint Arthroplasty. *Seminars in Arthroplasty*. September/December 2006;17(3/4).

Managing Editor, Hip and Knee section, eMedicine Clinical Knowledge Base (http://www.edmedicine.com).

Editor-in-Chief, American Legal Forum, Orthopaedic Medical Legal Advisor Bulletin since November 2005.

Elite reviewer on the Editorial Board, *Journal of Arthroplasty*, September 2006 to December 2016.

ABJS Member Associate Editors Board, *Clinical Orthopaedics and Related Research*, 2006 to present.

Guest Editor, *Journal of Bone and Joint Surgery*, May 2007 to December 2016.

International Editorial Board, *The Knee*, May 2007 to December 2016.

Musculoskeletal Transplant Foundation, Peer-Reviewed Research Grants, 2006, 2007.

Guest Editor, MIS Two-incision Total Hip Arthroplasty: Methods and Outcomes: Part I. *Seminars in Arthroplasty* December 2007;18(4).

Guest Editor, MIS Two-incision Total Hip Arthroplasty: Methods and Outcomes: Part II. *Seminars in Arthroplasty* June 2008; 19(2).

Guest Editor, Special Medico-legal Symposium. *Clinical Orthopaedics and Related Research*, February 2009 (21 authors and 15 peer-reviewed papers).

Guest editor, *International Journal of Molecular Sciences*, the International Scholarly Research Network (ISRN): 2009 to present.

Guest Editor, Composite Materials in Skeletal Engineering. *International Journal of Molecular Sciences*.

Medical Editor: Thacker MM, Tejwani N, Thakkar C., **Bal BS**, Talavera F McCarthy JJ, Patel D, Jaffe WL, eds. Acetabulum Fractures. MedScape, Jan. 24, 2012.

Reviewer, MU Research Board, Fall 2013: Patient-Specific Rehabilitation in Knee Osteoarthritis (PI, Sayers S).

Editor-in-Chief, *Open Access Surgery*. August 2012 to April 21, 2014.

Honorary Editorial Board of *Open Access Surgery*. April 22, 2014 to present.

Editorial Board, *Arthroplasty Today*, peer-review journal of AAHKS. July 2, 2014 to present.

Musculoskeletal Transplant Foundation, Established Investigator Grant Reviewer 2014.

MU Research Board Peer Grant Reviewer 2014.

Reviewer of abstracts for the 2016 Annual Orthopaedic Research Society Meeting, September 2015.

Associate Editor of Basic Science, Biomechanics and Kinesiology at *The Knee Journal*. December 2015 to December 2016.

Invited reviewer for the *Journal of Orthopaedic Trauma*. January 27, 2016 to present.

VIDEO PUBLICATION

Bal BS, Crist BD. Anterior Supine Hip Arthroplasty: Primary Surgical Approach with Extensile Options. Video J Orthopaedics. 2013 Aug; 4080. E Pub link: http://www.vjortho.com/2013/08/anterior-supine-hip-arthroplasty-primary-surgical-approach-with-extensile-options/

PHILANTHROPY

Founder, The Sonny and Dana Bal Orthopaedic Endowment. Award funds for orthopaedic educational and scientific endeavors at the University of Missouri-Columbia.

"Substrates for Osteochondal Tissue Engineering." Research grant and work in progress with Columbia University, New York and The Comparative Orthopaedic Laboratory, University of Missouri, Columbia. Total budget is $15,764.27.

Very Distinguished Fellows- Diplomats, Jefferson Club 2006-2007. Members support translates into student scholarships, nationally recognized faculty, groundbreaking research and state-of-the-art facilities that enhance the University's reputation and stature.

PATENTS AND INTELLECTUAL PROPERTY

1. **Bal BS**, Rahaman, MN, Li Y. Alumina/Polyethylene Acetabular Component and Method of Preparation. Invention disclosure submitted to Missouri S&T 02/06/2006.

2. Rahaman MN, **Bal BS**, Li Y. Functionally Graded Bioactive Glass Coatings on Zirconia Implants and Method of Preparation. Invention disclosure submitted to Missouri S&T 02/15/2006.

3. Rahaman MN, **Bal BS**, Li Y. Femoral head and method of fabrication thereof. US Patent Application No.: 12/209,943. Approved (2013).

4. Rahaman M, **Bal BS**. Synthetic osteochondral composite and method of fabrication thereof. US Patent Application No.: 12/209,943. Submitted 09/12/2008; notice of allowance issued 10/04/2013.

5. **Bal BS**, Huang T, Rahaman MN. Method for fabricating biocompatible porous titanium. Patent application filed with World Intellectual Property Organization; International Bureau published, 06/13/2013; UM Invention Disclosure No. 11UMC013; 12/10/2012. US application number 14/362,751 filed 06/04/2014.

6. Katti KV, Raghuraman, K, **Bal BS**, Cook JL. New nanotherapeutic agent for rheumatoid and osteoarthritis. Invention disclosure No. 12UMC054 submitted to University of Missouri's Office of Technology Management & Industrial Relations. Date: February 2012.

7. Shaw MN, Barnett, MA, Sifuentes XM, **Bal BS**, Khalid M. Prophylactic femoral implant for osteoporotic patients. Application to USPTO filed 06/19/2012; invention disclosure No. 11UMC055prov-2.

8. Rahaman MN, Liu X, Liu Y, **Bal BS**. Surface functional bioactive glass scaffold for bone. Provisional US Patent application submitted 01/15/2013, Serial Number 61/849,512.

9. Liu Y, Rahaman MN, **Bal BS**. Method to generate notochordal cell-like cells from human pluripotent stem cells for treating intervertebral disc (IVD) degeneration. Invention disclosure submitted to University of Missouri (05/23/2013). Provisional US Patent in preparation.

10. Liu Y, Rahaman MN, **Bal BS**. New materials with osteoinductive-like property and fabrication method thereof. Invention disclosure to University of Missouri.

11. Biomaterials with osteoinductive-like property and fabrication method thereof. Serial No. 61/965,153.

12. Rahaman MN, **Bal BS**, Li Y. Femoral head and method of manufacture thereof. U.S. Patent Application Serial No. 12/100,951; 1/22/2013.

13. **Bal BS**, McEntire BJ, Ramaswamy L. Composite metallic-ceramic implants and related methods. U.S. Patent Application Serial No. 14/570,916; Submitted 12/15/2014.

14. Bal BS, Rahaman MN. Constrained Acetabular Component. Provisional US Patent Application; submitted 2/27/15. Docket No. 15UMC002prov.

15. Bal BS, Huang T, Rahaman MN. Method for Fabricating Biocompatible Porous Titanium. US Patent 9,481,036 B2. Issued November 1, 2016.

16. Bal BS, Rahaman MN. Bioactive Device to Reduce Postoperative Pain and Regenerate Bone. Invention Disclosure University of Missouri July 2017

17. McEntire B, Bock R, Bal BS: Antipathogenic Compositions and Methods Thereof- Attorney docket 087770-619459; Patent Cooperation Treaty (PCT) application filed August 2019

18. McEntire B, Bock R, Bal BS: Methods of Surface Functionalization of Zirconia-Toughened Alumina with Silicon Nitride (file number 087770-631212)- U.S. Provisional Patent Application Serial No. 62/888,850; Filed August 19, 2019

Preliminary Calculation of Lost Earnings Capacity
Re: Estate of Jacqueline Harris, Deceased
by: Michael H. Thomson, Ph.D.

(1)	(2)	(3)
		Projected
Age	Year	Earnings
63	2019	$16,509
64	2020	$33,811
65	2021	$34,623
Future:		
66	2022	$35,454
Pension:		
67	2023	$17,993
68	2024	$16,291
69	2025	$16,597
70	2026	$16,910
71	2027	$17,231
72	2028	$17,559
73	2029	$17,896
74	2030	$18,240
75	2031	$18,593
76	2032	$18,954
77	2033	$19,323
78	2034	$19,702
79	2035	$20,090
80	2036	$20,487
81	2037	$20,893
82	2038	$21,309
83	2039	$21,736
84	2040	$22,172
85	2041	$5,655
	Past:	**$84,944**
	Future:	**$35,454**
	Pension:	**$347,629**
	Total:	**$468,027**

Footnotes:	
1. Calculations begin at:	July 1, 2019
2. Calculations end at:	March 31, 2041
3. Date of birth:	March 27, 1956
4. Date of death:	June 28, 2019
5. Figures based on earnings level of:	$22,549
6. Adjustment for future earnings growth/inflation:	2.4%
7. Adjustment for fringe benefits:	43.0%

Valuation of Household Services - Average @ 3-4 Hours/Day
Re: Estate of Jacqueline Harris, Deceased
by: Michael H. Thomson, Ph.D.

(1)	(2)	(3)	(4)	(5)
		Average	Value/	Household
Age	Year	Hrs/Day	Day	Services
63	2019	2.8	$70	$12,880
64	2020	2.8	$70	$25,550
65	2021	2.8	$70	$25,550
66	2022	2.8	$70	$26,572
67	2023	4.6	$115	$45,400
68	2024	4.6	$115	$47,216
69	2025	4.6	$115	$49,105
70	2026	4.6	$115	$51,069
71	2027	4.6	$115	$53,112
72	2028	4.6	$115	$55,236
73	2029	4.6	$115	$57,446
74	2030	4.6	$115	$59,744
75	2031	4.1	$102	$55,042
76	2032	3.9	$98	$54,785
77	2033	3.9	$98	$56,977
78	2034	3.9	$98	$59,256
79	2035	3.9	$98	$61,626
80	2036	3.9	$98	$64,091
81	2037	3.9	$98	$66,655
82	2038	3.9	$98	$69,321
83	2039	3.9	$98	$72,094
84	2040	3.9	$98	$74,977
85	2041	3.9	$98	$19,227
		Past:		**$63,980**
		Future:		**$1,098,950**
		Total:		**$1,162,930**

Footnotes:			
1. Calculations begin at:			July 1, 2019
2. Calculations end at:			March 31, 2041
3. Date of birth:			March 27, 1956
4. Date of death:			June 28, 2019
5. Figures based upon current replacement cost of $25/hour.			
6. Adjustment for future cost inflation:			4.0%
7. Amounts calculated to a normal life expectancy, age 84.94.			
8. Adjust hours/day or value/day, as appropriate.			

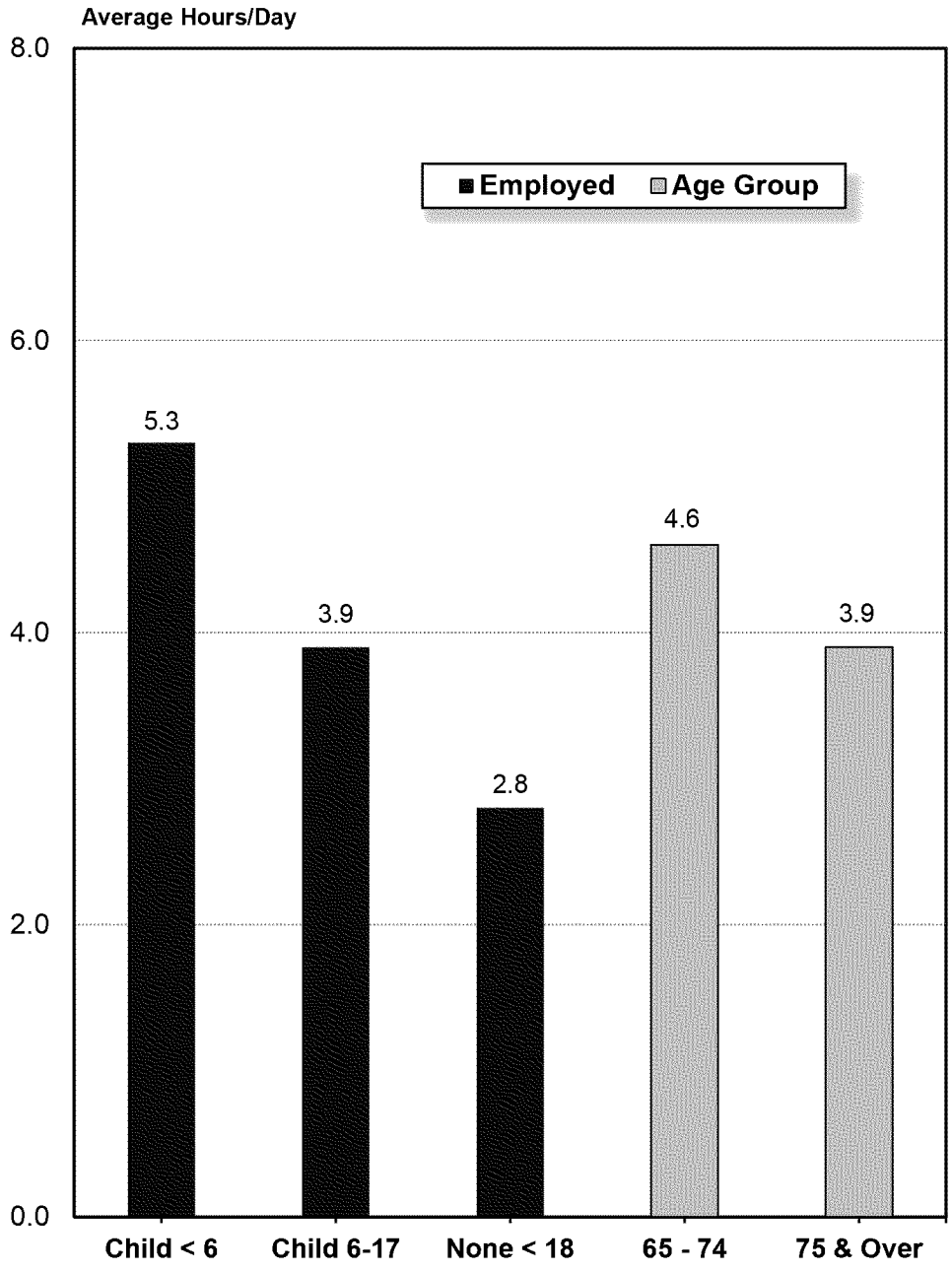
List/Definition of Household Services:

1. Interior Cleaning – making beds, vacuuming, dusting, cleaning bathrooms, washing windows …
2. Laundry and ironing.
3. Cooking – food and drink preparation.
4. Dishes – food and drink cleanup.
5. Other Housework – storing and organizing items, interior decorating, etc.
6. Lawn care.
7. Gardening and landscaping.
8. Care for pets and animals.
9. Interior household repairs, painting …
10. Household remodeling.
11. Household finances/paying bills.
12. Grocery shopping and other purchasing activities.
13. Childcare activities.
14. Care for adults.
15. Automobile repairs and maintenance.
16. Exterior home maintenance, painting …
17. Exterior tasks – washing windows, shoveling snow …

Notes:

1. Thomson Econometrics includes: telephone calls, waiting, and travel time for an activity as part of each underlying activity.
2. List prepared with reference to "American Time Use Survey", U.S. Department. of Labor, BLS, September 20, 2005.

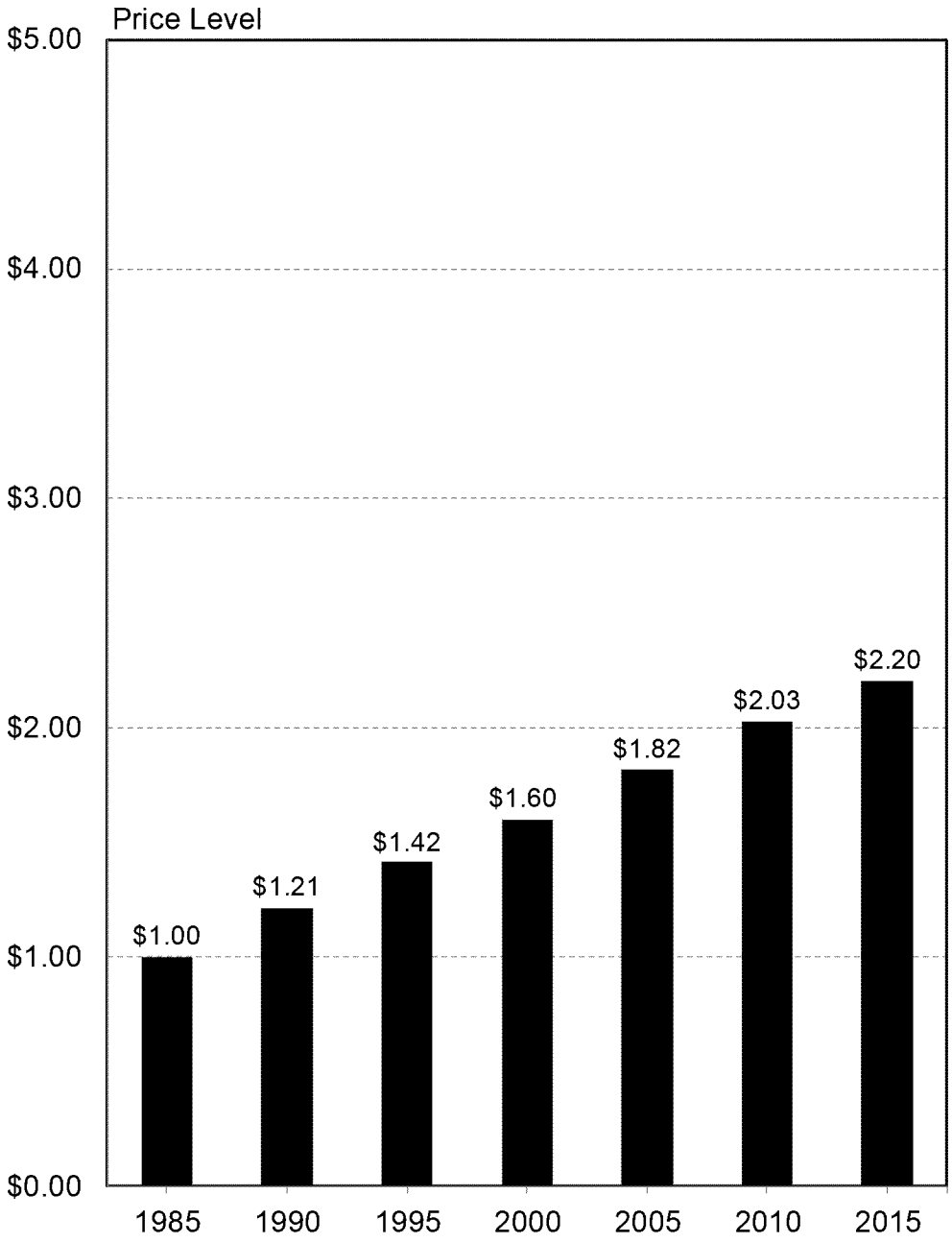
Household Services - Women



Prepared by: *Michael H. Thomson, Ph.D.*
Data: *American Time Use Survey, U.S. Dept. of Labor, BLS, June 25, 2020.*
Note: *Services include household, purchasing, caring and helping activities; and exclude secondary activities, indirect supervision & on-call time.*

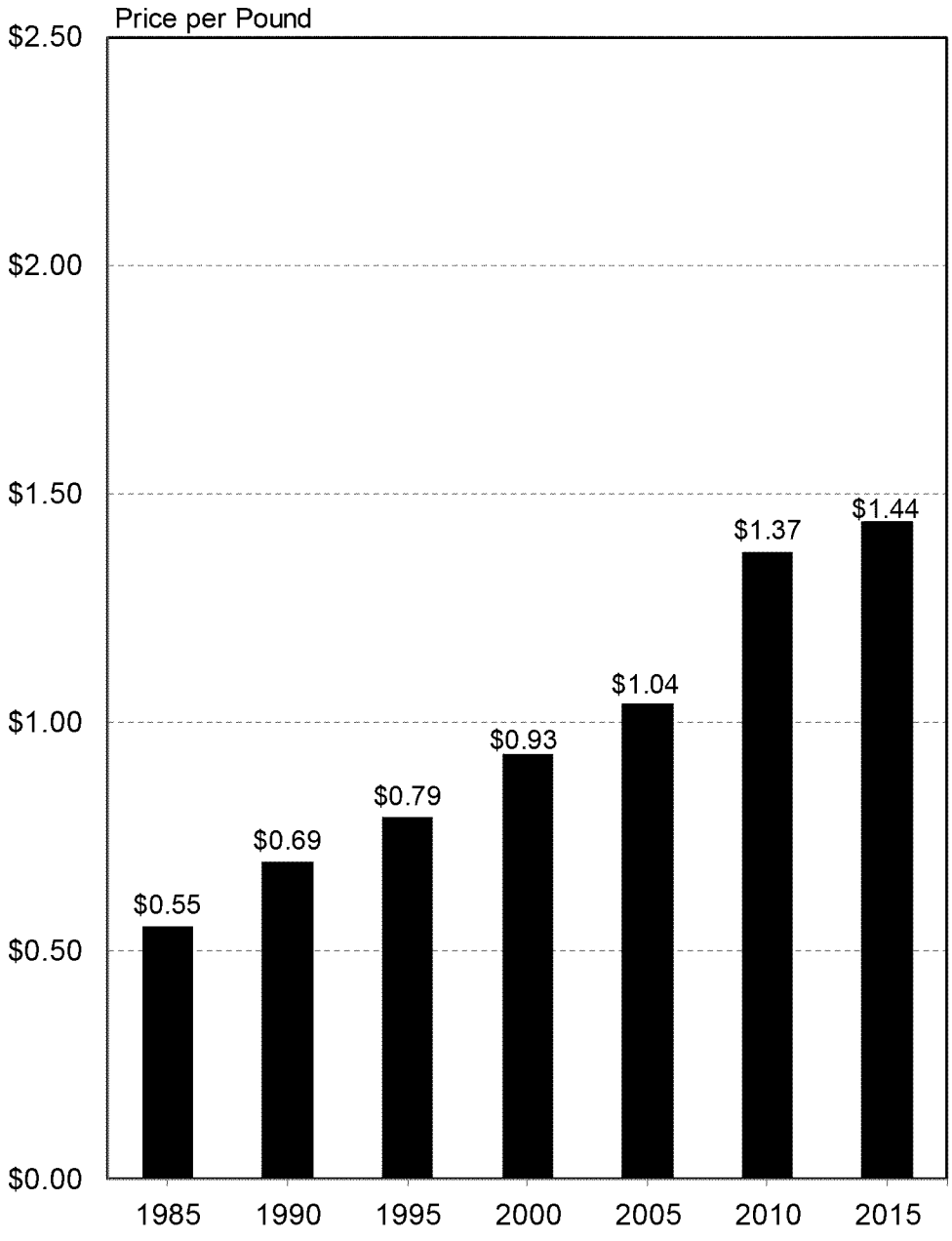
Thomson Econometrics

Consumer Prices over the past 30 years



Note: *Long Run Inflation Rate of 2.7%.*
Source: *CPI-U, Series CUUR0000SA0, Bureau of Labor Statistics, U.S. Dept. of Labor.*

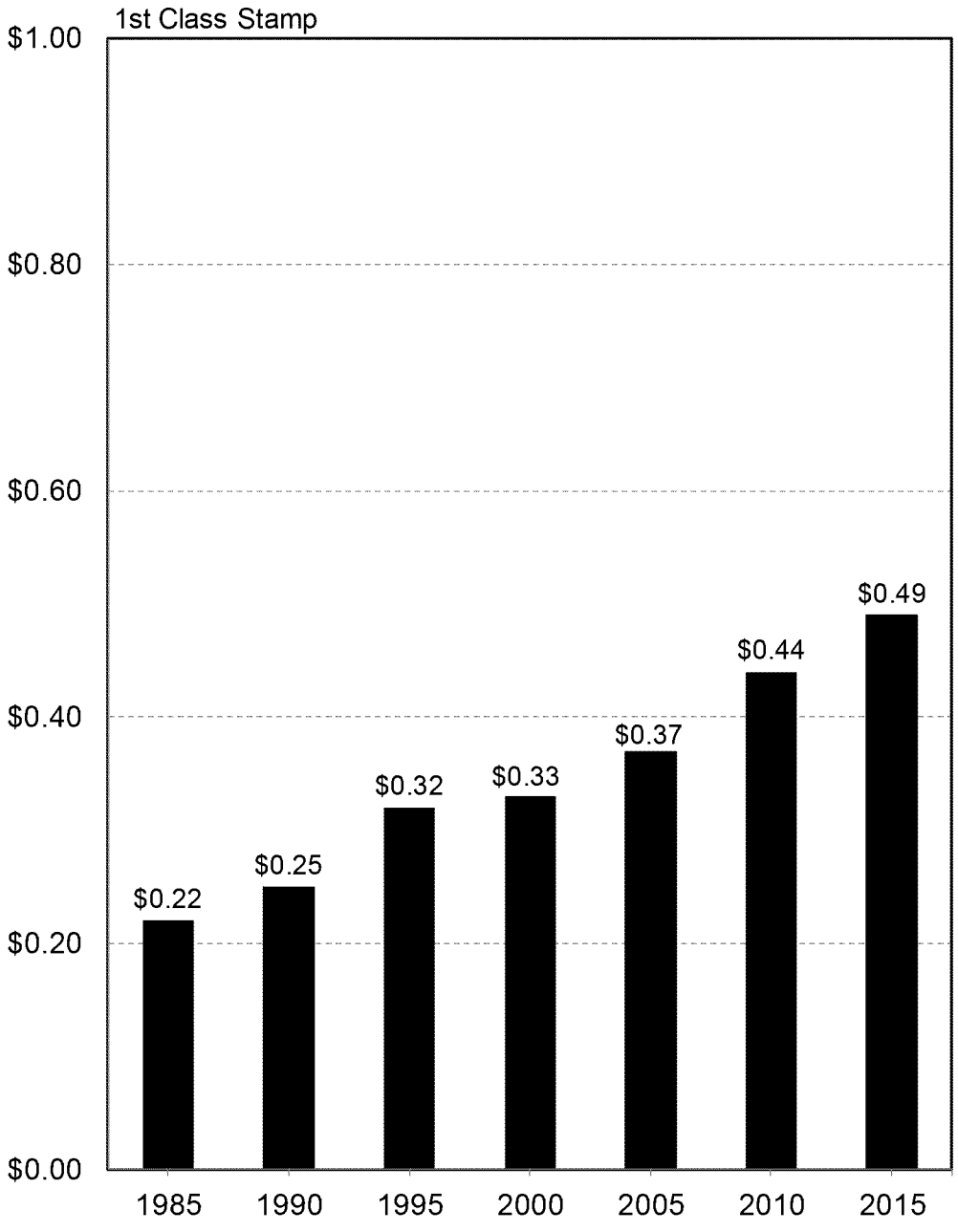
Bread Prices over the past 30 years



Note: *Long Run Inflation Rate of 3.2%.*
Source: *CPI-White Bread, Series APU0000702111, BLS, U.S. Dept. of Labor.*

Thomson Econometrics

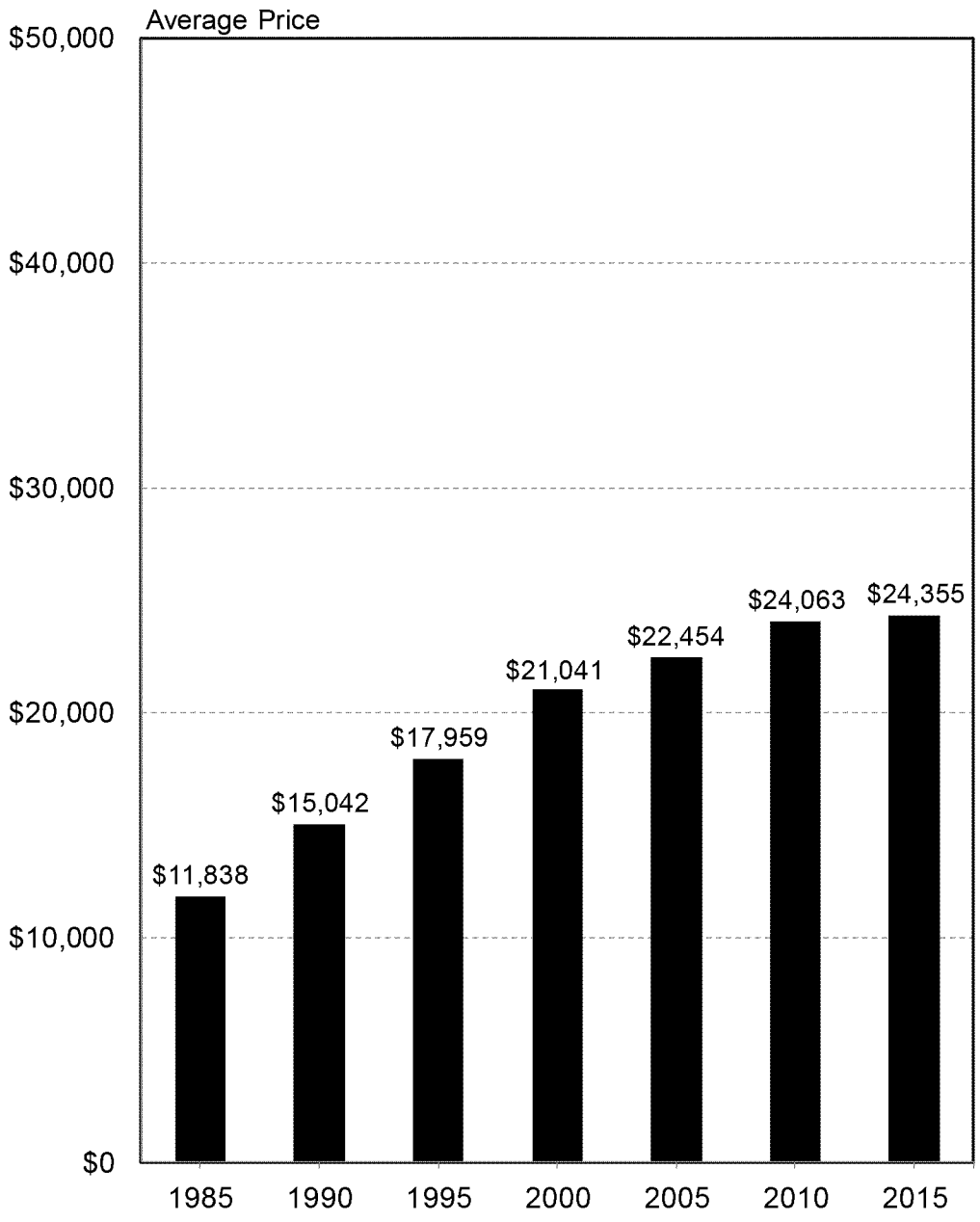
U.S. Postal Rates over the past 30 years



Note: *Long Run Inflation Rate of 2.7%.*
Source: *http://about.usps.com/who-we-are/postal-history/domestic-letter-rates-since-1863.pdf.*

Thomson Econometrics

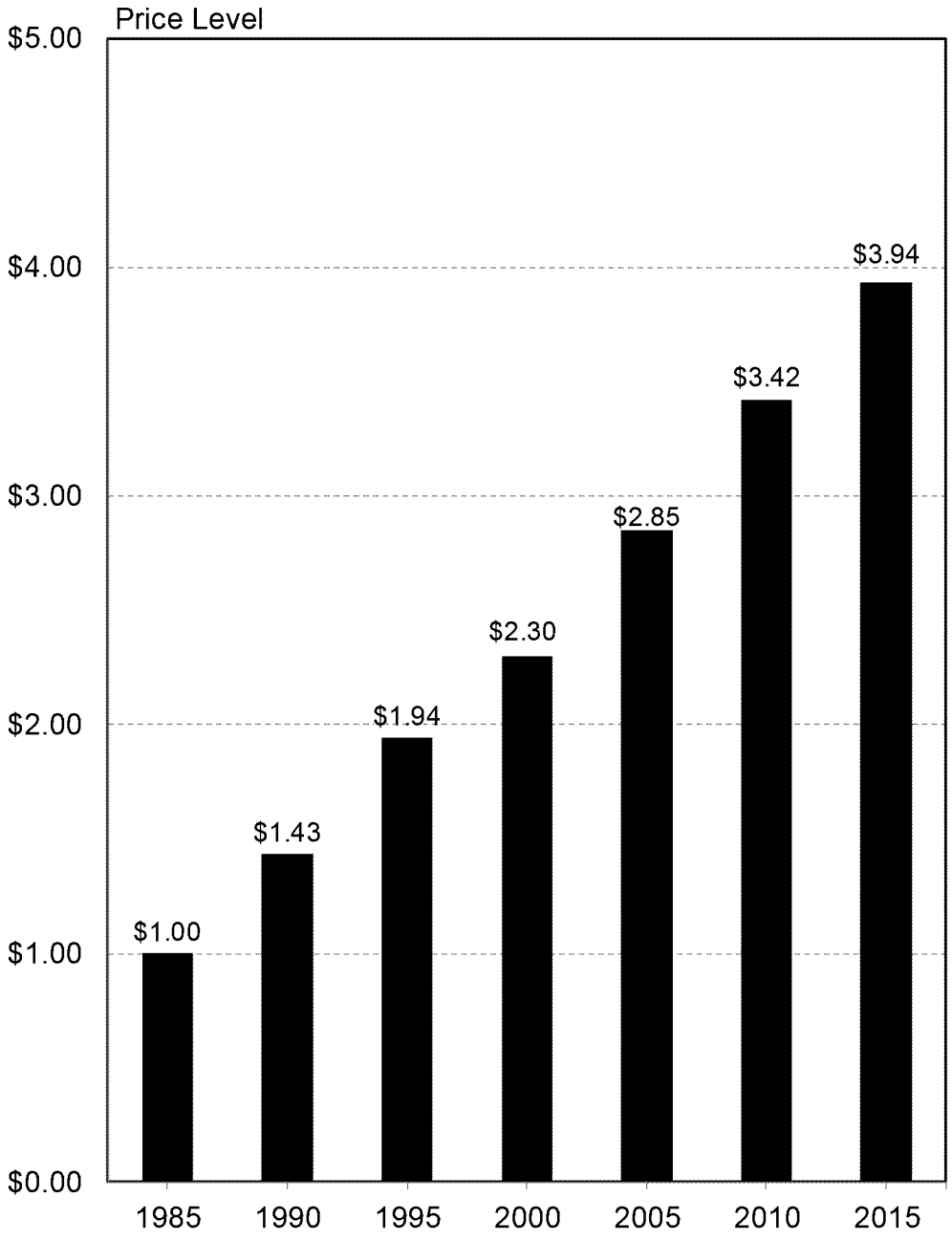
New Car Prices over the past 30 years



Note: Long Run Inflation Rate of 2.4%; adjusted for quality, 1.0%.
Source: Ward's Motor Vehicle Facts and Figures, 2011 and 2016; and CPI-New Cars, Series CUUR0000SS45011, BLS, U.S. Dept. of Labor.

Thomson Econometrics

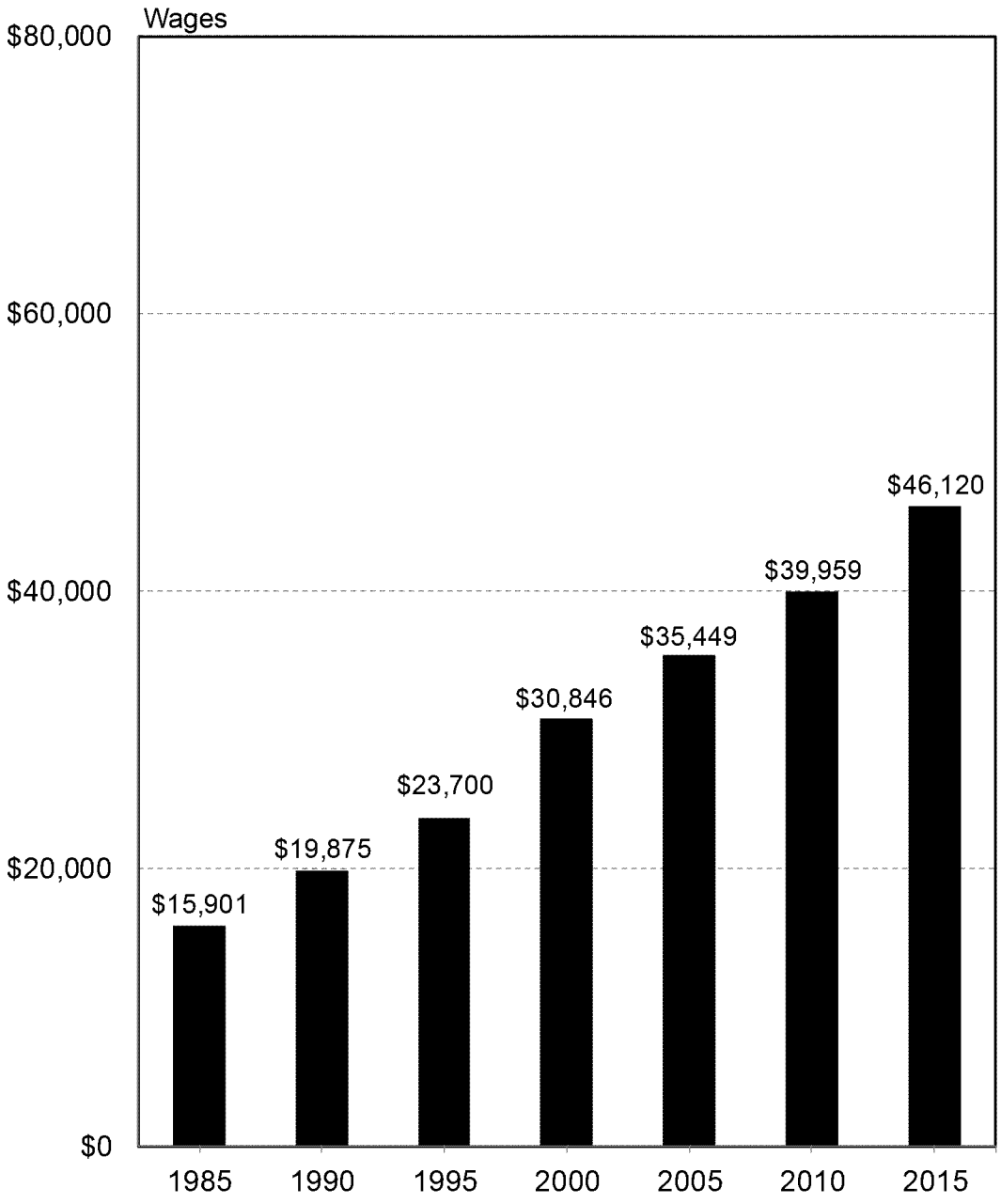
Medical Care Prices over the past 30 years



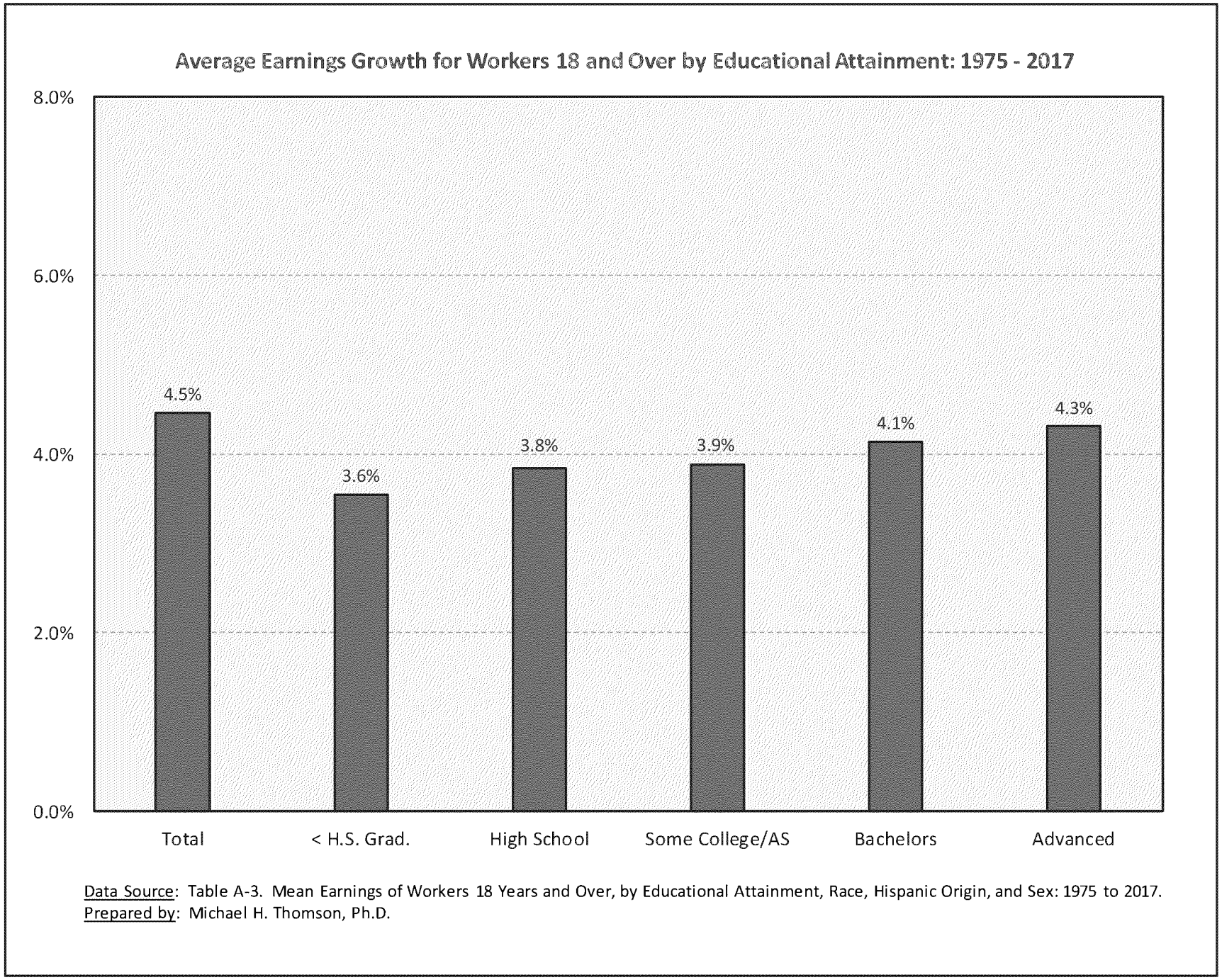
Note: *Long Run Inflation Rate of 4.7%.*
Source: *CPI-Medical Care, Series CUUR0000SAM, BLS, U.S. Dept. of Labor.*

Thomson Econometrics

Average Wages over the past 30 years



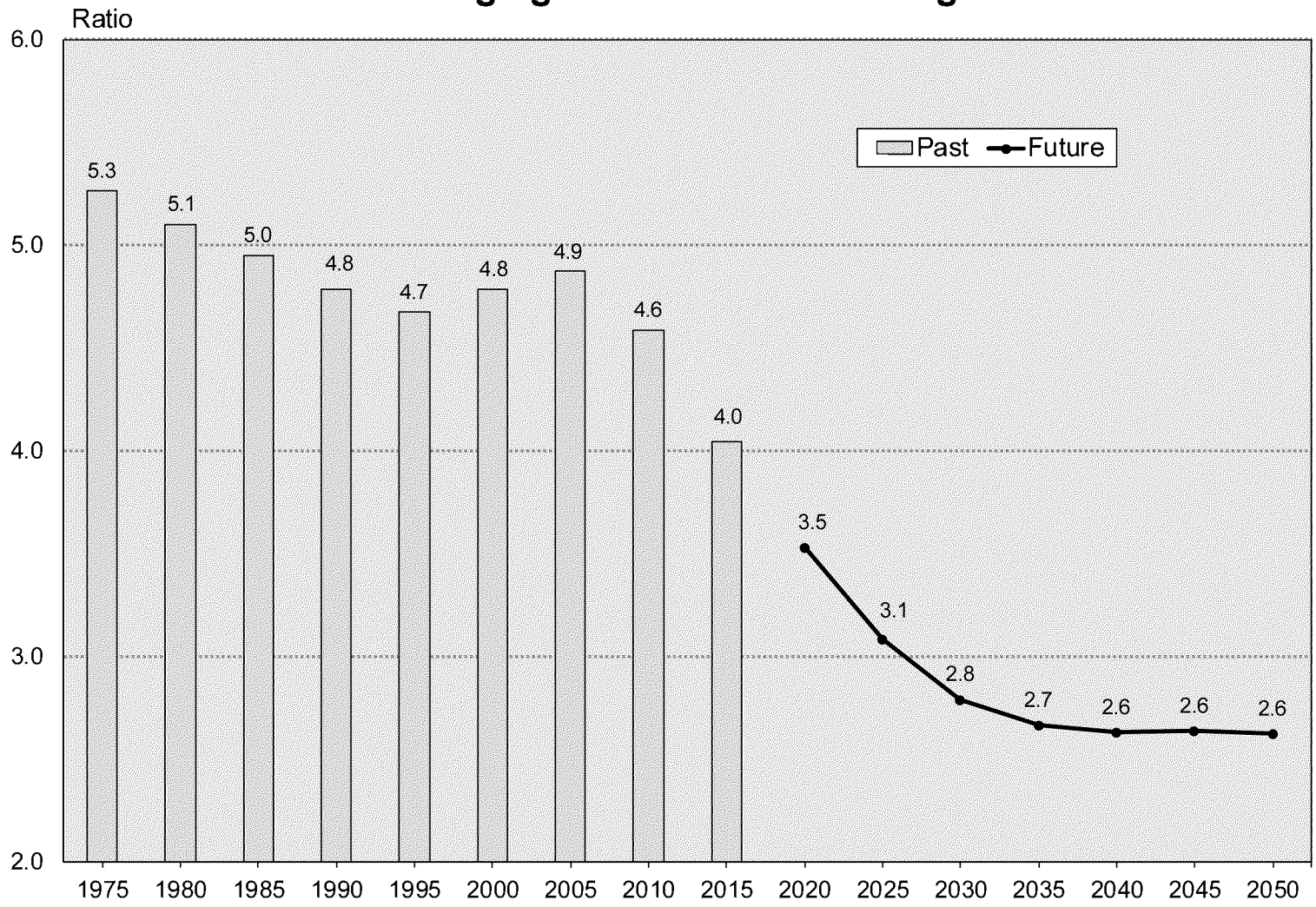
Note: Long Run Growth Rate of 3.6%.
Source: Average Wage Index (raw data), U.S. Social Security Administration.



Data Source: Table A-3. Mean Earnings of Workers 18 Years and Over, by Educational Attainment, Race, Hispanic Origin, and Sex: 1975 to 2017.
Prepared by: Michael H. Thomson, Ph.D.

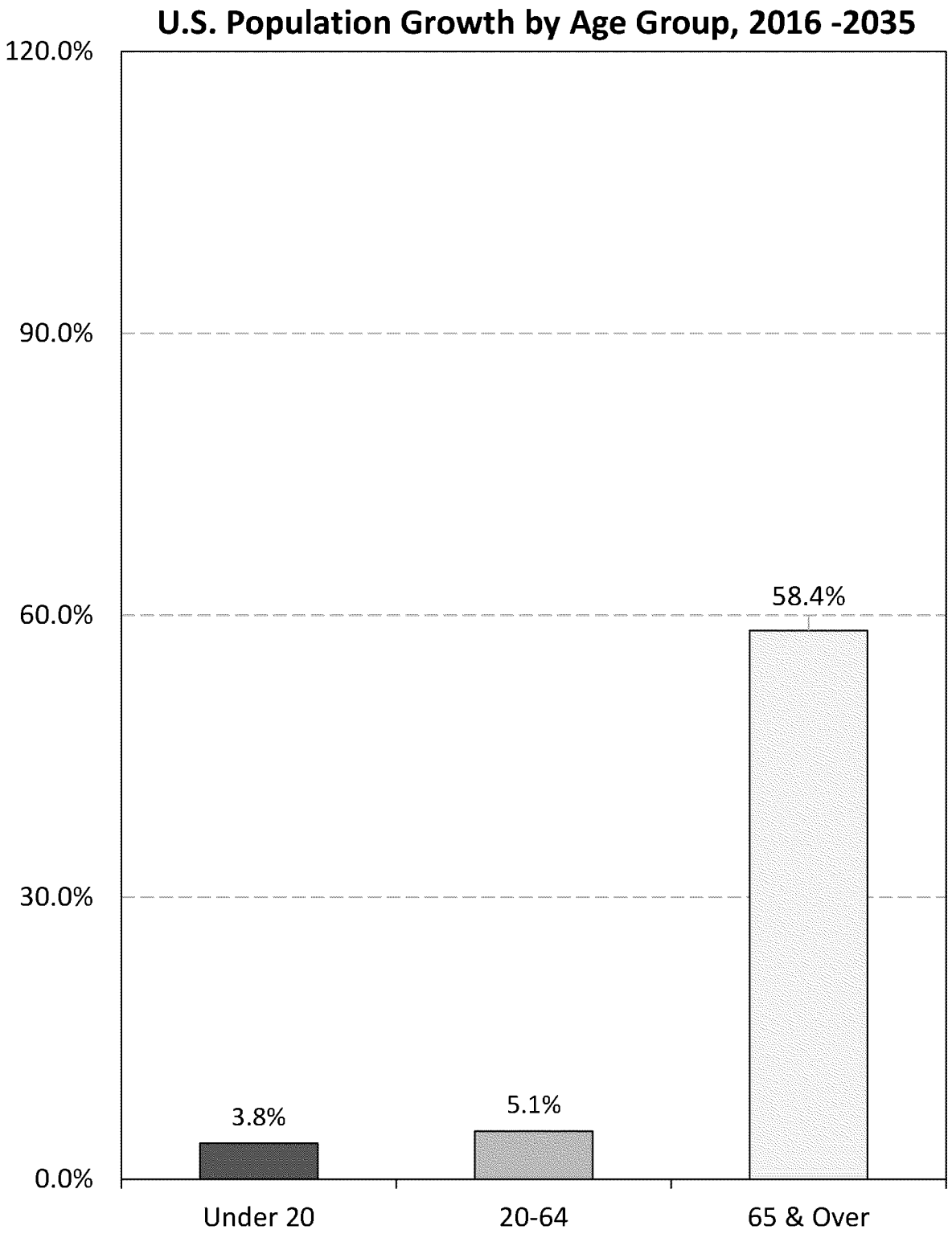
02054

Population Trends in the United States: Working Age Adults vs. Retiree Age Adults

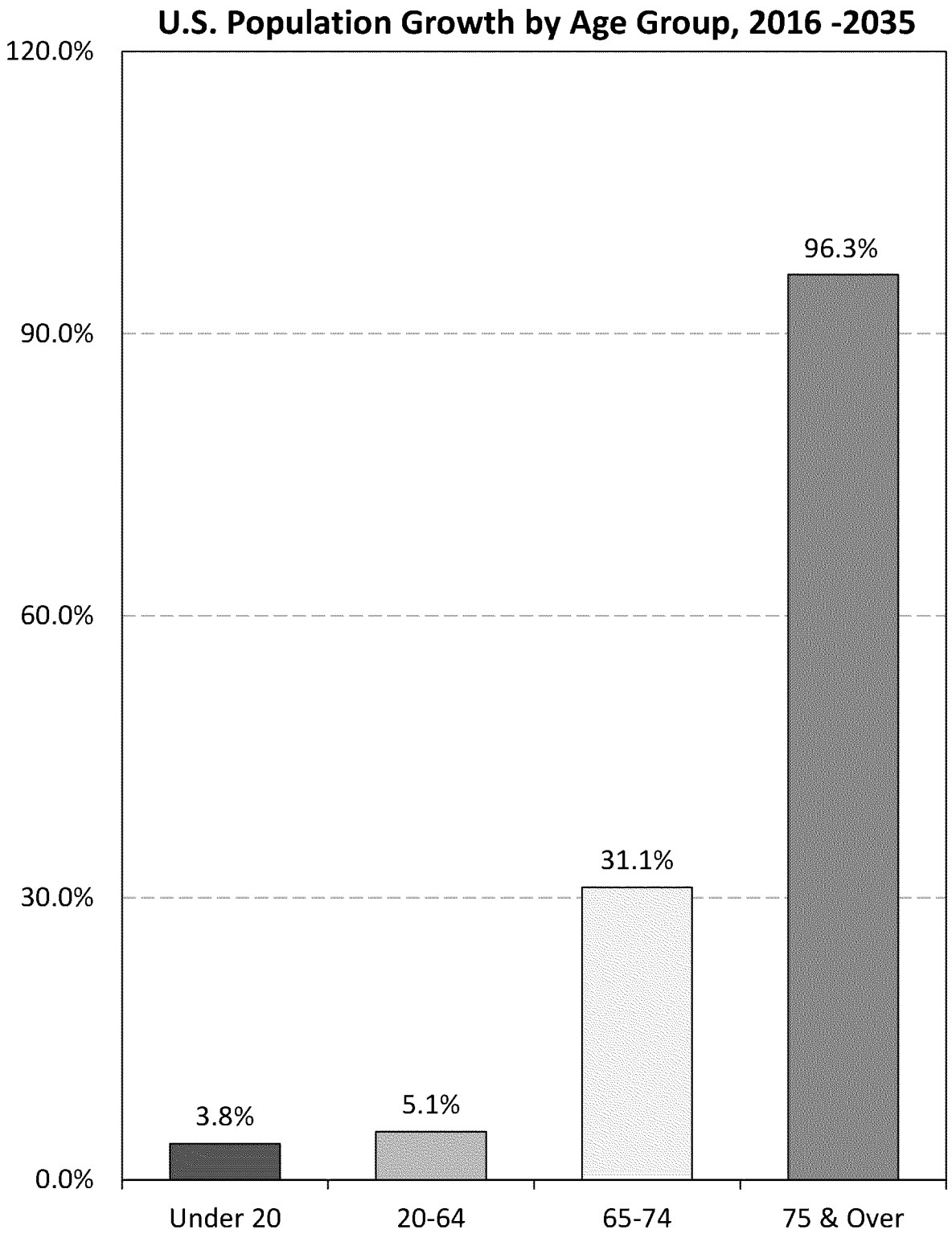


Data: *2018 Annual Report of the Board of Trustees, U.S. Social Security Administration, June 5, 2018, page 93.*
Note: *Ratio = Population age 20-64 vs. Population age 65 and over.*
Prepared by: *Michael H. Thomson, Ph.D.*

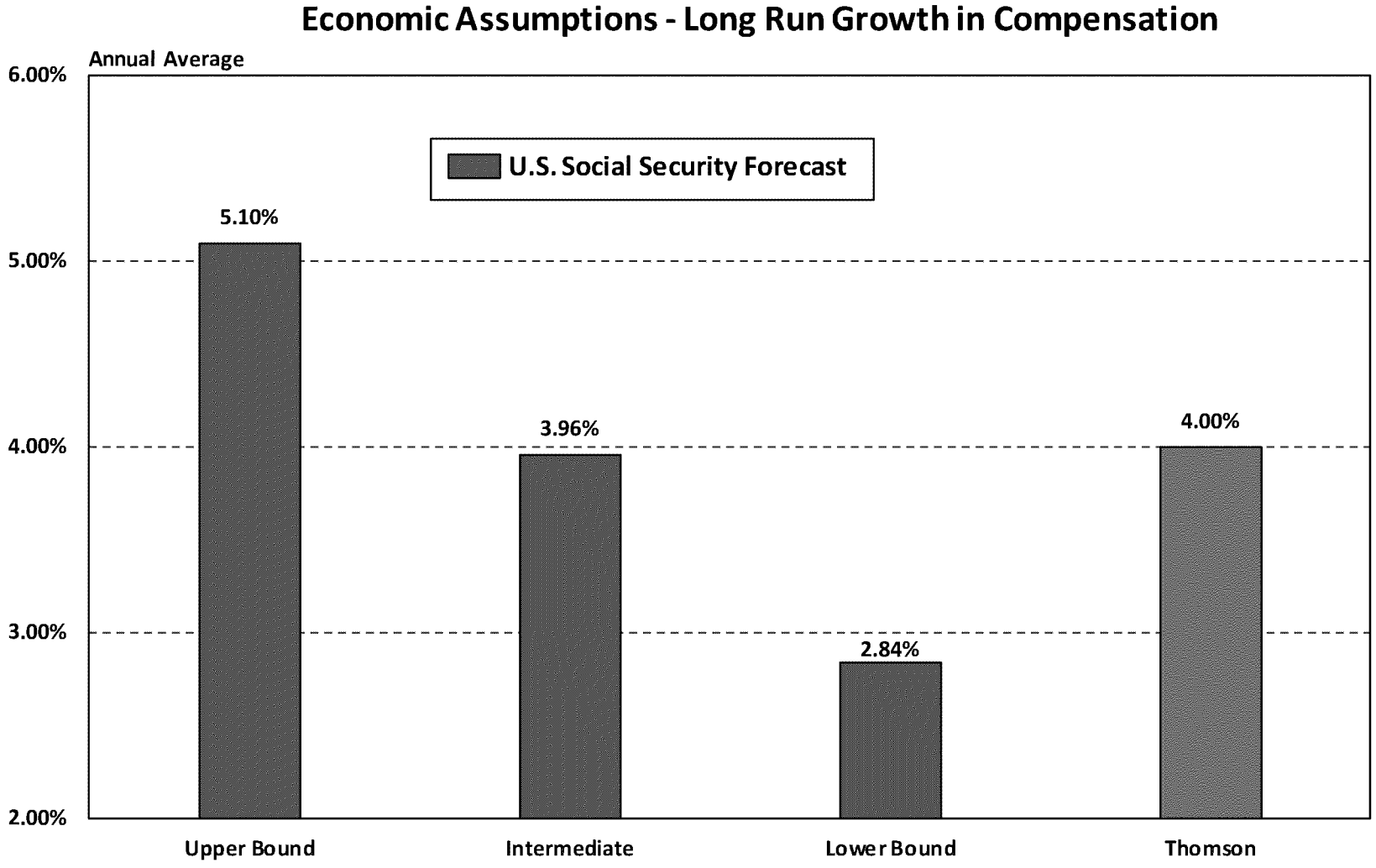
020621



Data: U.S. Census Bureau, 2017 National Population Projections Tables, Main Series, Table 3, Sept., 2018.
Note: Percentages measure change in population from base year of 2016.
Chart prepared by: Michael H. Thomson, Ph.D.

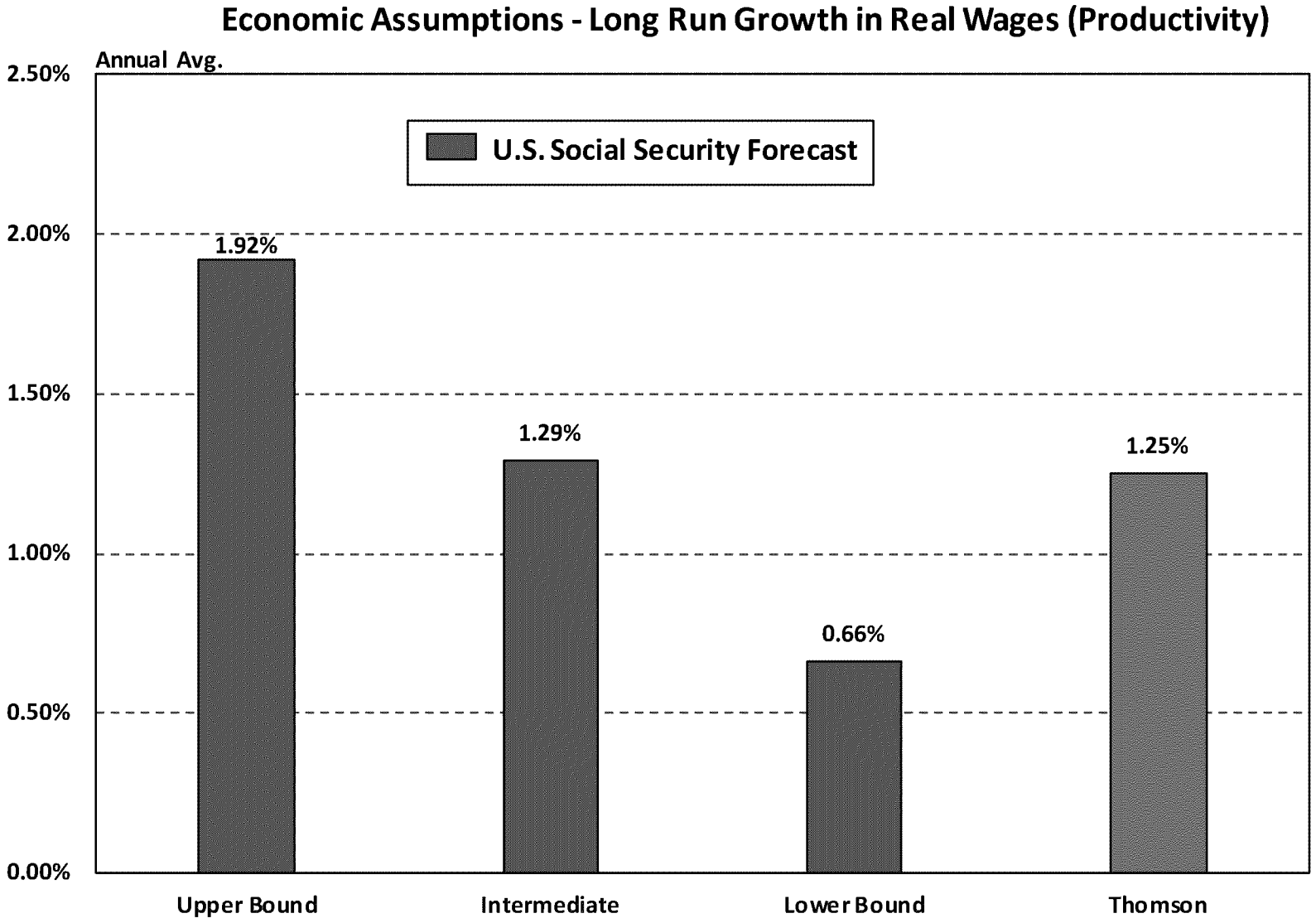


Data: U.S. Census Bureau, 2017 National Population Projections Tables, Main Series, Table 3, Sept., 2018.
Note: Percentages measure change in population from base year of 2016.
Chart prepared by: Michael H. Thomson, Ph.D.



Note: *Chart prepared by Michael H. Thomson, Ph.D.*

Source: *The 2018 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds, June 5 2018, pp. 99-106, 216-217.*

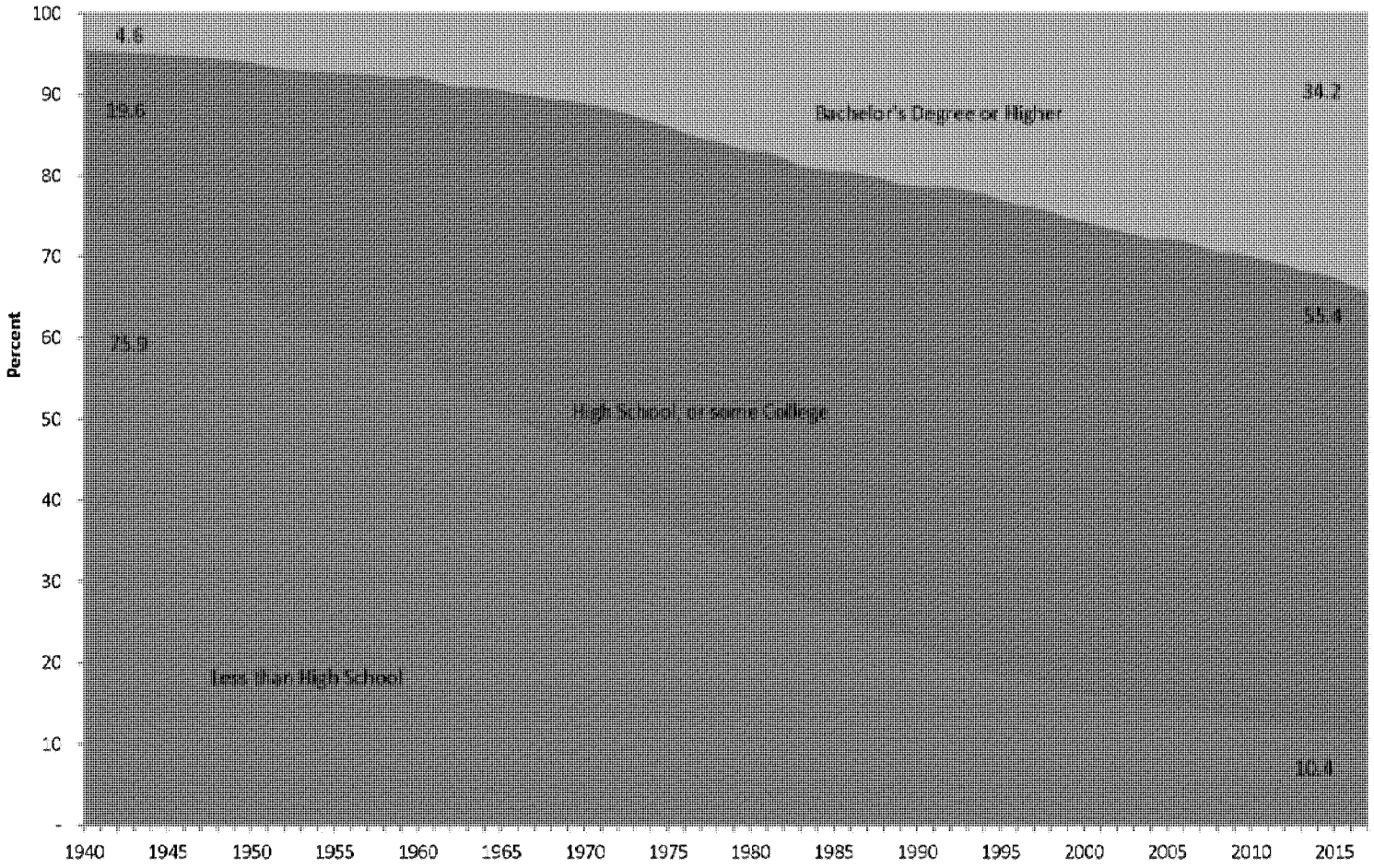


Note: *Chart prepared by Michael H. Thomson, Ph.D.*

Source: *The 2018 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds, June 5, 2018, pp. 99-106, 216-217.*

021006

Figure 2: Percent of Population Age 25 and over by Educational Attainment: 1940-2017

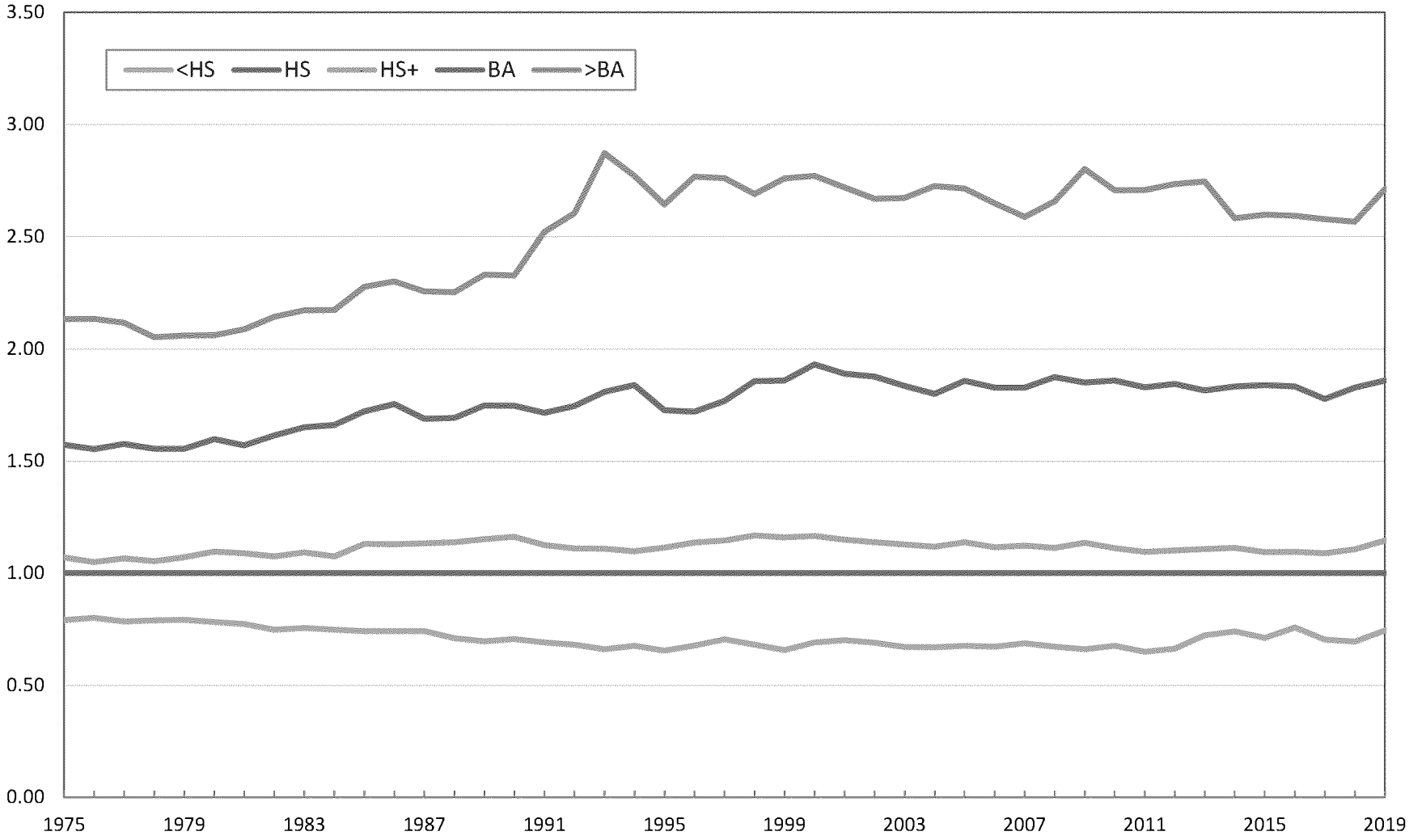


Sources: U.S. Census Bureau. 1947, 1952-2002 March Current Population Survey, 2003-2017 Annual Social and Economic Supplement to the Current Population Survey; 1940-1960 Census of Population.

United States Census Bureau

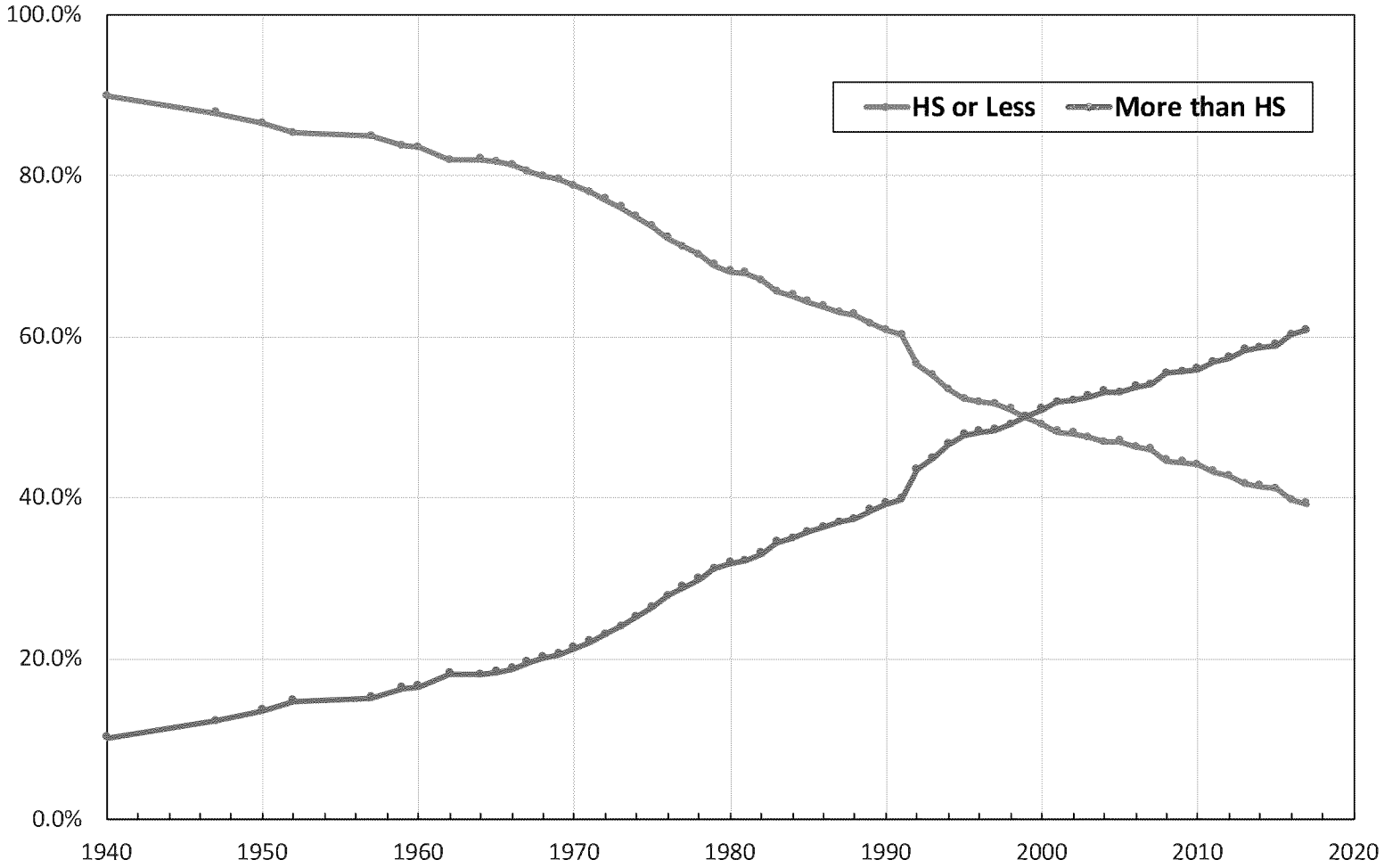
0211a

Average Earnings by Educational Attainment
as a Proportion of the Average Earnings of High School Graduates: 1975-2019



Source 1. U.S. Census Bureau chart at: https://www.census.gov/content/dam/Census/library/visualizations/time-series/demo/fig10.png.
Source 2. U.S. Census Bureau data at: https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-pinc/pinc-04.html.
Note 1. Original chart published by U.S. Census Bureau; updated with 2019 census data by Michael H. Thomson, Ph.D.

Educational Attainment in the U.S. - Years of School Completed, People 25 & Over



Note: Chart prepared by Michael H. Thomson, Ph.D.
Source: U.S. Census Bureau: 1940-1960 Census of Population, 1947 & 1952-2002 March Current Population Survey, and 2003-2017 Annual Social and Economic Supplement to the Current Population Survey,

Demsky, Benjamin

From: Sarah Schimitschek <sschimitschek@mckeenassociates.com>
Sent: Monday, August 15, 2022 7:28 AM
To: Pilarski, Laura; Krista Tester
Cc: Milad Yatooma; Tucciarone, Eric; Christopher Kwiecien; Steven Hurbis
Subject: RE: HARRIS - Dep of Sonny Bal, M.D.

Good Morning,

Dr. Bal had an emergency and asked that we cancel today's deposition. We will be in touch with new dates.

Sorry for the inconvenience.

Sarah Schimitschek
Legal Assistant to Steven C. Hurbis, Esq.
McKeen & Associates, P.C.
Penobscot Building
645 Griswold Street, Suite 4200
Detroit, MI 48226
(313) 961-4400
sschimitschek@mckeenassociates.com
www.mckeenassociates.com

From: Pilarski, Laura <lpilarski@fbmjlaw.com>
Sent: Friday, August 12, 2022 12:48 PM
To: Krista Tester <krista.tester@tnmglaw.com>; Sarah Schimitschek <sschimitschek@mckeenassociates.com>; Steven Hurbis <shurbis@mckeenassociates.com>
Cc: Milad Yatooma <milad.yatooma@tnmglaw.com>; Tucciarone, Eric <eTucciarone@fbmjlaw.com>; Christopher Kwiecien <christopher.kwiecien@tnmglaw.com>
Subject: External RE: HARRIS - Dep of Sonny Bal, M.D.

Hi Everyone,

Demsky, Benjamin

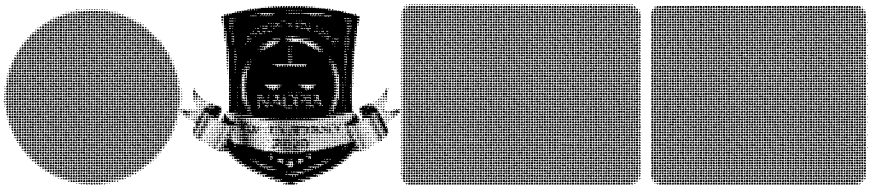
From: Steven Hurbis <shurbis@mckeenassociates.com>
Sent: Friday, September 16, 2022 10:51 AM
To: Demsky, Benjamin
Cc: Paul Dwaihy; Tucciarone, Eric; Flores, Robin; Pilarski, Laura
Subject: RE: Jacqueline Harris v Beaumont Health, et al., No. 21-187353-NH

Good Morning,

We have been attempting to reconnect with Dr. Bal and get new dates. Unfortunately, we are having an extraordinarily difficult time doing so without success.

Best,

Steven C. Hurbis, Esq.
McKeen & Associates, P.C.
Penobscot Building
645 Griswold St., Suite 4200
Detroit, MI 48226-3344
(313) 961-5985 (Facsimile)
(313) 961-4400 x 829



From: Demsky, Benjamin <bDemsky@fbmjlaw.com>
Sent: Friday, September 9, 2022 9:47 AM
To: Steven Hurbis <shurbis@mckeenassociates.com>
Cc: Paul Dwaihy <paul.dwaihy@tnmglaw.com>; Tucciarone, Eric <eTucciarone@fbmjlaw.com>; Flores, Robin <RFlores@fbmjlaw.com>; Pilarski, Laura <lpilarski@fbmjlaw.com>
Subject: External Jacqueline Harris v Beaumont Health, et al., No. 21-187353-NH

Steve,

Enclosed is a copy of our motion to compel Dr. Bal's deposition that will be filed with the court today. Please advise if you concur with the relief requested.

Thank you,

Ben

Benjamin A. Demsky, Esq
Associate Attorney
Foley, Baron, Metzger & Juip, PLLC
38777 Six Mile Rd., Suite 300
Livonia, MI 48152
Cell: (586) 229-9728
bdemsky@fbmjlaw.com

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

LAWANNA SMITH AS PERSONAL REPRESENTATIVE OFTHE ESTATE OF JACQUELINE HARRIS, DECEASED
Plaintiff,

vs.

No. 21-187353-NH
Hon. NANCI J. GRANT

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

Defendants.

BRIAN J. McKEEN (P34123)
STEVEN C. HURBIS (P80993)
McKEEN & ASSOCIATES, P.C.
Attorney for Plaintiff
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Detroit, MI 48226
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38777 Six Mile Rd., Suite 101
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paul.dwaihy@tnmglaw.com

ENRICO G. TUCCIARONE (P52767)
SARAH T. BERARD (P70999)
Attorneys for Defendants,
Tri County Orthopedics P.C., and
Jack D. Lennox, D.O.
38777 Six Mile Rd., Suite 300
Livonia, MI 48152
(734) 742-1800/ Fax (734) 521-2379
etucciarone@fbmjlaw.com
sberard@fbmjlaw.com

PLAINTIFF'S FIRST AMENDED WITNESS LIST

NOW COMES Plaintiff, Lawanna Smith as Personal Representative of the Estate of Jacqueline Harris, Deceased, by and through her attorneys, McKEEN & ASSOCIATES, PC, and for her Witness List hereby submits the following:

1. Lawanna Smith
2. Beaumont Health, Tri County Orthopedics, PC * (Adverse Witnesses)
3. Jack D. Lennox D.O. * (Adverse Witness)

4. Felicia M. Harris
5. Jonneka M. Harris
6. Perise J. Smith
7. Marjorie Finnie
8. Middlebelt Dermatology Center *
9. Beaumont Physical Medicine and Rehabilitation *
10. Ascension Providence Hospital *
11. Beaumont Commons *
12. Any and all physicians, nurses, therapists, technicians, assistants, aides, agents and/or employees, involved in the care and treatment of Jacqueline Harris at **Ascension Providence Hospital, Southfield Campus**, including but not limited to:
    a. Richard Haven Paul MD *
    b. Jennifer Dulbroo RN *
    c. Megan Gignac *
    d. Jennifer Jones *
    e. Duncan Dorsel *
    f. Jenell Jarbo *
    g. Any personnel whose signatures appear on Progress Notes.
    h. Any and all other health care providers who made entries in Jacqueline Harris's chart at **Ascension Providence Hospital, Southfield Campus** including individuals whose names have been misspelled or misinterpreted, or whose names are undecipherable in the medical records.

13. Any and all physicians, nurses, therapists, technicians, assistants, aides, agents and/or employees, involved in the care and treatment of Jacqueline Harris at the **Oakland County Michigan Medical Examiner's Office** including but not limited to:
    a. Ljubisa J. Dragovic, M.D. *

b. Any personnel whose signatures appear on Progress Notes.

c. Any and all other health care providers who made entries in Jacqueline Harris's chart at the **Oakland County Michigan Medical Examiner's Office** including individuals whose names have been misspelled or misinterpreted, or whose names are undecipherable in the medical records.

14. Any and all physicians, nurses, therapists, technicians, assistants, aides, agents and/or employees, involved in the care and treatment of Jacqueline Harris at **NMS Labs** including but not limited to:

a. Denice M. Teem BS, D-ABFT-FT *

b. Any personnel whose signatures appear on Progress Notes.

c. Any and all other health care providers who made entries in Jacqueline Harris's chart at **NMS Labs**, including individuals whose names have been misspelled or misinterpreted, or whose names are undecipherable in the medical records.

15. Any and all physicians, nurses, therapists, technicians, assistants, aides, agents and/or employees, involved in the care and treatment of Jacqueline Harris at **Beaumont Health** including but not limited to:

a. Kathy M. Borovicka MD *

b. Sarika Joshi MD *

c. Matteo Valenti DO *

d. Blake Fenkell DO *

e. Jack Lennox DO *

f. Eric Kovan DO *

g. Andrew Olswing DO *

h. Timothy McKnight DO *

i. Andrew V. Mizzi DO *

j. Joshua Berris DO *

k. Aaron Wood DO *

l. Aaron Jeremy Seidman DO *

m. Benjamin Main DO *

n. Eric J. Zuckerman DO *

o. Homer C. Linard DO *

p. Kristin Kamienecki DO *

q. Julia Hobson DO *

r. Nelly Summers MA *

s. Shannon Granning MA *

t. Erika C. Garris MA *

u. Shannon K. Louis MA *

v. Jamy Gerwatowski MA *

w. Karen Rotondo RN *

x. Rafil R. Yakupov RN *

y. Michelle Mach RN *

z. Michelle J. Filary Gutekunst RN *

aa. Halley Giordano RN *

bb. Steven Look RN *

cc. Nicole B. Green RN *

dd. Tiffany Lublin RN *

ee. Brian Rodgers RN *

ff. Jince J. Thanath PT *

gg. Hector Lacandazon PT *

hh. Shelly Przywara PTA *

ii. Karen Watson OT *

jj. Kimberly Colleran COTA *

kk. Soniya M Charian CRNA *

ll. David McCall CRNA *

mm. Harry Thomas Richardson *

nn. Sara J. Blackburn *

oo. Jeanette Carnacchi *

pp. Deborah Blaszczyk *

qq. Melanie Dalton *

rr. Terah Berlin *

ss. Kathy Noble *

tt. Dawn M. Toth *

uu. Kim Herman *

vv. Linda Cramer *

ww. Michael Abrash *

xx. Annette Aubuchon *

yy. Rebecca Martinez *

zz. Laura Caruso *

aaa. Zinab Chami *

bbb. Dorthea Crawford *

ccc. Carissa L. Kinczkowski *

ddd. Kenneth Baier *

eee. Kathy Jo Wheeler *

fff. Chris Clay *

ggg. Danyiel Bell *

hhh. Elantra Evans *

iii. Dashonna Andrews *

jjj. Denise Solomon *

kkk. James S. Smith *

lll. Any personnel whose signatures appear on Progress Notes.

mmm. Any and all other health care providers who made entries in Jacqueline Harris's chart at **Beaumont Health** including individuals whose names have been misspelled or misinterpreted, or whose names are undecipherable in the medical records.

16. Any and all physicians, nurses, therapists, technicians, assistants, aides, agents and/or employees, involved in the care and treatment of Jacqueline Harris at **Botsford Continuing Health Care** including but not limited to:

a. Jack D. Lennox DO *

b. Matteo Valenti DO *

c. David Susser DO *

d. Dr. Andrew Cykiert *

e. Mitchell S. Wayne DPM *

f. Elizabeth Robertson RN *

g. Johanna Bulinda RN *

h. Kelli O'Halloran RN *

i. Karrie Sobiesiak RN *

j. Kayla A. Wesolowski RN *

k. Radhika Kashikar PT *

l. Jacquelyn Jaqua OT *

m. Linda Jackson COTA *

n. C. Smith LLMSW *

o. Kim Stinnett *

p. Andrea Sparks *

q. Eleanor Prince *

r. Suzanne Lipar *

s. Karen Parker *

t. Sandra Russel *

u. Any personnel whose signatures appear on Progress Notes.

v. Any and all other health care providers who made entries in Jacqueline Harris's chart at **Botsford Continuing Health Care** including individuals whose names have been misspelled or misinterpreted, or whose names are undecipherable in the medical records.

17. Any and all physicians, nurses, therapists, technicians, assistants, aides, agents and/or employees, involved in the care and treatment of Jacqueline Harris at **Tri County Orthopedics, P.C.,** including but not limited to:

a. Jack D. Lennox D.O. *

b. Homer C. Linard III DO *

c. Matteo Valenti DO *

d. Any personnel whose signatures appear on Progress Notes.

e. Any and all other health care providers who made entries in Jacqueline Harris's chart at **Tri County Orthopedics, P.C.,** including individuals whose names have been misspelled or misinterpreted, or whose names are undecipherable in the medical records.

18. Any and all physicians, nurses, therapists, technicians, assistants, aides, agents and/or employees, involved in the care and treatment of Jacqueline Harris at **Health Wise Post Surgery In-Home Services** but not limited to:

a. Jack Lennox DO *

b. Nicole Calhoun RN *

c. Anette Pines RN *

d. Suresh Kandasamy PT *

e. Matthew Chappus *

f. Any personnel whose signatures appear on Progress Notes.

g. Any and all other health care providers who made entries in Jacqueline Harris's chart at **Health Wise Post Surgery In-Home Services** including individuals whose names have been misspelled or misinterpreted, or whose names are undecipherable in the medical records.

19. Any and all physicians, nurses, therapists, technicians, assistants, aides, agents and/or employees, involved in the care and treatment of Jacqueline Harris at **Midwest International Medicine Associates** but not limited to:

a. Matteo Valenti DO *

b. Nelly Summers MA *

c. Regina Fortson MA *

d. Amy Dinkert *

e. Amy Otten *

f. Any personnel whose signatures appear on Progress Notes.

g. Any and all other health care providers who made entries in Jacqueline Harris's chart at **Midwest International Medicine Associates** but including individuals whose names have been misspelled or misinterpreted, or whose names are undecipherable in the medical records.

20. Any and all physicians, nurses, therapists, technicians, assistants, aides, agents and/or employees, involved in the care and treatment of Jacqueline Harris at **Botsford Hospital** but not limited to:

a. Matteo Valenti DO *

b. Andrew Mizzi DO *

c. Kristin Kamienecku DO *

d. Jenny Michaels *

e. Amy Dinkert, ACNP-BC

f. Any personnel whose signatures appear on Progress Notes.

g. Any and all other health care providers who made entries in Jacqueline Harris's chart at **Botsford Hospital** but including individuals whose names have been misspelled or misinterpreted, or whose names are undecipherable in the medical records.

21. **Experts:**

a. John H. Hall, M.D., Expert in Orthopedic Surgery, Charlottesville, VA*

b. Ljubisa Dragovic M.D., Expert in Pathology, Pontiac, MI *

c. Kelty Baker M.D., Expert in Hematology, Huston, TX *

d. Willis Wagner, M.D., Expert in Vascular Surgery, CA *

e. Michael Thomson, PhD, Potential Expert in Economics/Damages, Bloomfield Hills, MI *

22. Custodians of Records, employees, and agents of:

a. Ascension Providence Hospital

b. Ascension Providence Hospital, Southfield Campus

c. Beaumont Physical Medicine and Rehabilitation

d. Botsford Beaumont

e. Beaumont Health

f. Tri County Orthopedics PC

g. Midwestern Internal Medicine Associates

h. Botsford Hospital

i. NMS Labs

j. Oakland County Medical Examiner's Office

k. Health Wise Post Surgery In-Home Services

l. Botsford Continuing Health Care

m. Livonia Public Schools

n. Centers for Medicare & Medicaid Services

o. Massive, LLC, f/k/a Med Lien Solutions

p. Blue Cross Blue Shield Blue Care Network of Michigan

q. Social Security Administration

r. United States Department of Treasury

s. State of Michigan Department of Community Health

t. Michigan Department of Health and Human Services

23. Any and all witnesses identified by Defendants, including experts.

24. Any and all individuals identified in medical records and pleadings.

25. Any and all necessary rebuttal witnesses, or any witnesses listed, but not called by Defendants.

26. Plaintiff reserves the right to amend her witness list should discovery and/or subsequent testimony dictate same.

Witnesses designated with an asterisk (*) may be called upon to render opinion or other expert testimony.

Respectfully Submitted:

McKEEN & ASSOCIATES, P.C.

/S/STEVEN C. HURBIS
BRIAN J. McKEEN (P34123)
STEVEN C. HURBIS (P80993)
Attorney for Plaintiff
645 Griswold St., Suite 4200
Detroit, MI 48226
(313) 961-4400

DATED: September 16, 2022

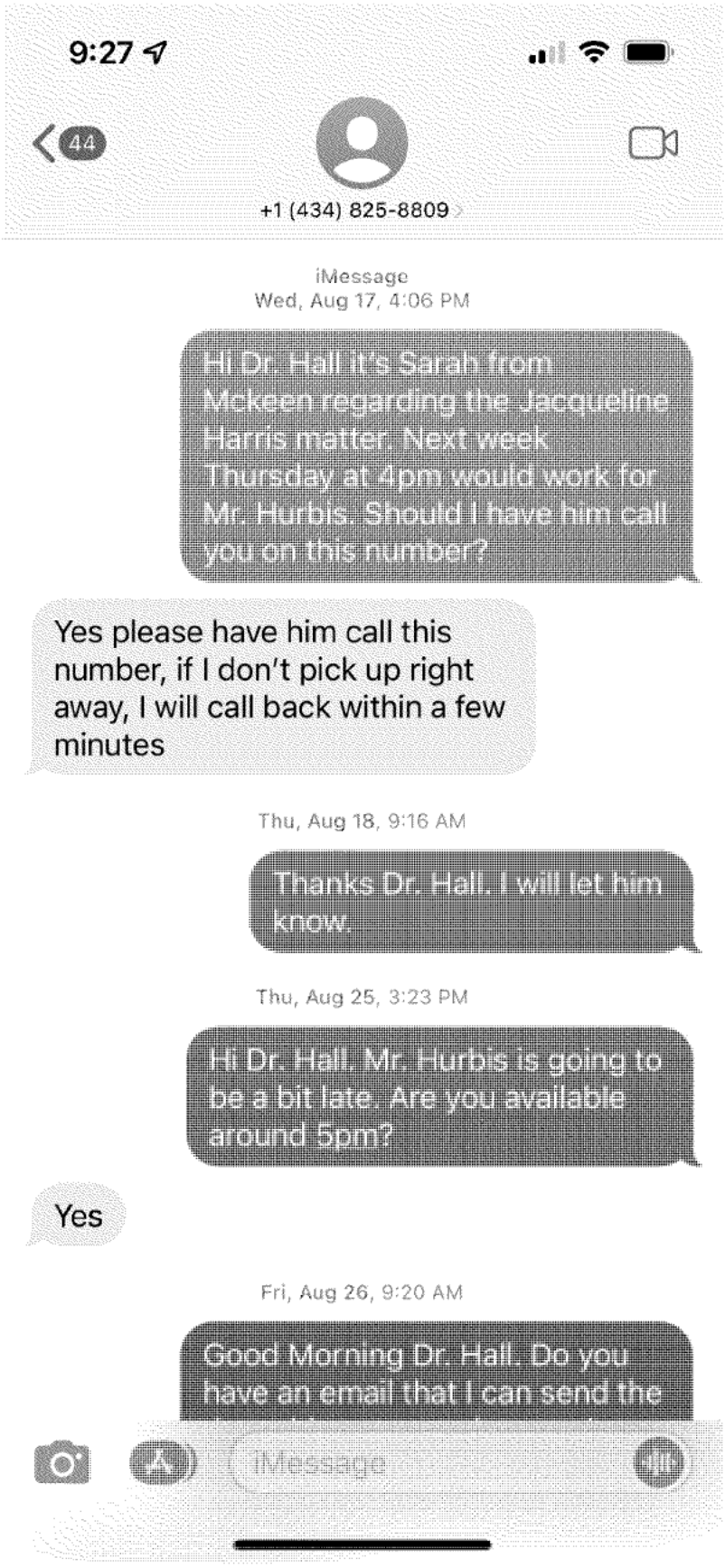
PROOF OF SERVICE

The undersigned hereby declares that she served a true copy of the foregoing document upon all attorneys of record at their respective addresses on file via M-File/E-File September 16, 2022.

Sarah Schimitschek

_____

Sarah Schimitschek



STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

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

Plaintiff,

Case No. 21-187353-NH
HON. NANCI J. GRANT

v

BEAUMONT HEALTH;
TRI COUNTY ORTHOPEDICS, P.C.; and
JACK D. LENNOX, D.O.,
Jointly and Severally,

Defendants.

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and Jack D. Lennox, D.O.
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DEFENDANTS TRI COUNTY ORTHOPEDICS, P.C. AND JACK LENNOX, D.O.'S MOTION TO STRIKE PLAINTIFF'S AMENDED WITNESS AND EXHIBIT LIST

NOW COME the Defendants, TRI COUNTY ORTHOPEDICS, P.C. and JACK D. LENNOX, D.O., by and through their attorneys, FOLEY, BARON, METZGER & JUIP, PLLC, and for their Motion to Strike Plaintiff's Amended Witness and Exhibit List, state as follows:

FEE

1. Plaintiff's First Amended Witness List should be struck on the grounds that it is untimely, causes undue burden to defendants, and would require re-litigation of this matter as plaintiff is attempting to replace their orthopedic surgery standard of care expert, Sonny Bal, M.D., with orthopedic surgeon, John H. Hall, M.D., in violation of this Honorable Court's initial scheduling order. Plaintiff did not disclose that they would be seeking to replace their orthopedic surgery standard of care expert, Dr. Bal, with Dr. Hall until after defendants filed a motion to compel Dr. Bal's deposition and 133 days after this Honorable Court's initial scheduling order required the parties to name their experts and file their witness and exhibit lists. Plaintiff has never previously identified Dr. Hall, either in discovery responses or otherwise, as a potential expert witness in this matter. Plaintiff's attempt to replace their orthopedic surgery standard of care expert, Dr. Bal, with Dr. Hall, in violation of this Honorable Court's initial scheduling order, is abusive to the litigation process, is an attempt to conduct a trial by surprise, and requires re-litigation of this matter if permitted, thereby subjecting the parties to additional costs and expenses. As such, plaintiff's amended witness list should be stricken, and plaintiff should be precluded from eliciting expert testimony from the above untimely disclosed expert at the time of trial.

2. Plaintiff filed this lawsuit against Defendants Tri County Orthopedics, P.C. and Jack Lennox, D.O., among others, alleging claims of medical malpractice and wrongful death on or around April 9, 2021. (**Exhibit A** – *Complaint*).

3. Attached to plaintiff's complaint was an Affidavit of Merit signed by orthopedic surgeon, Sonny Bal, M.D. (**Exhibit A** – *Complaint*).

4. On June 22, 2021, this Honorable Court entered an initial scheduling order, which stated: "All parties shall name their experts by 05/06/2022." (Emphasis in original). Further, the initial scheduling order stated: "Each party shall submit its witness list and a list of proposed exhibits to opposing counsel and the court by 05/06/2022." (Emphasis in original) (**Exhibit B –** *Initial Scheduling Order*).

5. Plaintiff filed their witness and exhibit list on April 25, 2022, which included the following expert witnesses:

21. **Experts:**

a. **Sonny Bal, M.D., Expert in Orthopedic Surgery, Columbia, MO ***

b. **Ljubisa Dragovic M.D., Expert in Pathology, Pontiac, MI ***

c. **Kelty Baker M.D., Expert in Hematology, Huston, TX ***

d. **Willis Wagner, M.D., Expert in Vascular Surgery, CA ***

e. **Michael Thomson, PhD, Potential Expert in Economics/Damages, Bloomfield Hills, MI ***

(**Exhibit C** – *Plaintiff's Witness and Exhibit List*).

6. Then, plaintiff provided responses to defendants' interrogatories and requests to produce to plaintiff regarding expert witnesses on May 9, 2022, in which plaintiff responded as follows:

INTERROGATORIES

1. With respect to each of Plaintiff's experts, please state in detail:

   a. The substance of the facts and opinions on which he/she will testify;

   b. A summary of the grounds for each opinion of each expert;

   c. His/her experience in the area of similar or comparable medical occurrences, injuries, illnesses, or disabilities.

ANSWER:

Please reference the attached Affidavit of Meritorious Claim of B. Sonny Bal M.D., and the Preliminary report of Dr. Michael Thomson PhD. Dr. Kelty Baker, and Dr. Willis Wagner will testify on causation and damages.

(**Exhibit D -** *Plaintiff's Responses to Defendants' Expert Witness Discovery*). Plaintiff filed supplemental responses to these discovery requests on June 23, 2022 and, again, only disclosed Sonny Bal, M.D., Michael Thomson, Ph.D, Kelty Baker, M.D., and Willis Wagner, M.D. (**Exhibit E -** *Plaintiff's Supplemental Responses to Defendants' Expert Witness Discovery*).

7. Plaintiff also did not disclose Dr. Hall as a potential expert witness in their initial disclosures, supplemental initial disclosures, or responses to defendants' and co-defendants' interrogatories and requests for production of documents. (**Exhibit F -** *Plaintiff's Initial Disclosures;* **Exhibit G -** *Plaintiff's Supplemental Initial Disclosures;* **Exhibit H -** *Plaintiff's Responses to Defendants' Discovery Requests;* **Exhibit I -** *Plaintiff's Responses to Co-Defendant's Discovery Requests*).

8. On June 23, 2022, this Honorable Court entered a stipulated order to adjourn scheduling order dates. The order, however, did not adjourn deadlines concerning the naming of expert witnesses or the filing of witness lists. (**Exhibit J –**

Stipulated Order to Adjourn Scheduling Order Dates). Therefore, per the initial scheduling order, the parties were required to file their witness lists and name their expert witnesses by May 6, 2022.

9. Despite repeated attempts to obtain the deposition of plaintiff's standard of care expert, Sonny Bal, MD, defendants were forced to file a motion to compel his deposition, which is scheduled to be heard by this Honorable Court on September 28, 2022 at 8:30 a.m., via Zoom. (**Exhibit K** – *NOH of Defendants' Motion to Compel Dr. Bal's Deposition*).

10. After filing this motion, plaintiff's counsel emailed defendants' counsel on September 16, 2022, at 10:51 a.m., writing: "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." (**Exhibit L** – *Email from Plaintiff's Counsel*).

11. Plaintiff then filed their First Amended Witness List on September 16, 2022, at 11:01 a.m., a mere 10 minutes after sending the above email. Plaintiff's First Amended Witness List contained only a single amendment - The replacement of Dr. Bal with John H. Hall, MD as plaintiff's orthopedic surgery standard of care expert. In fact, plaintiff's asterisk abbreviation provides that: "Witnesses designated with an asterisk (*) may be called upon to render opinion or other expert testimony."

21. **Experts:**

a. **John H. Hall, M.D., Expert in Orthopedic Surgery, Charlottesville, VA***

b. **Ljubisa Dragovic M.D., Expert in Pathology, Pontiac, MI ***

c. **Kelty Baker M.D., Expert in Hematology, Huston, TX ***

d. **Willis Wagner, M.D., Expert in Vascular Surgery, CA ***

e. **Michael Thomson, PhD, Potential Expert in Economics/Damages, Bloomfield Hills, MI ***

(**Exhibit M** – Plaintiff's First Amended Witness List).

12. Plaintiff did not seek leave from this Honorable Court or provide the defendants with any notice regarding this proposed amendment. Critically, plaintiff is attempting to change their standard of care expert 133 days after the expiration of the expert witness disclosure and witness list filing deadlines contained in the initial scheduling order.

13. Throughout the entirety of the notice of intent process and this litigation, defendants have relied on plaintiff's initial disclosures, discovery responses, and witness list, dated April 25, 2022, as well as the initial court order requiring all parties to disclose their expert witnesses and file their witness and exhibit lists by May 6, 2022.

14. The rules for filing and serving witness lists, original or supplemental, is controlled by MCR 2.401(I)(1)(a)-(b) and MCR 2.401(I)(2).

15. Dr. Hall was not identified as a potential expert witness in this matter until September 16, 2022 or, more specifically, 133 days after the expert disclosure deadline and witness list deadline contained in the initial scheduling order.

16. Plaintiff's attempt to add an additional expert is untimely, causes undue burden to defendants, is abusive to the litigation process, and requires the re-litigation of this matter if permitted. Defendants would be prejudiced if this Honorable Court allows plaintiff's amended witness list to stand and permits plaintiff to call potential expert witness, Dr. Hall, to testify at trial instead of their orthopedic surgery standard of care expert, Dr. Bal, as defendants have already disclosed their defense strategy based upon the discovery that has already been conducted in this matter.

17. Defendants now request that this Honorable Court strike plaintiff's first amended witness list pursuant to MCR 2.115(B) as this amendment is in violation of this Honorable Court's initial scheduling order that required the parties to name their expert witnesses by May 6, 2022.

WHEREFORE, Defendants, TRI COUNTY ORTHOPEDICS, P.C. and JACK D. LENNOX, D.O., respectfully request that this Honorable Court grant their Motion to Strike Plaintiff's Amended Witness List and order that plaintiff be precluded from eliciting expert testimony in support of their case from any witness other than those contained in their April 25, 2022 witness and exhibit list, as well as order any and all other just and appropriate relief.

Respectfully submitted,

FOLEY, BARON, METZGER & JUIP, PLLC

BY: /s/ Benjamin A Demsky

ENRICO G. TUCCIARONE (P52767)
BENJAMIN A. DEMSKY (P81055)
Attorneys for Defendants Tri County Orthopedics, P.C. and Jack D. Lennox, D.O.
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etucciarone@fbmjlaw.com
bdemsky@fbmjlaw.com

Dated: September 21, 2022

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

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

Plaintiff,

Case No. 21-187353-NH
HON. NANCI J. GRANT

v

BEAUMONT HEALTH;
TRI COUNTY ORTHOPEDICS, P.C.; and
JACK D. LENNOX, D.O.,
Jointly and Severally,

Defendants.

BRIAN J. McKEEN (P34123)
STEVEN C. HURBIS (P80993)
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ENRICO G. TUCCIARONE (P52767)
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BRIEF IN SUPPORT OF DEFENDANTS TRI COUNTY ORTHOPEDICS, P.C. AND JACK LENNOX, D.O.'S MOTION TO STRIKE PLAINTIFF'S AMENDED WITNESS AND EXHIBIT LIST

Introduction

Plaintiff's First Amended Witness List should be struck on the grounds that it is untimely, causes undue burden to defendants, and would require re-litigation of this matter as plaintiff is attempting to replace their orthopedic surgery standard of care

expert, Sonny Bal, MD, with a new, never disclosed orthopedic surgery expert, John H. Hall, MD. The witness list exchange filing deadline and expert witness disclosure deadline was 133 days ago. Plaintiff's responses to defendants' discovery requests do not mention Dr. Hall as a potential expert, nor has plaintiff attempted to amend their responses to include this potential expert. Plaintiff's attempt to add an additional expert in violation of this Honorable Court's initial scheduling order is abusive to the litigation process, an attempt to conduct a trial by surprise, and requires re-litigation of this matter if permitted.

Statement of Facts

Plaintiff filed this lawsuit against Defendants Tri County Orthopedics, P.C. and Jack Lennox, D.O., among others, alleging claims of medical malpractice and wrongful death on or around April 9, 2021. (**Exhibit A** – *Complaint*). The complaint contained an Affidavit of Merit signed by orthopedic surgeon, Sonny Bal, M.D. *Id.*

On June 22, 2021, this Honorable Court entered an initial scheduling order, which stated: "All parties shall name their experts by 05/06/2022." (Emphasis in original). Further, the initial scheduling order stated: "Each party shall submit its witness list and a list of proposed exhibits to opposing counsel and the court by 05/06/2022." (Emphasis in original) (**Exhibit B –** *Initial Scheduling Order*).

Plaintiff filed their witness and exhibit list on April 25, 2022, which included the following expert witnesses:

21. **Experts:**

a. **Sonny Bal, M.D., Expert in Orthopedic Surgery, Columbia, MO ***

b. **Ljubisa Dragovic M.D., Expert in Pathology, Pontiac, MI ***

c. **Kelty Baker M.D., Expert in Hematology, Huston, TX ***

d. **Willis Wagner, M.D., Expert in Vascular Surgery, CA ***

e. **Michael Thomson, PhD, Potential Expert in Economics/Damages, Bloomfield Hills, MI ***

(**Exhibit C** – *Plaintiff's Witness and Exhibit List*).

Then, plaintiff provided responses to defendants' interrogatories and requests to produce to plaintiff regarding expert witnesses on May 9, 2022, in which plaintiff responded as follows:

INTERROGATORIES

1. With respect to each of Plaintiff's experts, please state in detail:

   a. The substance of the facts and opinions on which he/she will testify;

   b. A summary of the grounds for each opinion of each expert;

   c. His/her experience in the area of similar or comparable medical occurrences, injuries, illnesses, or disabilities.

ANSWER:

Please reference the attached Affidavit of Meritorious Claim of B. Sonny Bal M.D., and the Preliminary report of Dr. Michael Thomson PhD. Dr. Kelty Baker, and Dr. Willis Wagner will testify on causation and damages.

(**Exhibit D -** *Plaintiff's Responses to Defendants' Expert Witness Discovery*). Plaintiff filed supplemental responses to these discovery requests on June 23, 2022 and, again,

only disclosed Sonny Bal, M.D., Michael Thomson, Ph.D, Kelty Baker, M.D., and Willis Wagner, M.D. (**Exhibit E -** *Plaintiff's Supplemental Responses to Defendants' Expert Witness Discovery*).

Plaintiff also did not disclose Dr. Hall as a potential expert witness in their initial disclosures, supplemental initial disclosures, or responses to defendants' and co-defendants' interrogatories and requests for production of documents. (**Exhibit F -** *Plaintiff's Initial Disclosures;* **Exhibit G -** *Plaintiff's Supplemental Initial Disclosures;* **Exhibit H -** *Plaintiff's Responses to Defendants' Discovery Requests;* **Exhibit I -** *Plaintiff's Responses to Co-Defendant's Discovery Requests*).

On June 23, 2022, this Honorable Court entered a stipulated order to adjourn scheduling order dates. The order, however, did not adjourn deadlines concerning the naming of expert witnesses or the filing of witness lists. (**Exhibit J –** *Stipulated Order to Adjourn Scheduling Order Dates*). Therefore, per the initial scheduling order, the parties were required to file their witness lists and name their expert witnesses by May 6, 2022.

Despite repeated attempts to obtain the deposition of plaintiff's standard of care expert, Sonny Bal, MD, defendants were forced to file a motion to compel his deposition, which is scheduled to be heard by this Honorable Court on September 28, 2022 at 8:30 a.m., via Zoom. (**Exhibit K** – *NOH of Defendants' Motion to Compel Dr. Bal's Deposition*). After filing this motion, plaintiff's counsel emailed defendants' counsel on September 16, 2022, at 10:51 a.m., writing: "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." (**Exhibit L –** *Email from Plaintiff's Counsel*).

Plaintiff then filed their First Amended Witness List on September 16, 2022, at 11:01 a.m., a mere 10 minutes after sending the above email. Plaintiff's First Amended Witness List contained only a single amendment - The replacement of Dr. Bal with John H. Hall, MD as plaintiff's orthopedic surgery standard of care expert. In fact, plaintiff's asterisk abbreviation provides that: "Witnesses designated with an asterisk (*) may be called upon to render opinion or other expert testimony."

21. **Experts:**

a. **John H. Hall, M.D., Expert in Orthopedic Surgery, Charlottesville, VA***

b. **Ljubisa Dragovic M.D., Expert in Pathology, Pontiac, MI ***

c. **Kelty Baker M.D., Expert in Hematology, Huston, TX ***

d. **Willis Wagner, M.D., Expert in Vascular Surgery, CA ***

e. **Michael Thomson, PhD, Potential Expert in Economics/Damages, Bloomfield Hills, MI ***

(**Exhibit M** – Plaintiff's First Amended Witness List).

Plaintiff did not seek leave from this Honorable Court or provide the defendants with any notice regarding this proposed amendment. Critically, plaintiff is attempting to change their standard of care expert 133 days after the expiration of the expert witness disclosure and witness list filing deadlines contained in the initial scheduling order.

Throughout the entirety of the notice of intent process and this litigation, defendants have relied on plaintiff's initial disclosures, discovery responses, and witness list, dated April 25, 2022, as well as the initial court order requiring all parties to disclose their expert witnesses and file their witness and exhibit lists by May 6, 2022. Dr. Hall was not identified as a potential expert witness in this matter until September 16, 2022 or, more specifically, 133 days after the expert disclosure deadline and witness list deadline contained in the initial scheduling order.

Law & Argument

Witness lists are an essential element of discovery. *Stepp v Dep't of Natural Resources*, 157 Mich App 774, 778 (1987). The ultimate objective of pretrial discovery is to make available to all parties, in advance of trial, all relevant facts or expert opinion and testimony which might be admitted into evidence at trial. Id., citing *Wilson v Borchard*, 370 Mich 404, 410 (1963). Regarding the timeline of when a witness list must be filed, MCR 2.401(I)(1) provides that all parties must file and serve witness lists within the time allotted by the trial court. *Duray Dev, LTC v Perrin*, 288 Mich App 143, 162-163 (2010). Specifically, the Michigan Court Rule states:

> Witness Lists.
>
> > (1) No later than the time directed by the court under subrule (B)(2)(a), the parties shall file and serve witness lists. The witness list must include:
> >
> > > (a) the name of each witness, and the witness' address, if known; however, records custodians whose testimony would be limited to providing the foundation for the admission of records may be identified generally;
> >
> > (b) whether the witness is an expert, and the field of expertise.

MCR 2.401(I)(1)(a)-(b). MCR 2.401(I)(2) provides that "[t]he trial court may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown." *Duray*, 288 Mich App at 162-163; see also *Dean v Tucker*, 182 Mich App 27, 32-34 (1990). The Court of Appeals has routinely affirmed the striking of untimely named witnesses. See, e.g., *Family Independence Agency v Miller*, unpublished opinion of the Court of Appeals, issued December 26, 2000 (Docket No.

220706) (affirming trial court's order prohibiting the respondent from calling witnesses in a child protective proceeding in which his parental rights were terminated when the respondent filed the witness list two months late without good cause).[1] (**Exhibit N**).

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

More than a year after filing this lawsuit and 133 days after witness lists were due and experts were required to be disclosed, plaintiff is seeking to replace its orthopedic surgery standard of care expert, Dr. Bal, with a new, never previously disclosed orthopedic surgery expert, Dr. Hall. Plaintiff did not seek to substitute Dr. Bal until defendants filed a motion to compel Dr. Bal's deposition. This court should not allow such gamesmanship by plaintiff as defendants are now subject to a trial by surprise, something that has been disapproved of by the Michigan Court of Appeals. *Stepp*, 157 Mich App at 779. Defendants will be severely impaired in defending this lawsuit if this Court permits the substitution of plaintiff's orthopedic surgery standard of care expert,

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[1] This unpublished opinion is cited because it provides support for the striking of witnesses as requested in this Motion.

Dr. Bal, more than a year after plaintiff filed this lawsuit and after the expiration of the witness list filing deadline and expert disclosure deadline. Moreover, plaintiff's attempt to replace their orthopedic surgery standard of care expert, Dr. Bal, with Dr. Hall, in violation of this Honorable Court's initial scheduling order, is abusive to the litigation process, is an attempt to conduct a trial by surprise, and requires re-litigation of this matter if permitted, thereby subjecting the parties to additional costs and expenses. Plaintiff's attempt to change their expert witness this late into this lawsuit is the epitome of a trial by surprise and should not be permitted by this Honorable Court.

Conclusion

Defendants now request that this Honorable Court strike Plaintiff's Amended Witness List pursuant to MCR 2.115(B), including John H. Hall, M.D., who was named 133 days after the witness list and expert disclosure deadlines, and more than a year after plaintiff filed this lawsuit. Not only is plaintiff's attempt to replace their orthopedic surgery standard of care expert, Dr. Bal, untimely, but defendants will also be unduly burdened and severely prejudiced if this Amended Witness list is not struck.

WHEREFORE, Defendants, TRI COUNTY ORTHOPEDICS, P.C. and JACK D. LENNOX, D.O., respectfully request that this Honorable Court grant their Motion to Strike Plaintiff's Amended Witness List and order that plaintiff be precluded from eliciting expert testimony in support of their case from any witness other than those contained in their April 25, 2022 witness and exhibit list, as well as order any and all other just and appropriate relief.

Respectfully submitted,

FOLEY, BARON, METZGER & JUIP, PLLC

BY: /s/ Benjamin A Demsky

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Dated: September 21, 2022

PROOF OF SERVICE

I state that I am employed with the firm of FOLEY, BARON, METZGER & JUIP, PLLC, and I hereby certify that on September 21, 2022, I served the foregoing document upon all counsel of record via the MiFile E-File and Serve System for the County of Oakland.

/s/ Robin M. Flores

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

LAWANNA SMITH AS PERSONAL
REPRESENTATIVE OFTHE ESTATE
OF JACQUELINE HARRIS, DECEASED
Plaintiff,

vs.

No. 21-187353-NH
Hon. Nanci J. Grant

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

Defendants.

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PLAINTIFF'S RESPONSE TO DEFENDANTS TRI COUNTY ORTHOPEDICS, P.C. AND JACK LENNOX, D.O.'S MOTION TO STRIKE PLAINTIFF'S AMENDED WITNESS LIST

NOW COMES Plaintiff, LAWANNA SMITH, as Personal Representative of the Estate of JACQUELINE HARRIS, Dec., by and through her attorneys, McKeen & Associates P.C., and for Plaintiff's Response to Defendants Tri County Orthopedics, P.C.'s and Jack D. Lennox, D.O.'s Motion to Strike Plaintiff's Amended Witness List, hereby states the following:

1. Plaintiff denies. Plaintiff's first amended witness list does not cause undue burden to the defense, it is not abusive of the litigation process, it is not an attempt at trial-by-surprise and, as this matter has yet to be fully litigated, the list would not require re-litigation. It does not even require a re-deposition. Discovery is still open; it does not need to be reopened. The Defendants are in the midst of deposing Plaintiffs experts. One expert has been deposed and others scheduled. Discovery is the time for the parties to learn about the other party's opinions and evidence, and to prepare their case for trial. This is what the plaintiff has done. While Dr. Bal signed the AOM, he has been unable to attend his deposition. Dr. Bal's last scheduled deposition could not be held because Dr. Bal could not appear. Plaintiff, through the email mentioned, notified the defense that it cannot reconnect with Dr. Bal. The replacing of an expert is one of the steps plaintiffs needed to take to prepare their case for trial. Prior to the hearing date, Plaintiff will have supplements both their initial disclosures and discovery responses.

2. Plaintiff admits. Please see complaint for a more complete summary of allegations.

3. Plaintiff admits.

4. Plaintiff admits and was complying with the scheduling order. Unfortunately, Plaintiff's expert Dr. Bal has not been cooperative, and he needs to be replaced. As discovery

remains open until December of this year, there is still time to have plaintiff's new expert Dr. Hall deposed and allow all parties time to fully prepare this matter for trial. Plaintiff attempted in good faith resolve the issue and seek proper leave from the Court. ***(Exhibit 4)***

5. Plaintiff admits. As the Court may see, Dr. Bal is plaintiff's only listed expert in orthopedic surgery. Because the doctor has not been reliable, plaintiff needs a more reliable expert in orthopedic surgery.

6. Plaintiff admits. This is discovery, a time to prepare a case for trial. To date, this is what plaintiff has done, and has done so within the time permitted by the Court. There is plenty of time in discovery for Plaintiff's new expert, Dr. Hall, to be deposed. Striking plaintiff's amended witness list would be against the purpose of discovery.

7. Plaintiff admits that it did not mention Dr. Hall in its initial disclosures. This is because, at the time, Dr. Bal was a sufficient expert and was still reliable. When he became unreliable plaintiff's counsel realized a new expert would be necessary, they informed the defense that they could not connect with Dr. Bal. This is not an attempted ambush by surprise.

8. Plaintiff admits. It was after May 6, 2022, when counsel realized Dr. Bal's reliability could potentially impact this case and that a new expert was needed.

9. Plaintiff can neither admit nor deny the reasons behind the defense's actions.

10. Plaintiff admits, while discovery was still ongoing, Plaintiff's counsel gave notice to defense counsel that plaintiff was having issues contacting their expert. After this, because discovery is still open, the defense likely knew plaintiff may need to retain a different expert. This knowledge further lessens any surprise to the defense.

11. Plaintiff admits that plaintiff's counsel took decisive action after realizing Dr. Bal would not work as an expert in this matter. The only change to the witness list is that Dr. Hall

replaced Dr. Bal.

12. Plaintiff admits that during discovery plaintiff discovered that Dr. Bal is not reliable, he needs to be replaced. Counsel's email likely put the defense on notice that plaintiff may need a new expert in orthopedic surgery.

13. Plaintiffs can neither admit nor deny what the defense relies on. While defense counsel has a right to rely on the initial disclosures, things change, and the law is flexible so it may address these changes fairly. Defense counsel is likely aware of this. Therefore, it is shortsighted of the defense to rely on something that may change through the course of discovery and change because of discovery. Plaintiff should not be penalized for the defense's thinking.

14. Plaintiff admits.

15. Plaintiff admits for reasons stated above.

16. Plaintiff denies. There is time to have Dr. Hall added to this case and deposed so all parties may prepare for trial and avoid any unfair prejudice.

17. Plaintiff denies. Plaintiff complied with the court's order and timely retained Dr. Bal as an expert. The defense does not mention this in their analysis. Plaintiff understands the Court ordered the parties to name their experts by May 6, 2022. Plaintiff took it seriously, complied, and named Dr. Bal. However, Dr. Bal became unreliable. Therefore, plaintiff needs a new expert. It should not be considered a violation of this Court's order when plaintiff complied with it and afterwards, circumstances changed. Therefore, adding a new expert to this matter during discovery is necessary and not a direct violation of this Court's order.

Plaintiff's need for getting a new expert is being done out of necessity rather than gamesmanship or surprise. Plaintiff is not dragging their feet. Plaintiff is getting deposition dates for Dr. Hall. Attempts in August were made to schedule Dr. Hall's deposition. ***(Exhibits 1 and 2)***

There is email showing that Plaintiff is getting Dr. Hall prepared as an expert in this matter. ***(Exhibit 3)***

WHEREFORE, Plaintiff respectfully requests that this Honorable Court DENY Defendants Tri County Orthopedics, P.C.'s and Jack D. Lennox, D.O.'s Motion to Strike Plaintiff's Amended Witness List

Respectfully Submitted:

McKEEN & ASSOCIATES, P.C.

/S/STEVEN C. HURBIS _____
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DATED: September 23, 2022

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

LAWANNA SMITH AS PERSONAL
REPRESENTATIVE OFTHE ESTATE
OF JACQUELINE HARRIS, DECEASED
Plaintiff,

vs.

No. 21-187353-NH
Hon. Nanci J. Grant

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

Defendants.

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BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANTS TRI COUNTY ORTHOPEDICS, P.C. AND JACK LENNOX, D.O.'S MOTION TO STRIKE PLAINTIFF'S AMENDED WITNESS LIST

In support of their Motion, Plaintiff relies on Michigan Law, the Michigan Court Rules, the facts and reasoning mentioned above, and the discretion and wisdom of this Honorable Court.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court DENY Defendants Tri County Orthopedics, P.C.'s and Jack D. Lennox, D.O.'s Motion to Strike Plaintiff's Amended Witness List

Respectfully Submitted:

McKEEN & ASSOCIATES, P.C.

/S/STEVEN C. HURBIS

BRIAN J. McKEEN (P34123)
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Dated: September 23, 2022

PROOF OF SERVICE

The undersigned hereby declares that she served a true copy of the foregoing document upon all attorneys of record at their respective addresses on file via M-File/E-File September 23, 2022.

Sarah Schimitschek

Sarah Schimitschek

STATE OF MICHIGAN

SIXTH JUDICIAL CIRCUIT COURT (OAKLAND COUNTY)

LAWANNA SMITH, as Personal Representative of the Estate of JACQUELINE HARRIS, Deceased,

Plaintiff,

-vs- Case No. 21-187353-NH

BEAUMONT HEALTH; TRI COUNTY ORTHOPEDICS, P.C., and JACK D. LENNOX, DO, Jointly and Severally,

Defendants.
_____/

MOTION

BEFORE THE HONORABLE NANCI J. GRANT, CIRCUIT JUDGE

Pontiac, Michigan - Wednesday, October 12, 2022

APPEARANCES:

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For Beaumont Health: CHARLES FISHER (P82248)
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For Tri County and Dr. Lennon: BENJAMIN A. DEMSKY (P81055)
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TRANSCRIBED FROM VIDEOTAPE BY:
Marguerite H. Anderson, CER, CSR-2334
(248) 935-5190

TABLE OF CONTENTS

WITNESSES:

None Called.

EXHIBITS: RECEIVED:

None Marked.

Pontiac, Michigan

Wednesday, October 12, 2022 - 9:49:41 a.m.

THE CLERK: Your Honor, now calling the case of Lawanna Smith versus Beaumont Health. Case Number 2021-187353-NH.

MR. HURBIS: Good morning, your Honor. Steven Hurbis, on behalf of the Estate of Lawanna Smith.

MR. DEMSKY: Good morning, your Honor. Benjamin Demsky, on behalf of Tri County Orthopedics and Dr. Lennox.

MR. FISHER: Good morning, your Honor. Charles Fisher, on behalf of the defendant Beaumont.

THE COURT: Okay. Go ahead with the motion.

MR. DEMSKY: So our first motion is to compel the deposition of plaintiff's orthopedic surgery standard of care expert, Sonny Bal. We have been attempting to get this dep for awhile now and to no avail.

So we're asking that the Court order his dep within 14 days.

THE COURT: Any objection to that?

MR. HURBIS: Your Honor, as I'm sure

you can guess from the motion, we're going to argue next -- we did not file a response. We can't produce Dr. Lennox(sic). I'm assuming in the natural course of things that's going to occur is if your Honor to order this, we would not be able to produce him in the 14 days and he would be stricken.

We would agree to withdraw him as an expert regardless, so however your Honor wants us to handle that.

THE COURT: Well, if you're going to -- if you're already agreeing to withdraw him, let's just let them -- that's wasting time and resources. So if you're withdrawing Dr. Lennox, unless Dr. Lennox is withdrawn, so now you're left with just Dr. Bal?

MR. HURBIS: No. Your Honor. Dr. Lennox is the defendant. Dr. Bal is our -- correct. We did offer to withdraw Dr. Bal when we were dealing with the amended witness list and we would still withdraw him regardless of how the Court rules on the other motion.

We have been unable to reestablish contact. So there's nothing I can do and I certainly don't want to violate the Court order

by failing to produce him within 14 days.

THE COURT: Well, wait a minute. You can't find Dr. Lennox, your client?

MR. HURBIS: No, your Honor. We represent the Estate. Dr. Bal is our standard of care -- was our standard --

THE COURT: I'm sorry. If this is all -- because you've got -- all right. Hold on.

Who is representing Dr. Lennox?

MR. DEMSKY: I am. And Tri County Orthopedics.

THE COURT: And you are withdrawing taking his dep or you are withdrawing -- so now I don't really understand what you're saying, Mr. Hurbis. When you say we're withdrawing Dr. Lennox --

MR. HURBIS: No. If I said that, your Honor, I misspoke. We would withdraw Dr. Bal as a listed expert witness.

THE COURT: Okay.

MR. DEMSKY: Your Honor, the only issue we have with them trying to withdraw Dr. Bal is he --

THE COURT: Then they have another person, then?

MR. DEMSKY: And he authored the affidavit of merit. We have not been able to depose Dr. Bal to see if he was even qualified, if he was practicing medicine in the year before the occurrence, he was an instructor, anything. To see if that affidavit that was executed in March '21 was actually -- is valid.

I mean, that really goes to the core of this lawsuit to begin with. So for them to attempt to try to withdraw their doctor who authored their affidavit of merit to initiate this lawsuit, I mean, at this point I would -- we would object to them trying to withdraw Dr. Bal, and that's really what all this comes down to.

THE COURT: I don't think you can be doing that. If you do that, then -- by doing that you're basically saying you don't have a case, Mr. Hurbis. Because if you withdraw your -- if you withdraw Dr. Bal then you don't -- then you don't have what you need to start the case, correct?

MR. HURBIS: Well, your Honor, the affidavit of merit was still filed. The law is crystal clear they have 91 days from the date the case is filed to challenge the sufficiency of the

affidavit of merit. That time period has of course passed.

It does matter if the Court allows us to amend witness list or not. What I would say is that we can withdraw Dr. Bal, discovery is still ongoing. If we did not have a standard of care witness to produce before the close of discovery, then we would obviously not be able to proceed with the case.

But as things stand now, discovery is still open for another two additional months. And again, should we fail to produce the standard of care expert within that timeframe, that would be an appropriate time for a dismissal.

But in terms of the AOM, the statute is clear, the defendant -- and it's an absolute bar, and it's been upheld by both the Court of Appeals and Michigan Supreme Court, although I did not intend to get into these issues today, that they have 91 days to challenge the affidavit of merit. Once those go by, there cannot be any further challenges.

Of course, should they depose or standard of care expert and he fails to meet the appropriate requirements in terms of practice

time, evidence for his opinions and things like that, that would be an appropriate time to move to strike him and we would be dealing with the same issue.

MR. DEMSKY: And we can challenge the affidavit of merit with good cause. We can't -- we wouldn't be able to challenge the affidavit of merit without actually deposing Dr. Bal because there would be no way of knowing his area of practice, how long he practices, what he actually does until we depose him.

So the idea, again, that they're trying to change the expert who authored their affidavit of merit at this point and not allowing us to depose him by attempting to withdraw him, I mean, that's -- if he doesn't meet the requirements, they don't have a case.

THE COURT: Can we just do this as a practical matter? You -- who can't find Dr. Bal at this point?

MR. HURBIS: We have been unable to reestablish contact with him, your Honor.

THE COURT: Well, there -- so there's your admission that Dr. Bal isn't either cooperating, they don't have him, they won't be

able to call him. So there's your first -- the -- therefore, there could be a supposition that they weren't -- they weren't -- I won't say supposition. Well, I guess you can say it just for purposes of this motion only, that they weren't qualified for that affidavit of merit.

So where do you want to go next then, Mr. Demsky?

MR. DEMSKY: I mean, we think that a court order -- at this point we haven't had a court order directing this doctor to appear for a deposition. I don't know if their lack of contact will be changed if Dr. Bal gets an order across his desk saying the court orders him to appear.

And I also think it's a little interesting that on the 15th they had contact with Dr. Bal because they cancelled the dep at his request.

THE COURT: The 15th of what?

MR. DEMSKY: Of August.

THE COURT: Thank you.

MR. DEMSKY: So that was when the dep was supposed to occur. Then they attached text messages to the response to our motion to strike,

that they're contacting the new standard of care expert, their attempted new standard of care expert on August 17th, only two days later.

THE COURT: So let's do this. Let's just do this. Bring your motion to compel. And your motion to compel is only about Sonny Bal, correct?

MR. DEMSKY: Correct.

THE COURT: So Dr. -- so Dr. Bal has to be deposed within the next three weeks.

If he does not make himself available for a deposition in the next three weeks, then you can make the appropriate motion at that time. All right?

As for the -- as for the motion to strike.

MR. DEMSKY: So our motion to strike is essentially on the same basis. It's 133 days after the court -- their initial scheduling order said that we had to have our experts in by May 6th. They didn't attempt to switch or file an amended witness list until September 16th.

They didn't ask leave for this Court, they didn't notify us until they filed the amended witness list. And again, like I said,

this really all goes back to Dr. Bal.

So we would ask that the Court strike the witness list, their amended witness list on those grounds as I stated in our motion.

MR. HURBIS: Your Honor, if I may respond.

THE COURT: Mm-hmm.

MR. HURBIS: The appropriate case law, which is still the controlling authority for an issue like this is of course Dean v Tucker, which deals with this exact issue, the naming of witnesses.

I will just briefly mention that the other cases cited by the defendant, including the probate issue, Carmik(phonetic) versus Macomb County Community College, In Re Miller versus Stanley Independent Agency, and then both the Hayes and Herrera cases, are vastly different circumstances than we have here. Both --

THE COURT: Here's the circumstances. I'm going to ask you -- I'm going to interrupt you and I -- and I realize that. I don't apologize for it because here's the bottom line:

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.

THE COURT: All right. Thank you.

MR. HURBIS: Thank you.

MR. DEMSKY: Have a good day, Judge.

(At 10:00:05 a.m., proceedings concluded.)

- - -

STATE OF MICHIGAN)
) ss.
COUNTY OF OAKLAND)

I, Marguerite H. Anderson, CER, CSR-2334, do hereby certify that this transcript, consisting of 14 pages, is a complete, true and correct rendition of the videotape of the proceedings as recorded in this case on October 12, 2022.

I further state that I assume no responsibility for any events that occurred during the above proceedings or any inaudible responses by any party or parties that are not discernible on the electronic recording of the proceedings.

/s/ Marguerite H. Anderson

Marguerite H. Anderson, CER, CSR-2334
78 Bobolink Street
Rochester Hills, Michigan 48309
(248) 935-5190

Dated: October 26, 2022.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

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

Plaintiff,

Case No. 21-187353-NH
HON. NANCI J. GRANT

v

BEAUMONT HEALTH;
TRI COUNTY ORTHOPEDICS, P.C.; and
JACK D. LENNOX, D.O.,
Jointly and Severally,

Defendants.

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ORDER GRANTING DEFENDANTS TRI COUNTY ORTHOPEDICS, P.C. AND JACK D. LENNOX, D.O.'S MOTION TO COMPEL DEPOSITION OF PLAINTIFF'S EXPERT, SONNY BAL, M.D.

At a session of said Court held in the City of Pontiac,
County of Oakland, State of Michigan:

on 10/12/2022

PRESENT: Nanci J. Grant
Hon Nanci J. Grant

This matter having come before the Court on Defendants Tri County Orthopedics, P.C. and Jack D. Lennox, D.O.'s Motion to Compel Deposition of Plaintiff's Expert, Sonny Bal, M.D., this Court having heard oral argument on October 12, 2022, and the Court being otherwise fully advised in the premises:

IT IS HEREBY ORDERED that Defendants Tri County Orthopedics, P.C. and Jack D. Lennox, D.O.'s Motion to Compel Deposition of Plaintiff's Expert, Sonny Bal, M.D. is granted for the reasons stated on the record.

IT IS FURTHER ORDERED that plaintiff's expert, Sonny Bal, M.D., shall appear for a deposition within 21 days (i.e., by November 2, 2022).

IT IS SO ORDERED.

This is not a final Order resolving the last pending claim and does not close the case.

/s/ Nanci J. Grant
October 12, 2022
CIRCUIT COURT JUDGE
Nanci J. Grant SL

I hereby stipulate to entry of the above order:

/s/ Steven C. Hurbis

BRIAN J. McKEEN (P34123)
STEVEN C. HURBIS (P80993)
Attorneys for Plaintiff

/s/ Benjamin A. Demsky

ENRICO G. TUCCIARONE (P52767)
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Tri County Orthopedics, P.C.
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/s/ Charles A. Fisher

PAUL J. DWAIHY (P66074)
CHARLES A. FISHER (P82248)
Attorneys for Defendant Beaumont Health

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

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

Plaintiff,

Case No. 21-187353-NH
HON. NANCI J. GRANT

v

BEAUMONT HEALTH;
TRI COUNTY ORTHOPEDICS, P.C.; and
JACK D. LENNOX, D.O.,
Jointly and Severally,

Defendants.

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ORDER GRANTING DEFENDANTS TRI COUNTY ORTHOPEDICS, P.C. AND JACK D. LENNOX, D.O.'S MOTION TO STRIKE PLAINTIFF'S AMENDED WITNESS AND EXHIBIT LIST

At a session of said Court held in the City of Pontiac,
County of Oakland, State of Michigan:

on 10/12/2022

PRESENT: Nanci J. Grant
Hon Nanci J. Grant

This matter having come before the Court on Defendants Tri County Orthopedics, P.C. and Jack D. Lennox, D.O.'s Motion to Strike Plaintiff's Amended Witness and Exhibit List, this Court having heard oral argument on October 12, 2022, and the Court being otherwise fully advised in the premises:

IT IS HEREBY ORDERED that Defendants Tri County Orthopedics, P.C. and Jack D. Lennox, D.O.'s Motion to Strike Plaintiff's Amended Witness and Exhibit List is granted for the reasons stated on the record.

IT IS FURTHER ORDERED that plaintiff may file a motion to amend their witness list to be heard on a later date and time.

IT IS SO ORDERED.

This is not a final Order resolving the last pending claim and does not close the case.

/s/ Nanci J. Grant
October 12, 2022
CIRCUIT COURT JUDGE
Nanci J. Grant SL

I hereby stipulate to entry of the above order:

/s/ Steven C. Hurbis

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/s/ Benjamin A. Demsky

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/s/ Charles A. Fisher

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CHARLES A. FISHER (P82248)
Attorneys for Defendant Beaumont Health

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

LAWANNA SMITH AS PERSONAL
REPRESENTATIVE OFTHE ESTATE
OF JACQUELINE HARRIS, DECEASED
Plaintiff,

vs.

No. 21-187353-NH
Hon. Nanci J. Grant

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

Defendants.

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PLAINTIFF'S EMERGENCY MOTION FOR LEAVE TO FILE PLAINTIFF'S SECOND AMENDED WITNESS LIST

NOW COMES Plaintiff, LAWANNA SMITH, as Personal Representative of the Estate of JACQUELINE HARRIS, Dec., by and through her attorneys, McKeen & Associates P.C., and for her Emergency Motion for Leave to File Plaintiff's Second Amended Witness List, hereby states the following:

1. This is a complex medical malpractice action.

2. On April 25, 2022, Plaintiff filed her Witness List for this matter in accordance with the Court's scheduling order as it existed at the time. ***Exhibit 1, Plaintiff's Witness List***

3. On September 16, 2022, Plaintiff filed her Amended Witness List to replace Plaintiff's orthopedic expert witness, Dr. Bal, due to Dr. Bal's ongoing failure to communicate. ***Exhibit 2, Plaintiff's Amended Witness List***

4. On September 21, 2022, Defendants filed a Motion to Strike Plaintiff's Amended Witness and Exhibit List. ***Exhibit 3, Defendants' Motion to Strike***

5. On October 12, 2022, this Court entered an order granting Defendants' Motion to Strike Plaintiff's Amended Witness and Exhibit List. This Court also ordered that Plaintiff "may file a motion to amend their witness list to be heard on a later date and time." ***Exhibit 4, Court Order***

6. Plaintiff now seeks leave to amend the Witness List which she filed on April 25, 2022.

7. Plaintiff seeks leave to amend her Witness List to replace Plaintiff's only listed expert in orthopedic surgery, Dr. Bal, with new expert, Dr. Hall. Unfortunately, Plaintiff's expert Dr. Bal has not been cooperative, and he needs to be replaced. As discovery remains open until December of this year, there is still time to have Dr. Hall deposed and allow all parties time to

fully prepare this matter for trial. Plaintiff attempted in good faith to resolve the issue and seek proper leave from the Court.

8. 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).

9. MCR 2.401(I) governs witness lists and establishes this Court's authority to establish a time for filing and serving witness lists. However, expert witnesses not listed in accordance with the Court's established time for disclosing witnesses can still be called to testify at trial upon a showing of good cause.

10. Here good cause exists for allowing Plaintiff to amend her witness list to replace Plaintiff's orthopedic expert witness. Plaintiff seeks leave to add Dr. Hall, whose testimony was not anticipated to be needed in this matter when the original witness list was filed. It was only after Plaintiff was having much difficulty contacting the current expert, Dr. Bal, that the need for a replacement expert witness became known.

11. Preventing a party from calling an expert that was not timely disclosed on a witness list is considered a discovery sanction which should be exercised cautiously. *Dean v Tucker*, 182 Mich App 27, 31–35; 451 NW2d 571 (1990).

12. The Court of Appeals has outlined a series of factors that should be considered in determining whether a party should be permitted to call a witness who was not previously disclosed. The Court of Appeals has noted that factors to consider include, whether the failure to disclose the witness earlier was willful or accidental, the party seeking to produce the witness' compliance with discovery requests, any prejudice to the non-moving party, whether the opposing party has had actual notice and the length of time before trial that the opposing party received notice, whether the moving party has engaged in deliberate delay, the degree of compliance by the

moving party with the court's other orders, and whether the moving party has timely attempted to cure the failure to disclose the witness. *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).

13. None of the potential reasons for denying Plaintiff's request for leave to file an amended witness list apply in this matter, and ample good cause supports granting Plaintiff leave to amend her witness list. Plaintiff attempted in good faith to resolve the issue and seek proper leave from the Court.

14. There was no prior failure, either willful or accidental, of Plaintiff to disclose the witness Plaintiff now seeks to add through amendment of her Witness List. The need for the replacement expert witness which Plaintiff now seeks to disclose on her amended witness list was not known until Plaintiff experienced much difficulty communicating with Plaintiff's current orthopedic witness, Dr. Bal.

15. Plaintiff has complied with discovery requests in this matter, and discovery is still ongoing. There would be no prejudice to Defendants resulting from the proposed amendment because Defendants would still have a full opportunity to conduct discovery regarding the expert's opinions. There is no immediately pending trial. Plaintiff is not seeking to add witnesses at the last minute before trial to achieve some sort of unfair strategic advantage. Instead, Plaintiff is seeking to do the exact opposite, i.e., provide Defendants with ample notice of the expert witness Plaintiff may call at trial with sufficient time for Defendants to conduct discovery or take any other actions they deem necessary in response.

16. There has been no deliberate delay in seeking to disclose the additional witnesses Plaintiff now seeks to add to her Witness List through amendment. Plaintiff has not engaged in any delay and has instead acted diligently in the aftermath of failed communication with Dr. Bal,

to seek a replacement expert witness and amend her witness list.

17. Good cause exists to allow Plaintiff to amend her Witness List to add experts whose testimony Plaintiff could not have anticipated was necessary in this matter when Plaintiff filed her original Witness List. Furthermore, none of the reasons which the Court of Appeals has indicated could support denying Plaintiff the ability to call these additional experts at trial apply in this matter.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court GRANT Plaintiff's Emergency Motion for Leave to File Plaintiff's Second Amended Witness List, and enter an order granting Plaintiff leave to file her First Amended List.

Respectfully Submitted:

McKEEN & ASSOCIATES, P.C.

/S/STEVEN C. HURBIS _____
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DATED: October 19, 2022

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

LAWANNA SMITH AS PERSONAL REPRESENTATIVE OFTHE ESTATE OF JACQUELINE HARRIS, DECEASED
Plaintiff,

vs.

No. 21-187353-NH
Hon. Nanci J. Grant

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

Defendants.

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BRIEF IN SUPPORT OF PLAINTIFF'S EMERGENCY MOTION FOR LEAVE TO FILE PLAINTIFF'S SECOND AMENDED WITNESS LIST

In support of their Motion, Plaintiff relies on Michigan Law, the Michigan Court Rules, the facts and reasoning mentioned above, and the discretion and wisdom of this Honorable Court.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court GRANT Plaintiff's Emergency Motion for Leave to File Plaintiff's Second Amended Witness List, and enter an order granting Plaintiff leave to file her First Amended List.

Respectfully Submitted:

McKEEN & ASSOCIATES, P.C.

/S/STEVEN C. HURBIS_____
BRIAN J. McKEEN (P34123)
STEVEN C. HURBIS (P80993)
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Dated: October 19, 2022

PROOF OF SERVICE

The undersigned hereby declares that she served a true copy of the foregoing document upon all attorneys of record at their respective addresses on file via M-File/E-File October 19, 2022.

Sarah Schimitschek

Sarah Schimitschek

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

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

Plaintiff,

Case No. 21-187353-NH
HON. NANCI J. GRANT

v

BEAUMONT HEALTH;
TRI COUNTY ORTHOPEDICS, P.C.; and
JACK D. LENNOX, D.O.,
Jointly and Severally,

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DEFENDANTS TRI COUNTY ORTHOPEDICS, P.C. AND JACK D. LENNOX D.O.'S RESPONSE TO PLAINTIFF'S EMERGENCY MOTION FOR LEAVE TO FILE PLAINTIFF'S SECOND AMENDED WITNESS LIST

NOW COMES the Defendants, TRI COUNTY ORTHOPEDICS, P.C. and JACK D. LENNOX, D.O., through their counsel, FOLEY, BARON, METZGER, & JUIP, PLLC, and for their Response to Plaintiff's Emergency Motion for Leave to File Plaintiff's Second Amended Witness List, states as follows:

1. Admitted, only, that this is a medical malpractice action.

2. Admitted, only, that plaintiff filed her witness list on April 25, 2022.

3. Denied in the manner pled. Plaintiff attempted to file an amended witness list on September 16, 2022; however, this Honorable Court struck this amended witness list on October 12, 2022. (**Exhibit A** - *Orders Granting Defendants' Motions*). Moreover, while plaintiff alleges to have had difficulty contacting Dr. Bal, the exhibits attached to her response to defendants' motion to strike plaintiff's amended witness list demonstrates otherwise. (**Exhibit B -** *Plaintiff's Text Messages with Dr. Hall*).

Dr. Bal's deposition was mutually agreed to proceed on August 15, 2022 at 1:00 p.m. On August 15, 2022, at 7:28 a.m., plaintiff's counsel contacted Dr. Bal's deposition at Dr. Bal's request because he had "an emergency." Plaintiff's counsel advised "[w]e will be in touch with new dates." (**Exhibit C** - *Email canceling Dr. Bal's August 15, 2022 deposition*). As such, according to this email, plaintiff was in contact with Dr. Bal as of August 15, 2022. Yet, a mere two days later, plaintiff's counsel's office is texting with their new proposed orthopedic surgery expert, John Hall, M.D. This clearly demonstrates that plaintiff was not having issues communicating with Dr. Bal but instead likely discovered that Dr. Bal did not meet the qualifications to render standard of care testimony under MCL 600.2169, MCL 600.2912d, and MCR 2.112(L), thereby invalidating plaintiff's lawsuit. Plaintiff's counsel then met with Dr. Hall on August 25, 2022. (**Exhibit B -** Plaintiff's Text Messages with Dr. Hall).

4. Admitted that defendants filed a motion to strike plaintiff's amended witness and exhibit list on September 21, 2022.

5. Admitted, only, that this Honorable Court's orders speak for themselves. (**Exhibit A** - *Orders Granting Defendants' Motions*).

6. Admitted, only, that plaintiff filed this motion for leave to file a second amended witness list on October 19, 2022.

7. Denied in the manner pled. As outlined in Numbered Paragraph 3 above, plaintiff has not attempted in good faith to resolve this issue and to seek proper leave from this Honorable Court until more than a month after she attempted to file an amended witness and exhibit list, which was already filed in violation of this Honorable Court's initial scheduling order. Further, noticeably absent from plaintiff's motion is evidence of any attempted communication with Dr. Bal following his canceled deposition on August 15, 2022. Plaintiff attaches no affidavits, no text messages, no email communications, or any other evidence to demonstrate the alleged difficulties they had contacting Dr. Bal. Plaintiff's failure to provide such support merely suggests that such communications are non-existent.

8. The cited case law speaks for itself.

9. MCR 2.401(I) speaks for itself. However, plaintiff has failed to demonstrate good cause for allowing her to amend her witness list as outlined above and in the attached Brief.

10. Denied. Plaintiff has failed to demonstrate "good cause" as required under MCR 2.401(I)(2) because she has not demonstrated that she had any difficulty contacting Dr. Bal after canceling his August 15, 2022 deposition. Instead, the text messages to Dr. Hall beginning on August 17, 2022 show that plaintiff was attempting to shield Dr. Bal from being deposed by defendants. (**Exhibit B -** *Plaintiff's Text Messages with Dr. Hall*).

This simply does not suffice as "good cause" under MCR 2.401(I)(2) and such conduct should not be rewarded.

11. The cited case law speaks for itself. However, denying plaintiff's motion would not be akin to a dismissal because even if plaintiff replaced Dr. Bal with Dr. Hall it does not rectify the issue of the invalid AOM.

12. The cited case law speaks for itself. However, this Honorable Court does not even need to address the *Dean* factors because plaintiff has failed to demonstrate good cause under MCR 2.401(I)(2). In any event, as outlined in the attached Brief, the *Dean* factors actually weigh in defendants' favor.

13. Denied for the reasons stated above and in the attached Brief.

14. Denied for the reasons stated above and in the attached Brief. Notably, plaintiff has failed to demonstrate "good cause" as required under MCR 2.401(I)(2) because she has not demonstrated that she had any difficulty contacting Dr. Bal after canceling his August 15, 2022 deposition. Instead, the text messages to Dr. Hall beginning on August 17, 2022 show that plaintiff was attempting to shield Dr. Bal from being deposed by defendants. (**Exhibit B -** *Plaintiff's Text Messages with Dr. Hall*). This simply does not suffice as "good cause" under MCR 2.401(I)(2) and such conduct should not be rewarded.

15. Denied. Defendants would absolutely be prejudiced by this amendment as plaintiff is seeking to replace their standard of care expert, Dr. Bal, who signed the AOM, with another orthopedic surgery standard of care expert, Dr. Hall, more than a year and a half after filing this lawsuit.

16. Denied. Plaintiff has engaged in deliberate delay as evidenced by the text messages to Dr. Hall beginning on August 17, 2022 and plaintiff's failure to advise defendants or this Honorable Court that she intended to replace her standard of care expert until September 16, 2022, which was after defendants filed a motion to compel Dr. Bal's deposition and 133 days after the initial scheduling order required the parties to file witness lists and disclose expert witnesses.

17. Denied. Plaintiff has failed to demonstrate "good cause" as required under MCR 2.401(I)(2) because she has not demonstrated that she had any difficulty contacting Dr. Bal after canceling his August 15, 2022 deposition. Instead, the text messages to Dr. Hall beginning on August 17, 2022 show that plaintiff was attempting to shield Dr. Bal from being deposed by defendants. (**Exhibit B -** *Plaintiff's Text Messages with Dr. Hall*). In fact, noticeably absent from plaintiff's motion is evidence of any attempted communication with Dr. Bal following his canceled deposition on August 15, 2022. Plaintiff attaches no affidavits, no text messages, no email communications, or any other evidence to demonstrate the alleged difficulties they had contacting Dr. Bal. Plaintiff's failure to provide such support merely suggests that such communications are non-existent.

WHEREFORE, defendants, TRI COUNTY ORTHOPEDICS, P.C. and JACK D. LENNOX, D.O., respectfully request that this Honorable Court deny Plaintiff's Emergency Motion for Leave to File Plaintiff's Second Amended Witness List in its entirety, as well as award any and all other just and appropriate relief.

Respectfully submitted,

FOLEY, BARON, METZGER & JUIP, PLLC

BY: /s/ Benjamin A Demsky
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Dated: October 28, 2022

PROOF OF SERVICE

I state that I am employed with the firm of FOLEY, BARON, METZGER & JUIP, PLLC, and I hereby certify that on October 28, 2022, I served the foregoing document upon all counsel of record via the MiFile E-File and Serve System for the County of Oakland.

/s/ Robin M. Flores

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

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

Plaintiff,

Case No. 21-187353-NH
HON. NANCI J. GRANT

v

BEAUMONT HEALTH;
TRI COUNTY ORTHOPEDICS, P.C.; and
JACK D. LENNOX, D.O.,
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BRIEF IN SUPPORT OF DEFENDANTS TRI COUNTY ORTHOPEDICS, P.C. AND JACK D. LENNOX D.O.'S RESPONSE TO PLAINTIFF'S EMERGENCY MOTION FOR LEAVE TO FILE PLAINTIFF'S SECOND AMENDED WITNESS LIST

Statement of Facts

Plaintiff filed this lawsuit against defendants Tri County Orthopedics, P.C. and Jack Lennox, D.O., among others, alleging claims of medical malpractice and wrongful death

on or around April 9, 2021. (**Exhibit D** - *Complaint*). The complaint contained an Affidavit of Merit signed by orthopedic surgeon, Sonny Bal, M.D. *Id.*

On June 22, 2021, this Honorable Court entered an initial scheduling order, which stated: "All parties shall name their experts by 05/06/2022." (Emphasis in original). Further, the initial scheduling order stated: "Each party shall submit its witness list and a list of proposed exhibits to opposing counsel and the court by 05/06/2022." (Emphasis in original) (**Exhibit E** - *Initial Scheduling Order*). Plaintiff concedes that she never disclosed their potential orthopedic surgeon expert, John H. Hall, M.D., until she filed her first amended witness list on September 16, 2022. See pg. 3 of Plaintiff's Emergency Motion.

Defendants filed a motion to compel Dr. Bal's deposition and a motion to strike plaintiff's amended witness and exhibit list, which were heard by this Honorable Court on October 12, 2022. The court granted both motions, compelling Dr. Bal to appear for a deposition by November 2, 2022, and striking plaintiff's first amended witness and exhibit list, but allowing plaintiff to file a motion to amend later. (**Exhibit A** - *Orders Granting Defendants' Motions*).

Plaintiff alleges that their orthopedic surgery standard of care expert who signed the Affidavit of Merit (AOM), Dr. Bal, "has not been cooperative, and he needs to be replaced." See pg. 2 of Plaintiff's Emergency Motion. According to her motion, plaintiff's "good cause" stems from her alleged inability to get into contact with Dr. Bal: "It was only after Plaintiff was having much difficulty contacting the current expert, Dr. Bal, that the need for a replacement expert witness became known." See pg. 3 of Plaintiff's Emergency Motion. Plaintiff's "good cause", however, is merely contrived to avoid the inevitability that her lawsuit will be dismissed for lack of a valid AOM. Notably, while plaintiff alleges to

have had difficulty contacting Dr. Bal, the exhibits attached to her response to defendants' motion to strike plaintiff's amended witness list demonstrates otherwise. (**Exhibit B -** *Plaintiff's Text Messages with Dr. Hall*).

Dr. Bal's deposition was mutually agreed to proceed on August 15, 2022 at 1:00 p.m. On August 15, 2022, at 7:28 a.m., plaintiff's counsel contacted Dr. Bal's deposition at Dr. Bal's request because he had "an emergency." Plaintiff's counsel advised "[w]e will be in touch with new dates." (**Exhibit C** - *Email canceling Dr. Bal's August 15, 2022 deposition*). As such, according to this email, plaintiff was in contact with Dr. Bal as of August 15, 2022. Yet, a mere two days later, plaintiff's counsel's office is texting with their new proposed orthopedic surgery expert, John Hall, M.D. This clearly demonstrates that plaintiff was not having issues communicating with Dr. Bal but instead likely discovered that Dr. Bal did not meet the qualifications to render standard of care testimony under MCL 600.2169, MCL 600.2912d, and MCR 2.112(L), thereby invalidating plaintiff's lawsuit. Plaintiff's counsel then met with Dr. Hall on August 25, 2022. (**Exhibit B -** Plaintiff's Text Messages with Dr. Hall).

Noticeably absent from plaintiff's motion is evidence of any attempted communication with Dr. Bal following his canceled deposition on August 15, 2022. Plaintiff attaches no affidavits, no text messages, no email communications, or any other evidence to demonstrate the alleged difficulties they had contacting Dr. Bal. Plaintiff's failure to provide such support merely suggests that such communications are non-existent.

Further, plaintiff was in contact with Dr. Hall as of August 17, 2022 but made no attempt to file a motion for leave to amend their witness list then and did not attempt to do so until defendants filed a motion to compel Dr. Bal's deposition on September 16,

2022. In fact, at the hearing of defendants' motions to compel Dr. Bal's deposition and to strike plaintiff's amended witness list, plaintiff's counsel attempted to withdraw Dr. Bal as plaintiff's standard of care expert even though he signed the AOM. This Court acknowledged the issue with plaintiff's counsel's attempt to withdraw Dr. Bal as an expert and, as a result, Dr. Bal was ordered to appear for a deposition by November 2, 2022. (**Exhibit A** - Orders Granting Defendants' Motions).

Plaintiff's attempt to replace Dr. Bal with Dr. Hall is simply an attempt to avoid the inevitable: the dismissal of plaintiff's action for an invalid AOM. Dr. Bal, not Dr. Hall, signed the AOM, which allowed plaintiff to file this lawsuit. If Dr. Bal was not qualified to sign the AOM, plaintiff's lawsuit will be invalidated and dismissed. Simply replacing Dr. Bal with Dr. Hall does not rectify the issue with plaintiff's complaint and AOM and, thus, is wholly unwarranted. Moreover, as demonstrated above, the text messages between plaintiff's counsel and Dr. Hall beginning on August 17, 2022 show that plaintiff was not having issues contacting Dr. Bal but instead was attempting to shield Dr. Bal from being deposed, so that defendants could not confirm that Dr. Bal actually retired from the practice of medicine in 2017 and, thus, was not qualified to sign the AOM on March 11, 2021.

Because plaintiff has failed to demonstrate good cause as required by MCR 2.401(I)(2), defendants respectfully request that this Honorable Court deny plaintiff's emergency motion for leave to file plaintiff's second amended witness list.

Law & Argument

Witness lists are an essential element of discovery. *Stepp v Dep't of Natural Resources,* 157 Mich App 774, 778 (1987). The ultimate objective of pretrial discovery is to make available to all parties, in advance of trial, all relevant facts or expert opinion and

testimony which might be admitted into evidence at trial. *Id.,* citing *Wilson v Borchard*, 370 Mich 404, 410 (1963). Regarding the timeline of when a witness list must be filed, MCR 2.401(I)(1) provides that all parties must file and serve witness lists within the time allotted by the trial court. *Duray Dev, LTC v Perrin*, 288 Mich App 143, 162-163 (2010). MCR 2.401(I)(2) provides that "[t]he trial court may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown." *Duray*, 288 Mich App at 162-163; see also *Dean v Tucker*, 182 Mich App 27, 32-34 (1990).

Although "good cause" is not defined in MCR 2.401(I)(2), "[g]ood cause' simply means a 'satisfactory,' 'sound or valid' 'reason'…" *People v Buie*, 491 Mich 294, 319 (2012), quoting *Random House Webster's College Dictionary* (1997); see also *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 264 (2013). Here, plaintiff has failed to demonstrate "good cause" as required under MCR 2.401(I)(2) because she has not demonstrated that she had any difficulty contacting Dr. Bal after canceling his August 15, 2022 deposition. Instead, the text messages to Dr. Hall beginning on August 17, 2022 show that plaintiff was attempting to shield Dr. Bal from being deposed by defendants. (**Exhibit B -** *Plaintiff's Text Messages with Dr. Hall*). This simply does not suffice as "good cause" under MCR 2.401(I)(2) and such conduct should not be rewarded.

Plaintiff further argues that a denial of her motion to amend would constitute a dismissal of her claims. However, even if plaintiff replaced Dr. Bal with Dr. Hall it does not rectify the issue of the invalid AOM and, thus, disallowing plaintiff's second amended witness list is not akin to a dismissal. As such, this Honorable Court does not even need to address the *Dean* factors

In any event, even the *Dean* factors weight in defendants' favor:

> (1) Whether the violation was wilful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. [*Vicencio v Ramirez*, 211 Mich App 501, 507 (1995), citing *Dean, supra* at 32-33.

First, plaintiff's violation of the initial scheduling order was wilful as demonstrated by the text messages to Dr. Hall and her failure to request leave to amend from this Honorable Court in August 2022 when she allegedly began having issues getting into contact with Dr. Bal. Second, plaintiff has a history of refusing to comply with the initial scheduling order as she failed to identify Dr. Hall in any of her papers until September 16, 2022 – 133 days after witness lists were due and experts were required to be disclosed. Third, defendants would be severely prejudiced if plaintiff was allowed to replace their standard of care expert who signed the AOM, Dr. Bal, with Dr. Hall, who had not previously been disclosed until September 16, 2022 as noted above. This would be akin to a trial by surprise, something that has been disapproved of by the Michigan Court of Appeals. *Stepp,* 157 Mich App at 779. Fourth, as demonstrated above, plaintiff's attempt to replace Dr. Bal with Dr. Hall 133 days after witness lists were due and experts were required to be disclosed and without previously seeking leave of this Honorable Court is indicative of deliberate delay. Fifth, as this involves the late naming of an expert, plaintiff has not complied with this Honorable Court's initial scheduling order pertaining to this issue. Sixth, plaintiff knowingly failed to attempt to cure the defect until defendants filed a motion to compel Dr. Bal's deposition on September 16, 2022. Instead, plaintiff filed an amended witness list and offered dates for Dr. Hall's deposition, even though this

Honorable Court never permitted them to amend her witness list and defendants never agreed to the same. Lastly, a lesser sanction would not serve the interests of justice as plaintiff's attempts to amend their witness list does not rectify the issue with the invalid AOM signed by Dr. Bal on March 11, 2021.

For the reasons outlined above, this Honorable Court should deny plaintiff's motion in its entirety.

Conclusion

WHEREFORE, defendants, TRI COUNTY ORTHOPEDICS, P.C. and JACK D. LENNOX, D.O., respectfully request that this Honorable Court deny Plaintiff's Emergency Motion for Leave to File Plaintiff's Second Amended Witness List in its entirety, as well as award any and all other just and appropriate relief.

Respectfully submitted,

FOLEY, BARON, METZGER & JUIP, PLLC

BY: /s/ Benjamin A Demsky

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BENJAMIN A. DEMSKY (P81055)
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Dated: October 28, 2022

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

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

Plaintiff,

vs.

Case No. 21-187353-NH
Hon. Nanci J. Grant

BEAUMONT HEALTH,
TRI COUNTY ORTHOPEDICS, PC
and JACK D. LENNOX, DO
Jointly and Severally,

Defendants.

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BEAUMONT HEALTH'S BRIEF IN RESPONSE TO PLAINTIFF'S EMERGENCY MOTION FOR LEAVE TO FILE A SECOND AMENDED WITNESS LIST

NOW COMES Defendant Beaumont Health, by and through its attorneys, Tanoury, Nauts, McKinney & Dwaihy, PLLC, and for its Response to Plaintiff's Emergency Motion for Leave to File a Second Amended Witness List, states as follows:

The impetuous to Plaintiff filing a motion for leave to amend was the hearing regarding Co-Defendant's Motion to Compel the Deposition of Dr. Bal and Co-Defendant's Motion to strike Plaintiff's First Amended Witness List. During the hearing, the Court promptly identified Plaintiff had not contacted opposing counsel to request stipulation to an amendment, nor did Plaintiff file a motion for leave to amend her witness list. Therefore, the Court granted both of Co-Defendant's Motions. (**Exhibit A** – Orders Granting Co-Defendant's Motions).

Despite the Court's warnings at the aforementioned hearing on Co-Defendant's motions, Plaintiff further attempted to circumvent the need for a motion to amend by attempting to file a Voluntary Dismissal of All Defendants, wherein Plaintiff requested a dismissal without prejudice. (**Exhibit B** – Voluntary Dismissal). The only conceivable reason why Plaintiff would unilaterally request a dismissal without prejudice, prior to the hearing date on Plaintiff's previously filed motion to amend, is because **Plaintiff now understands her case must be dismissed given Dr. Bal's Affidavit of Merit is invalid.** Therefore, it is implied Plaintiff agrees with the crux of Defendant's argument against Plantiff's motion to amend, which is that an amendment would be moot.

Without a doubt, witness lists constitute crucial documents which are relied upon by opposing parties and the Court. *Stepp v Dep't of Natural Resources,* 157 Mich App 774, 778 (1987). The purpose of the discovery process is to make available to all parties, in advance of trial, all relevant facts or expert opinion and testimony which might be admitted into evidence at trial. *Id.,* citing *Wilson v Borchard*, 370 Mich 404, 410 (1963). Irrespective of when a witness list must be filed, MCR 2.401(I)(1) provides that all parties must file and serve witness lists within the time allotted by the trial court. *Duray*

Dev, LTC v Perrin, 288 Mich App 143, 162-163 (2010). MCR 2.401(I)(2) provides that "[t]he trial court may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon **good cause** shown." *Duray*, 288 Mich App at 162-163; see also *Dean v Tucker*, 182 Mich App 27, 32- 34 (1990).

The phrase "good cause" is not explicitly defined under MCR 2.401(I)(2), "[g]ood cause' simply means a 'satisfactory,' 'sound or valid' 'reason'…" *People v Buie*, 491 Mich 294, 319 (2012), quoting *Random House Webster's College Dictionary* (1997); see also *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 264 (2013). Here, plaintiff has failed to demonstrate "good cause" as required under MCR 2.401(I)(2) because she has not demonstrated that she had any difficulty contacting Dr. Bal after canceling his August 15, 2022 deposition. The text messages cited by Plaintiff reveal Plaintiff instead sought to shield Dr. Bal from cross-examination. (**Exhibit C -** Text Messages with Dr. Hall). Plaintiff's showing is insufficient to constitute "good cause" pursuant to MCR 2.401(I)(2) where Plaintiff's own gamesmanship precipitated Plaintiff's need for an emergency motion.

Plaintiff, perhaps sensing the futility of her arguments under MCR 2.401(I)(2)'s good cause provision, goes on to argue a denial of her request to amend would equate to a dismissal of her claims. This is simply not a "legal" argument within the context of our profession. Furthermore, replacing Dr. Bal with Dr. Hall does nothing to rectify Plaintiff's reliance on an invalid AOM. Plaintiff's request is plainly moot, and the Court need not address the *Dean* factors.

However, and for the sake of argument, it should be noted the *Dean* factors mandate denial of Plaintiff's motion:

> (1) Whether the violation was willful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. [*Vicencio v Ramirez*, 211 Mich App 501, 507 (1995), citing *Dean, supra* at 32-33.

The first factor of analysis presented under *Dean* is the most important, as it looks to determine the violator's state of mind, and thus speaks to the fairness of the violator's predicament. Here, Plaintiff's Counsel admitted to willfully violating the Courts initial scheduling order at the prior hearings on Co-Defendant's motions to compel production of Dr. Bal and to strike Plaintiff's amended witness list. Thus, Plaintiff is reaping what she's sown. Furthermore, the text messages to Dr. Hall demonstrate Plaintiff's clear need to amend her witness list in August of 2020, as they show Plaintiff's knowledge Dr. Bal was unresponsive. Second, plaintiff exhibits a history of refusing to comply with the Court's scheduling order, as aforementioned. Third, defendants would be severely prejudiced if plaintiff was allowed to replace their standard of care expert who signed the AOM, Dr. Bal, with Dr. Hall, who had not previously been disclosed until September 16, 2022 as noted above. In a hypothetical scenario where Plaintiff is allowed to replace Dr. Hall, while still being allowed to rely on Dr. Bal's defective AOM, this would constitute a trial by surprise. *Stepp,* 157 Mich App at 779. Fourth, as demonstrated above, plaintiff's attempt to replace Dr. Bal with Dr. Hall 133 days after witness lists were due and experts were required to be disclosed and without previously seeking leave of this Honorable Court is indicative of deliberate delay. Fifth, and perhaps

most telling, plaintiff intentionally delayed any attempts to correct the defect until Co-defendants filed a motion to compel Dr. Bal's deposition on September 16, 2022. This is characteristic of Plaintiff's disregard for the rules of civil procedure and the Court's orders. Instead, plaintiff filed an amended witness list and offered dates for Dr. Hall's deposition without leave of the Court or stipulation from opposing counsel. Finally, no lesser sanction would not serve the interests of justice or judicial economy, as plaintiff's attempts to amend her witness list does nothing to ameliorate the defect caused by filing a defective Affidavit of Merit signed by Dr. Bal.

However, and as aforementioned, analysis under *Dean* is without purpose where Plaintiff's Affidavit of Merit is defective due to a lack of qualifications of Plaintiff's expert. The entire basis for the instant lawsuit is undisputedly predicated on a misrepresentation by Plaintiff. Counsel is tasked with vetting experts prior to submitting an Affidavit of Merit attested to by a licensed expert. Instead, Plaintiff's Counsel has defrauded the Court either willfully or by ineptitude, progressed a meritless case for over a year at great expense to the parties, and then attempted to amend Plaintiff's witness list unilaterally at a late date and in violation of the Court's order. Even if Plaintiff's amendment were granted, it would be pointless where Defendants are plainly entitled to a dismissal on the basis of multiple arguments stemming from a voided Affidavit of Merit.

WHEREFORE, Defendant Beaumont Health respectfully requests this Court deny Plaintiff's Emergency Motion for Leave to File an Amended Witness List.

TANOURY, NAUTS, McKINNEY
& DWAIHY, PLLC

By: */s/ Paul J. Dwaihy*
PAUL J. DWAIHY (P66074)
CHARLES A. FISHER (P82248)
Attorneys for Defendant Beaumont
38777 Six Mile Road, Ste. 101
Livonia, MI 48152
(313) 964-4500

Dated: October 31, 2022

CERTIFICATE OF SERVICE

Krista Tester, an employee with the law firm of Tanoury Nauts McKinney & Dwaihy, PLLC, being first duly sworn, deposes and says that on October 31, 2022, she caused a copy of this document to be served upon all parties of record, via MIFILE.

By: */s/ Krista Tester*
Krista Tester

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

LAWANNA SMITH AS PERSONAL
REPRESENTATIVE OFTHE ESTATE
OF JACQUELINE HARRIS, DECEASED
Plaintiff,

vs.

No. 21-187353-NH
Hon. Nanci J. Grant

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

Defendants.

BRIAN J. McKEEN (P34123)
STEVEN C. HURBIS (P80993)
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ORDER OF VOLUNTARY DISMISSAL OF ALL DEFENDANTS

Plaintiff, LAWANNA SMITH, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JACQUELINE HARRIS, by and through her attorneys McKEEN & ASSOCIATES, P.C., is voluntarily dismissing **without** prejudice all Defendants in the above-named action.

IT IS HEREBY ORDERED the above-named case is dismissed **without** prejudice. This is a final order and does close the case numbered 21-187353-NH.

Respectfully Submitted:

McKEEN & ASSOCIATES, P.C.

_____

STEVEN C. HURBIS (P80993)
Attorneys for Plaintiff
645 Griswold St., Suite 4200
Detroit, MI 48226
(313) 961-4400

DATED: October 26, 2022

Demsky, Benjamin

Subject: FW: Scheduled: Lawanna Smith, et al vs. Beaumont Health, et al [21-187353-NH] - 2022-10-26 01:00 PM EDT

From: Steven Hurbis <shurbis@mckeenassociates.com>
Sent: Wednesday, October 26, 2022 7:44 AM
To: Scheduling Team <scheduling@chapagiblin.com>; Sarah Schimitschek <sschimitschek@mckeenassociates.com>; Ariel Higgins <ahiggins@mckeenassociates.com>; paul.dwaihy@tnmglaw.com; Tucciarone, Eric <eTucciarone@fbmjlaw.com>; Pilarski, Laura <lpilarski@fbmjlaw.com>; Flores, Robin <RFlores@fbmjlaw.com>; krista.tester@tnmglaw.com; randees12@aol.com
Subject: RE: Scheduled: Lawanna Smith, et al vs. Beaumont Health, et al [21-187353-NH] - 2022-10-26 01:00 PM EDT

Good morning everyone,

We filed a voluntary dismissal **without** prejudice this morning. To that end, we will not be proceeding with Dr. Valenti's deposition or Dr. Wagner.

Best,

Steven C. Hurbis, Esq.
McKeen & Associates, P.C.
Penobscot Building
645 Griswold St., Suite 4200
Detroit, MI 48226-3344
(313) 961-5985 (Facsimile)
(313) 961-4400 x 829

From: Remote Counsel <invitations@remotecounsel.com>
Sent: Tuesday, October 25, 2022 9:25 AM
To: scheduling@chapagiblin.com; Sarah Schimitschek <sschimitschek@mckeenassociates.com>; Ariel Higgins <ahiggins@mckeenassociates.com>; Steven Hurbis <shurbis@mckeenassociates.com>; paul.dwaihy@tnmglaw.com; eTucciarone@fbmjlaw.com; lpilarski@fbmjlaw.com; RFlores@fbmjlaw.com; krista.tester@tnmglaw.com; randees12@aol.com
Subject: Scheduled: Lawanna Smith, et al vs. Beaumont Health, et al [21-187353-NH] - 2022-10-26 01:00 PM EDT

Scheduling Team invited you to a meeting Wednesday, October 26th at 01:00 PM EDT

Internal Ref #: Matteo Valenti, D.O.

Lawanna Smith, et al vs. Beaumont Health, et al [21-187353-NH]
Starts10/26/2022 at 01:00 PM EDT
Ends 10/26/2022 at 05:00 PM EDT

Message
MEETING ID: 822-0175-380
PASSCODE: 30665

Join Meeting

PC, Mac, iOS or Android

https://link.edgepilot.com/s/dd3d966d/RZz9QEahx0yuRoz08RhHTA?u=https://chapagiblin.remotecounsel.com/zoom/meeting/MTY2Mjg0

Phone

646-568-7788
Meeting ID: 822-0175-380

Videoconference System

H323 162.255.36.11##8220175380
SIP 8220175380@162.255.36.11

Test Your System
We recommend testing your system at least 48 hours before the event
Visit our Test Center and click on "Cameo Test"

Support
Contact us at scheduling@chapagiblin.com or 248.626.2288
Please reference Bridge ID 172159 when calling support

Scheduling Team
Chapa & Giblin/Chapa Legal Video
scheduling@chapagiblin.com
(800) 308-4244

Demsky, Benjamin

From: Flores, Robin
Sent: Wednesday, October 19, 2022 11:21 AM
To: Steven Hurbis
Cc: Tucciarone, Eric; Pilarski, Laura; Paul Dwaihy; 'Milad Yatooma'; Sarah Schimitschek; Demsky, Benjamin; charles.fisher@tnmglaw.com; Krista Tester
Subject: RE: RE: Jacqueline Harris v Beaumont Health, et al., No. 21-187353-NH

Mr. Hurbis,

As you know the court ordered Dr. Bal to appear for deposition by November 2, 2022, which is two weeks away. Please provide dates as soon as possible.

Thank you,

Robin M. Flores
Legal Assistant to Benjamin A. Demsky
Foley, Baron, Metzger & Juip, PLLC
Cambridge Center
38777 Six Mile Rd., Suite 300
Livonia, MI 48152

Office: 734-742-1840
Fax: 734-521-2379
Website: www.fbmjlaw.com

From: Demsky, Benjamin <bDemsky@fbmjlaw.com>
Sent: Wednesday, September 21, 2022 10:41 AM
To: Steven Hurbis <shurbis@mckeenassociates.com>
Cc: Tucciarone, Eric <eTucciarone@fbmjlaw.com>; Flores, Robin <RFlores@fbmjlaw.com>; Pilarski, Laura <lpilarski@fbmjlaw.com>; Paul Dwaihy <paul.dwaihy@tnmglaw.com>
Subject: RE: Jacqueline Harris v Beaumont Health, et al., No. 21-187353-NH

Steve,

Enclosed is a copy of our motion to strike plaintiff's amended witness list/Dr. Hall that will be filed with the court today. Please advise if you concur with the relief requested.

Thank you,

Ben

Benjamin A. Demsky, Esq.
Associate Attorney
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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

LAWANNA SMITH AS PERSONAL REPRESENTATIVE OFTHE ESTATE OF JACQUELINE HARRIS, DECEASED
Plaintiff,

vs.

No. 21-187353-NH
Hon. Nanci J. Grant

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

Defendants.

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STEVEN C. HURBIS (P80993)
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PLAINTIFF'S MOTION FOR VOLUNTARY DISMISSAL WITHOUT PREJUDICE

NOW COMES Plaintiff, LAWANNA SMITH, as Personal Representative of the Estate of JACQUELINE HARRIS, Dec., by and through her attorneys, McKeen & Associates P.C., and for Plaintiff's Motion for Voluntary Dismissal Without Prejudice, hereby states the following:

1. This is a complex medical malpractice action brought by Lawanna Smith as Personal Representative of the Estate of Jacqueline Harris, deceased.
2. Plaintiff filed her Complaint in this matter on April 9, 2021.
3. The discovery cut-off date is currently set for December 12, 2022.
4. Plaintiff is requesting that this Honorable Court grant Plaintiff's motion for voluntary dismissal without prejudice, pursuant to MCR 2.504(A)(2).
5. Plaintiff is currently not in a meaningful position to advance the case under the deadlines set forth in the current scheduling order. Rather than burden this Court's docket with prolonged extensions, Plaintiff seeks leave of this Court to voluntarily dismiss this current action **without prejudice** and for refiling.
6. Plaintiff has filed the appropriate order should the Court grant this motion.
7. Defendants will not be prejudiced by this as any litigation work product that has been conducted on this case can be carried over to the subsequent lawsuit.
8. As set forth in MCR 2.504(A)(2)(b), unless otherwise specified, the voluntary dismissal should be without prejudice.
9. Since the Statute of Limitations has not expired on this case as the Letters of Authority were issued January 13, 2021, making the Statue of Limitations run on this case on January 13, 2023, Plaintiff is seeking leave to voluntarily dismiss this action without prejudice.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court GRANT Plaintiff's Motion for Voluntary Dismissal without Prejudice.

Respectfully Submitted:

McKEEN & ASSOCIATES, P.C.

/S/STEVEN C. HURBIS

BRIAN J. McKEEN (P34123)
STEVEN C. HURBIS (P80993)
Attorneys for Plaintiff
645 Griswold St., Suite 4200
Detroit, MI 48226
(313) 961-4400

DATED: November 1, 2022

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

LAWANNA SMITH AS PERSONAL
REPRESENTATIVE OFTHE ESTATE
OF JACQUELINE HARRIS, DECEASED
Plaintiff,

vs.

No. 21-187353-NH
Hon. Nanci J. Grant

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

Defendants.

BRIAN J. McKEEN (P34123)
STEVEN C. HURBIS (P80993)
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Attorneys for Tri County Orthopedics and
Jack D. Lennox, D.O.
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sberard@fbmjlaw.com

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR VOLUNTARY DISMISSAL WITHOUT PREJUDICE

In support of her motion, Plaintiff relies on the facts outlined above, the Michigan Court Rules, and the discretion of this Honorable Court. Pursuant to MCR 2.504(A)(2), Plaintiff is requesting that this Honorable Court grant Plaintiff's motion for voluntary dismissal without prejudice:

> (A) **Voluntary Dismissal; Effect.**
>
> > (2) **By Order of Court.** Except as provided in subrule (A)(1), an action may not be dismissed at the plaintiff's request except by order of the court on terms and conditions the court deems proper.
> >
> > **(b) Unless the order specifies otherwise, a dismissal under subrule (A)(2) is without prejudice.**

Plaintiff is currently not in a meaningful position to advance the case under the deadlines set forth in the current scheduling order. Rather than burden this Court's docket with prolonged extensions, Plaintiff seeks leave of this Court to voluntarily dismiss this current action **without prejudice** and for refiling. 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. Plaintiff has filed the appropriate order should the Court grant this motion.

In conclusion, Plaintiff is seeking leave to voluntarily dismiss this action without prejudice since the Statue of Limitations on this case does not run until January 13, 2023. Additionally, Plaintiff is taking such action to avoid burdening this Court's docket with prolonged extensions.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court GRANT Plaintiff's Motion for Voluntary Dismissal without Prejudice.

Respectfully Submitted:

McKEEN & ASSOCIATES, P.C.

/S/STEVEN C. HURBIS
BRIAN J. McKEEN (P34123)
STEVEN C. HURBIS (P80993)
McKEEN & ASSOCIATES, P.C.
Attorneys for Plaintiffs
645 Griswold St., Suite 4200
Detroit, MI 48226
(313) 961-4400

Dated: November 1, 2022

PROOF OF SERVICE

The undersigned hereby declares that she served a true copy of the foregoing document upon all attorneys of record at their respective addresses on file via M-File/E-File on November 1, 2022

Sarah Schimitschek

Sarah Schimitschek

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

LAWANNA SMITH as
Personal Representative of
THE ESTATE OF
JACQUELINE HARRIS, DECEASED ,

Plaintiff,

-v-

Case Number: **2021-187353-NH**
Honorable Nanci J. Grant

BEAUMONT HEALTH, TRI COUNTY
ORTHOPEDICS, PC and
JACK D. LENNOX, D.O.,
Jointly and Severally,

Defendants,
_____/

ORDER AND OPINION

At a session of said Court, held in the Courthouse in the City of Pontiac, County of Oakland, State of Michigan on the 14th day of November, 2022,

PRESENT: HONORABLE NANCI J. GRANT, CIRCUIT JUDGE

This matter is before the Court on Plaintiff's Motion for Voluntary Dismissal Without Prejudice, Plaintiff's Motion for Leave to File Plaintiff's Second Witness List, and Defendant Beaumont Health's Objection to Voluntary Dismissal. The Court waives oral argument pursuant to MCR 2.119(E)(3) and denies the Motions. 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 in this matter were due by May 6, 2022, with discovery closing on June 7, 2022. Trial in this matter is currently set for February 7, 2023. Allowing an amended witness list at this late stage is also highly prejudicial.

Finally, the Court acknowledges Defendant's argument regarding issues with Plaintiff's affidavit of merit. The Court cannot make a dispositive ruling absent a properly noticed dispositive motion citing MCR 2.116.

IT IS SO ORDERED.

NANCI J. GRANT, Circuit Court Judge

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

LAWANNA SMITH as
Personal Representative of
THE ESTATE OF
JACQUELINE HARRIS, Deceased ,

Plaintiff,

-v-

Case Number: **2021-187353-NH**
Honorable Nanci J. Grant

BEAUMONT HEALTH, TRI COUNTY
ORTHOPEDICS, PC and
JACK D. LENNOX, D.O.,
Jointly and Severally,

Defendants,
_____/

ORDER AND OPINION

At a session of said Court, held in the Courthouse in the City of Pontiac, County of Oakland, State of Michigan on the 14th day of December, 2022,

PRESENT: HONORABLE NANCI J. GRANT, CIRCUIT JUDGE

This matter is before the Court on Defendant Beaumont's Motion for Summary Disposition. This is a medical malpractice case which arises from a knee replacement performed on Plaintiff's Decedent in 2019. Following the knee replacement, the Decedent, Jacqueline Harris (herein "Ms. Harris") passed away in the Providence Hospital Emergency Department. Plaintiff contends Ms. Harris' death was proximately caused by complications with the knee-replacement surgery. Defendant Beaumont seeks dismissal because it alleges Plaintiff's Affidavit of Merit is statutorily deficient. Plaintiff opposes the Motion. The Court waives oral argument pursuant to MCR 2.119(E)(3) and grants the Motion.

Plaintiff filed her Complaint, along with her Affidavit of Merit, on April 9, 2021. Her Affidavit of Merit was signed by Dr. Sonny Bal, M.D. (herein "Dr. Bal."). Discovery was open until June 7, 2022. Defendant alleges, and the Court agrees, that Dr. Bal was not qualified to sign Plaintiff's Affidavit of Merit because he retired from the practice of medicine years before the alleged malpractice occurred.

Analysis

In order for an individual to qualify to sign an affidavit of merit in Michigan, they must have spent the majority of their professional time either practicing or teaching in the relevant field in the year leading up to the care at issue. Qualification to testify as an expert witness in a medical malpractice action requires the proposed expert must have spent greater than 50 percent of his or her professional time practicing in the relevant specialty the year before the alleged malpractice. *Kiefer v Markley*, 283 Mich App 555, 559 (2009). MCL 600.2169 provides as follows, in relevant part:

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

MCL 600.2912d requires an affidavit of merit be filed and outlines the duties owed by Plaintiff's counsel in submitting said affidavit. "[T]he plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169."

According to Defendant, Dr. Bal ceased practice in November of 2017. The care at issue occurred on May 29th, 2019. Plaintiff has not produced Dr. Bal for deposition, violating the Court's Order to produce him. Dr. Bal's LinkedIn page states that he retired from the clinical practice of medicine in November 2017. He also retired from serving as an adjunct professor at the Missouri University of Science and Technology, as well as serving as a professor of orthopedic surgery at the University of Missouri Health Care in November 2017. In September of 2020, Dr. Bal was deposed in a separate matter where he testified that he had been winding down his practice since 2015. Defendant also attached sworn trial testimony in another matter wherein Dr. Bal confirmed he retired in November of 2017.

Based on this deficiency, Beaumont requests dismissal. In Response, Plaintiff argues that the Court should not dismiss the case on this basis because Plaintiff's counsel needs only a "reasonable" belief that the physician signing the affidavit of merit is qualified at the time of signing. Moreover, Plaintiff characterizes this Motion as merely an "unfettered attack upon the credibility of Dr. Bal, which is not a proper basis for summary disposition." In other words, Plaintiff states that the Court should not rely on outside deposition or the trial testimony, and instead rely only on the Affidavit of Merit itself, wherein Dr. Bal swears he is qualified to sign.

It is 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. Again, this case was filed in April of 2021. Plaintiff retained Dr. Bal prior to that date because he signed her Affidavit of Merit. Plaintiff had over one year to work out any issues with her experts. The Court agrees that Plaintiff's counsel may "reasonably" rely upon the statements of experts, but discovery ended in June of 2022: over one year after her Complaint was filed. Dr. Bal was the expert she relied upon to file her claim in the first place. He has not been produced for deposition and Plaintiff has not attached any evidence of any kind indicating that he was in fact qualified to sign the Affidavit of Merit in this case.

"A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR

2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 120 (1999). A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10). The court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial. *Id.*

Plaintiff merely points to the Affidavit of Merit itself. However, the Affidavit of Merit is being directly challenged in this Motion. Therefore, it is Plaintiff's burden to produce evidence which creates a genuine issue of material fact as to the validity of the Affidavit of Merit. Plaintiff cannot simply argue that the Affidavit is valid without providing any substantiating evidence, as it is being directly challenged through sworn testimony provided by Defendant.

"As the federal courts have aptly noted under the analogous federal summary judgment standards, once discovery is closed the summary disposition hearing becomes the 'put up or shut up' stage of the proceeding, and if there is no factual support for a claim, it will not continue." *Pena v Ingham County Road Com'n*, 255 Mich App 299, n 4 (2003).

Here, Defendant provided sworn testimony which suggests the statements contained in Plaintiff's Affidavit of Merit surrounding Dr. Bal's qualifications are untrue. Namely, that he was engaged in practice or teaching in the one-year period prior to the alleged conduct. Plaintiff has not come forward with any evidence to suggest otherwise.

Defendant's Motion is granted.

The 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.

IT IS SO ORDERED.

NANCI J. GRANT, Circuit Court Judge

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

LAWANNA SMITH as
Personal Representative of
THE ESTATE OF
JACQUELINE HARRIS, DECEASED ,

Plaintiff,

-v-

Case Number: **2021-187353-NH**
Honorable Nanci J. Grant

BEAUMONT HEALTH, TRI COUNTY
ORTHOPEDICS, PC and
JACK D. LENNOX, D.O.,
Jointly and Severally,

Defendants,
_____/

ORDER AND OPINION

At a session of said Court, held in the Courthouse in the City of Pontiac, County of Oakland, State of Michigan on the 8th day of December, 2022,

PRESENT: HONORABLE NANCI J. GRANT, CIRCUIT JUDGE

This matter is before the Court on Plaintiff's Motion for Reconsideration of the Court's November 14, 2022 Opinion & Order denying her Motion for Voluntary Dismissal. The moving party must demonstrate palpable error to be successful on a motion for reconsideration. MCR 2.119(F)(3) provides as follows:

> [A] motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

A motion for reconsideration "which merely presents the same issues ruled on by the court" will not be granted. *Id.*

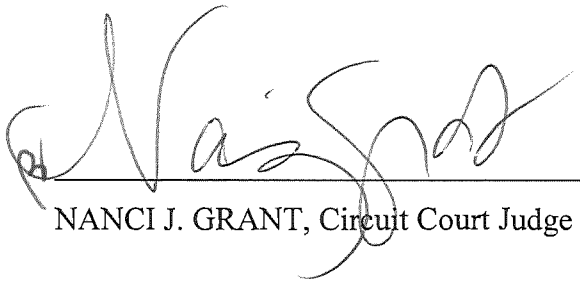
Plaintiff again argues that her witness, Dr. Bal, is being "uncooperative" and that the Court abused its discretion in denying her Motion. The Court disagrees. Dr. Bal signed Plaintiff's Affidavit of Merit. Pursuant to MCL 600.2912d, prior to filing a medical malpractice suit, a plaintiff must obtain an affidavit of merit signed by a physician qualified to testify as to the nature of the alleged malpractice. This must be done at the **outset** of every medical malpractice suit.

Plaintiff filed her Complaint, along with her Affidavit of Merit, on April 9, 2021. Discovery was open until June 7, 2022. Plaintiff is now claiming 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.

The Court finds no palpable error.

Plaintiff's Motion is denied.

IT IS SO ORDERED.



NANCI J. GRANT, Circuit Court Judge

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

LAWANNA SMITH as
Personal Representative of
THE ESTATE OF
JACQUELINE HARRIS, Deceased ,

Plaintiff,

-v-

Case Number: **2021-187353-NH**
Honorable Nanci J. Grant

BEAUMONT HEALTH, TRI COUNTY
ORTHOPEDICS, PC and
JACK D. LENNOX, D.O.,
Jointly and Severally,

Defendants,
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ORDER AND OPINION

At a session of said Court, held in the Courthouse in the City of Pontiac, County of Oakland, State of Michigan on the 14th day of December, 2022,

PRESENT: HONORABLE NANCI J. GRANT, CIRCUIT JUDGE

This matter is before the Court on Defendant Beaumont's Motion for Summary Disposition. This is a medical malpractice case which arises from a knee replacement performed on Plaintiff's Decedent in 2019. Following the knee replacement, the Decedent, Jacqueline Harris (herein "Ms. Harris") passed away in the Providence Hospital Emergency Department. Plaintiff contends Ms. Harris' death was proximately caused by complications with the knee-replacement surgery. Defendant Beaumont seeks dismissal because it alleges Plaintiff's Affidavit of Merit is statutorily deficient. Plaintiff opposes the Motion. The Court waives oral argument pursuant to MCR 2.119(E)(3) and grants the Motion.

Plaintiff filed her Complaint, along with her Affidavit of Merit, on April 9, 2021. Her Affidavit of Merit was signed by Dr. Sonny Bal, M.D. (herein "Dr. Bal."). Discovery was open until June 7, 2022. Defendant alleges, and the Court agrees, that Dr. Bal was not qualified to sign Plaintiff's Affidavit of Merit because he retired from the practice of medicine years before the alleged malpractice occurred.

Analysis

In order for an individual to qualify to sign an affidavit of merit in Michigan, they must have spent the majority of their professional time either practicing or teaching in the relevant field in the year leading up to the care at issue. Qualification to testify as an expert witness in a medical malpractice action requires the proposed expert must have spent greater than 50 percent of his or her professional time practicing in the relevant specialty the year before the alleged malpractice. *Kiefer v Markley*, 283 Mich App 555, 559 (2009). MCL 600.2169 provides as follows, in relevant part:

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> (b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:
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> (i) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.
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MCL 600.2912d requires an affidavit of merit be filed and outlines the duties owed by Plaintiff's counsel in submitting said affidavit. "[T]he plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169."

According to Defendant, Dr. Bal ceased practice in November of 2017. The care at issue occurred on May 29th, 2019. Plaintiff has not produced Dr. Bal for deposition, violating the Court's Order to produce him. Dr. Bal's LinkedIn page states that he retired from the clinical practice of medicine in November 2017. He also retired from serving as an adjunct professor at the Missouri University of Science and Technology, as well as serving as a professor of orthopedic surgery at the University of Missouri Health Care in November 2017. In September of 2020, Dr. Bal was deposed in a separate matter where he testified that he had been winding down his practice since 2015. Defendant also attached sworn trial testimony in another matter wherein Dr. Bal confirmed he retired in November of 2017.

Based on this deficiency, Beaumont requests dismissal. In Response, Plaintiff argues that the Court should not dismiss the case on this basis because Plaintiff's counsel needs only a "reasonable" belief that the physician signing the affidavit of merit is qualified at the time of signing. Moreover, Plaintiff characterizes this Motion as merely an "unfettered attack upon the credibility of Dr. Bal, which is not a proper basis for summary disposition." In other words, Plaintiff states that the Court should not rely on outside deposition or the trial testimony, and instead rely only on the Affidavit of Merit itself, wherein Dr. Bal swears he is qualified to sign.

It is 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. Again, this case was filed in April of 2021. Plaintiff retained Dr. Bal prior to that date because he signed her Affidavit of Merit. Plaintiff had over one year to work out any issues with her experts. The Court agrees that Plaintiff's counsel may "reasonably" rely upon the statements of experts, but discovery ended in June of 2022: over one year after her Complaint was filed. Dr. Bal was the expert she relied upon to file her claim in the first place. He has not been produced for deposition and Plaintiff has not attached any evidence of any kind indicating that he was in fact qualified to sign the Affidavit of Merit in this case.

"A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR

2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 120 (1999). A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10). The court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial. *Id.*

Plaintiff merely points to the Affidavit of Merit itself. However, the Affidavit of Merit is being directly challenged in this Motion. Therefore, it is Plaintiff's burden to produce evidence which creates a genuine issue of material fact as to the validity of the Affidavit of Merit. Plaintiff cannot simply argue that the Affidavit is valid without providing any substantiating evidence, as it is being directly challenged through sworn testimony provided by Defendant.

"As the federal courts have aptly noted under the analogous federal summary judgment standards, once discovery is closed the summary disposition hearing becomes the 'put up or shut up' stage of the proceeding, and if there is no factual support for a claim, it will not continue." *Pena v Ingham County Road Com'n*, 255 Mich App 299, n 4 (2003).

Here, Defendant provided sworn testimony which suggests the statements contained in Plaintiff's Affidavit of Merit surrounding Dr. Bal's qualifications are untrue. Namely, that he was engaged in practice or teaching in the one-year period prior to the alleged conduct. Plaintiff has not come forward with any evidence to suggest otherwise.

Defendant's Motion is granted.

The 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.

IT IS SO ORDERED.

NANCI J. GRANT, Circuit Court Judge

2023 WL 8660933
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Latoya SNEAD, Personal Representative of the Estate of Joseph H. Williams, IV, Plaintiff-Appellant,
v.
ASCENSION PROVIDENCE HOSPITAL, formerly known as Providence Park Hospital, Maple Manor Rehab Center of Novi, Inc., the Manor of Novi, and Rhema-Novi, Inc., doing business as Manor of Novi [1], Defendants-Appellees.

No. 362008
|
December 14, 2023

Oakland Circuit Court, LC No. 2020-181231-NH

Before: Letica, P.J., and O'Brien and Cameron, JJ.

Opinion

Per Curiam.

***1** In this medical malpractice action, the trial court initially granted summary disposition in favor of defendants, Ascension Providence Hospital, formerly known as Providence Park Hospital (Ascension), Maple Manor Rehab Center of Novi, Inc. (Maple Manor), and Rhema-Novi, Inc., doing business as The Manor of Novi (Manor of Novi), and dismissed plaintiff's [2] case without prejudice. The trial court subsequently dismissed the case *with* prejudice on reconsideration. Plaintiff appeals as of right. We affirm.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

The decedent, Joseph H. Williams, IV, was treated at each defendant's respective facility in 2017. While in their care, Williams developed several pressure sores or decubitus ulcers that worsened over the course of his admissions, eventually became necrotic and infected, and required extensive treatment, antibiotic therapy, and multiple surgical debridements. Plaintiff's claims of medical malpractice stem from the allegedly negligent conduct of each defendant's nursing staff.

Plaintiff's complaint was accompanied by an affidavit of merit (AOM) authored by registered nurse Sharon Caprara. After discovery was complete, defendants collectively filed seven summary disposition motions, but the trial court addressed only three on the merits. In those motions, each defendant argued that Caprara—the only expert plaintiff proffered during discovery—did not meet the statutory requirements to testify as an expert because she devoted the majority of her professional time to administrative duties, rather than to active clinical practice or the instruction of nursing. Defendants opined that they were entitled to summary disposition because plaintiff did not have a qualified expert to support her claims. Ascension also sought summary disposition on the basis that plaintiff's AOM and complaint were defective in light of Caprara's lack of qualification. Plaintiff described Caprara's duties as director of nursing at a 150-bed nursing facility and argued that each activity came within the scope of the active clinical practice of nursing for purposes of expert qualification under MCL 600.2169. She also argued that if the court determined that Caprara was not qualified, plaintiff's counsel had a good-faith belief regarding Caprara's qualifications and plaintiff should be allowed to substitute one of her other proposed nursing experts in Caprara's place. The trial court agreed with defendants and granted their motions under MCR 2.116(C)(10). In doing so, however, the trial court opined that plaintiff's complaint should be dismissed without prejudice pursuant to our Supreme Court's warning in *Ligons v Crittenton Hosp*, 490 Mich 61, 75; 803 NW2d 271 (2011), that "dismissal must be without prejudice unless other grounds for the dismissal exist, such as the expiration of the limitations period."

***2** Maple Manor and Manor of Novi both moved for reconsideration, primarily arguing that dismissal *with* prejudice was the proper remedy because their dispositive motions challenged plaintiff's ability to come forward with necessary expert testimony, not the sufficiency of her AOM. Ascension concurred and joined in both codefendants' motions. In response to these motions and in a separate motion for reconsideration, plaintiff opined that the trial court reached the correct result with respect to the nature of the dismissal, but asked that if the court chose to reconsider its earlier ruling, it should also reconsider allowing plaintiff

to amend her witness list to name a new nursing expert or otherwise allow her to rely on a different expert.

On reconsideration, the trial court agreed with defendants that it misapplied *Ligons*. The court acknowledged that defendants' motions were primarily predicated on Caprara's lack of qualification under MCL 600.2169(1), which rendered her unable to serve as an expert and therefore unable to establish the appropriate standard of care at trial.[3] The court indicated that the distinction between a challenge to the AOM and inability to prove the standard of care was important, and the court had agreed that plaintiff could not establish the standard of care at trial. As such, the court granted defendants' motions for reconsideration and dismissed plaintiff's complaint with prejudice. It also denied plaintiff's motion for reconsideration with respect to a new expert witness. The court opined that allowing plaintiff to amend her witness list or name a new nursing expert would be inappropriate because discovery had concluded, and defendants would be severely prejudiced by having to essentially relitigate the entire case. Moreover, plaintiff's attorney was involved in a deposition of Caprara that took place before this case began. Despite his understanding of Caprara's qualifications, he proceeded with Caprara as plaintiff's only expert witness. Given this, the court did not believe it was in the interests of justice to allow plaintiff to amend her witness list.

II. DISMISSAL WITH OR WITHOUT PREJUDICE

Plaintiff first argues on appeal that the trial court erred by dismissing her case with prejudice. We disagree.

A. STANDARD OF REVIEW

We review "a trial court's decision on a motion for reconsideration for an abuse of discretion." *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 629; 750 NW2d 228 (2008). An abuse of discretion occurs when the trial court's decision "falls outside the range of reasonable and principled outcomes." *Jackson v Bulk AG Innovations, LLC*, 342 Mich App 19, 24; 993 NW2d 11 (2022) (quotation marks and citation omitted). Whether to dismiss a case with or without prejudice is often within the discretion of the trial court, but the proper nature of a dismissal in the context of summary disposition is a question of law and, therefore, reviewed de novo. *Rinke v Auto Moulding Co*, 226 Mich App 432, 439; 573 NW2d 344 (1997).

B. LAW AND ANALYSIS

A party moving for reconsideration must generally "demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." *Woods*, 277 Mich App at 629, quoting MCR 2.119(F)(3). "The decision whether to grant dismissal with or without prejudice, by definition, determines whether a party may refile a claim or whether the claim is permanently barred." *ABB Paint Finishing, Inc v Nat'l Union Fire Ins Co of Pittsburgh, Pa*, 223 Mich App 559, 562; 567 NW2d 456 (1997). In accordance with res judicata principles, when a dismissal is granted on the merits of the case, dismissal should be granted with prejudice so as to preclude the plaintiff from refiling the same action against the same defendant. *Id.* at 562-563.

***3** In its original ruling on defendants' dispositive motions, the trial court deemed dismissal without prejudice appropriate because "the only grounds for dismissal presented to this Court through any of the Motions is due to lack of qualification or factual support with regard to Plaintiff's expert ...." The trial court dismissed the case with prejudice on reconsideration because it recognized that summary disposition was warranted on the basis of plaintiff's failure to produce a qualified standard-of-care expert, and not solely because Caprara's lack of qualification rendered her AOM defective. Plaintiff contends that the trial court's initial interpretation of relevant caselaw was correct and required dismissal without prejudice.

In *Ligons*, 490 Mich at 66-68, the plaintiff filed two AOMs with his complaint, neither of which fully satisfied the AOM requirements under MCL 600.2912b. This Court held that the defective AOMs required dismissal with prejudice because "no tolled time remained during which plaintiff could refile his suit after defendants successfully challenged his AOMs." *Id.* at 69. Our Supreme Court affirmed this Court's conclusion, observing that MCL 600.2912d(1) requires a plaintiff in a medical malpractice action to file an AOM along with his or her complaint. *Id.* at 72. Given the mandatory language of the statute, a complaint unaccompanied by an appropriate AOM is insufficient to commence the lawsuit, thus requiring dismissal. *Id.* at 72-73. Our Supreme Court cautioned, however, that "dismissal must be without prejudice

unless other grounds for the dismissal exist, such as the expiration of the limitations period." *Id.* at 75.

Maple Manor and Manor of Novi moved for summary disposition under MCR 2.116(C)(10) because plaintiff relied solely on Caprara to establish the standard of care and breach thereof, but Caprara was not an expert under MCL 600.2169(1)(b), and could not provide expert testimony as to those elements of plaintiff's claim. Notably, neither of these defendants challenged plaintiff's AOM. Ascension, on the other hand, did argue that plaintiff's AOM was defective due to Caprara's lack of qualification, but it also opined that summary disposition was appropriate for a second, independent reason—namely, because Caprara's lack of qualification left plaintiff unable to establish the standard of care or breach. The trial court agreed that Caprara was not qualified to testify as an expert in this case, and that ruling is not challenged on appeal. Because each defendant sought summary disposition for reasons concerning the factual merits of plaintiff's claim, rather than strictly on procedural grounds, the trial court correctly determined on reconsideration that *Ligons* did not require dismissal without prejudice, and that dismissal with prejudice was the proper remedy.

Plaintiff challenges this interpretation of *Ligons*, arguing that the distinction between an AOM challenge under MCL 600.2912d and a challenge to an expert's qualification under MCL 600.2169 is immaterial because the former statute incorporates the qualification requirements of the latter. Plaintiff opines that, in cases where a witness who is not qualified under MCL 600.2169 is disqualified from authoring an AOM under MCL 600.2912d, a savvy defendant could obtain dismissal with prejudice by characterizing its argument as a challenge to expert qualifications. Plaintiff's position is unpersuasive because it fails to appreciate the nuances of the procedural postures at issue here.

Plaintiff is correct that the AOM statute incorporates the qualifications for expert witnesses in medical malpractice actions listed in MCL 600.2169, and that the statute requires a plaintiff to file an AOM "signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169." *Crego v Edward W Sparrow Hosp Ass'n*, 327 Mich App 525, 531; 937 NW2d 380 (2019), quoting MCL 600.2912d(1) (quotation marks omitted). Even so, plaintiff's suggestion that an expert's lack of qualification under MCL 600.2169 renders that expert's AOM per se defective is incorrect. MCL 600.2912d(1) does not require the plaintiff's AOM to be signed by a qualified expert, but rather "by a health professional *who the plaintiff's attorney reasonably believes meets the requirements* for an expert witness under section 2169." *Id.* (emphasis added.) See also *Jones v Botsford Continuing Care Corp*, 310 Mich App 192, 200; 871 NW2d 15 (2015) ("The fact that the Legislature used the 'reasonably believes' language demonstrates that there will be cases in which counsel had such a reasonable belief even though the expert is ultimately shown not to meet the criteria of MCL 600.2169(1)."). This flexible standard makes sense because an AOM, as a component of the complaint, is prepared on the basis of limited information, without the benefit of discovery. *Kalaj v Khan*, 295 Mich App 420, 428; 820 NW2d 223 (2012). Moreover, the purpose of the AOM is to deter frivolous medical malpractice claims, *Castro v Goulet*, 312 Mich App 1, 8; 877 NW2d 161 (2015), not to establish the defendant's liability.

***4** MCL 600.2169, on the other hand, addresses a witness's qualification to provide expert *testimony* in a medical malpractice case. *Jones*, 310 Mich App at 199. "The plaintiff in a medical malpractice action bears the burden of proving: (1) the applicable standard of care, (2) breach of that standard by defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury." *Cox v Bd of Hosp Managers for City of Flint*, 467 Mich 1, 10; 651 NW2d 356 (2002) (quotation marks and citation omitted). Expert testimony is necessary to establish the first, second, and fourth elements, *Kalaj*, 295 Mich App at 429, and failure to prove any single element is fatal to the plaintiff's claim, *Cox*, 467 Mich at 10. For that reason, a plaintiff's inability to produce a qualified expert in a medical malpractice case commonly leads to summary disposition under MCR 2.116(C)(10) for failure to establish a question of material fact for trial. See, e.g., *McElhaney v Harper-Hutzel Hosp*, 269 Mich App 488, 497-498; 711 NW2d 795 (2006). Plaintiff's prediction that medical malpractice claims will be routinely dismissed with prejudice on the basis of a defective AOM under MCL 600.2169 lacks merit because dispositive motions under MCR 2.116(C)(10) are considered premature before discovery has been completed. *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 540; 687 NW2d 143 (2004). See also *Watts v Canady*, 253 Mich App 468, 471; 655 NW2d 784 (2002) (noting, in an appeal from denial of summary disposition on the basis of a defective AOM, that "[a]ny opinion regarding whether [the affiant] is qualified under § 2169 is premature at this stage of the proceedings"). After discovery has been completed, a challenge to the AOM on the basis of the

affiant's qualifications as an expert, while not unheard of, is superfluous when the affiant is the plaintiff's only expert.

Here, the trial court held that the only expert plaintiff proffered during discovery was not qualified to testify as an expert under MCL 600.2169(1). Without a qualified expert, plaintiff was left unable to prove essential elements of her claim and dismissal was warranted. See *Cox*, 467 Mich at 10 ("Failure to prove any one ... element is fatal.") (quotation marks and citation omitted). And because that dismissal was premised on plaintiff's inability to produce evidence that would create a triable issue of fact regarding these elements, it involved the factual merits of plaintiff's claim. "Where a trial court dismisses a case on the merits, the plaintiff should not be allowed to refile the same suit against the same defendant and dismissal should therefore be with prejudice." *ABB Paint Finishing*, 223 Mich App at 563. The trial court did not abuse its discretion by dismissing plaintiff's case with prejudice on reconsideration.

III. NEW EXPERT WITNESS

Plaintiff further contends the trial court abused its discretion when it denied her request to amend her witness list or rely on another expert previously identified in her witness list. We disagree.

A. STANDARD OF REVIEW

A trial court's refusal to permit a litigant to name a new expert witness is reviewed for an abuse of discretion. *Cox v Hartman*, 322 Mich App 292, 312; 911 NW2d 219 (2017).

B. LAW AND ANALYSIS

In support of this alleged error, plaintiff reasons that the trial court failed to consider the factors outlined in *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).[4] Manor of Novi argues on appeal that *Dean* is not controlling under these circumstances because that case excluded an expert witness as a discovery sanction, whereas the instant appeal arises from the trial court's determination that plaintiff's expert was unqualified to testify at trial. We acknowledge *Dean* is similar to this case in certain respects, specifically that the plaintiff's claim of legal malpractice was resolved by summary disposition because she was barred from presenting necessary expert testimony. *Id.* at 29. But the legal question in *Dean* arose in the context of a discovery sanction for the plaintiff's failure to file a timely witness list. *Id.* Unlike this case, the trial court in *Dean* did not find the plaintiff's proposed expert unqualified. Here, plaintiff proffered expert testimony did not meet her burden of proof because Caprara was not qualified to testify as an expert under MCL 600.2169(1). Thus, plaintiff's reliance on *Dean* is misplaced.

***5** Instead, this case is more analogous to *Cox*, 322 Mich App at 312-316. In relevant part, the plaintiff in *Cox* sued a registered nurse for malpractice that purportedly occurred during the birth of the plaintiff's daughter. *Id.* at 296-297. After discovery concluded, the nurse defendant moved for summary disposition on the basis that the plaintiff's expert was not qualified under MCL 600.2169(1). *Id.* at 297. The trial court agreed and granted the motion. *Id.* at 298. The plaintiff then moved to name a new nursing expert and amend her AOM, and the trial court denied the plaintiff's motion. *Id.* On appeal, this Court rejected the plaintiff's claim of error, noting the plaintiff was on notice that the expert's qualifications were in question and could have moved to name a new expert much earlier. *Id.* at 313. Yet the plaintiff chose to rely only on the challenged expert. *Id.* Moreover, the plaintiff had not acted with diligence relative to expert discovery throughout the case and had yet to identify a new expert at the time the trial court heard the plaintiff's motion. *Id.* at 315-316. At that point, the case had been pending for 22 months, and the trial was to be held three months later. *Id.* at 316. This Court agreed with the trial court that a new witness at that stage would be prejudicial to the defendant and concluded that the trial court's ruling was within the range of principled outcomes. *Id.*

The instant case is very similar to *Cox* as to this issue. Once the proposed expert had been deposed in *Cox*, the plaintiff was aware that the expert's qualifications were in question because she revealed that the majority of her time had been devoted to instructing or practicing as a nurse practitioner, rather than as a registered nurse. *Id.* at 313. Here, Caprara's qualifications were likewise revealed during her deposition, including the type of work she had performed during the year preceding the alleged malpractice. In fact, Ascension also produced evidence that plaintiff's counsel should have been aware that Caprara was unqualified even before the complaint was filed because he had participated in a deposition in an unrelated case in which Caprara admitted that she had spent most of her professional time attending to administrative

duties. Thus, plaintiff was on notice that Caprara might not meet the statutory requirements for expert qualification.

The nursing defendant in *Cox* moved for summary disposition approximately three months after the expert's deposition, challenging the expert's qualifications, and the trial court did not rule in the nursing defendant's favor for several additional months. *Id.* Here, there was a similar delay of over four months between the filing of defendants' dispositive motions and the trial court's initial grant of summary disposition. During this time, plaintiff could have sought leave to amend her witness list or to reopen discovery to elicit testimony from a previously named expert. But like in *Cox*, plaintiff relied solely on Caprara's testimony in opposing summary disposition and declined to take any precautionary steps to protect her claims in the event the trial court agreed with defendants that Caprara was unqualified to testify as an expert witness.

Plaintiff's conduct during discovery is also analogous to the circumstances at issue in *Cox*. In *Cox*, the trial court had to order the plaintiff to specifically identify which of several possible experts would be called at trial and compel production of the expert or experts for deposition. *Id.* at 315. Although the defendants in this action did not resort to motion practice to compel discovery, plaintiff gave defendants reason to believe Caprara would be plaintiff's only expert at trial. Manor of Novi, at least, repeatedly requested depositions of plaintiff's trial experts, and Caprara was the only expert produced. Manor of Novi also asked for confirmation that the other experts identified on plaintiff's witness list would not be proffered at trial. That request apparently went unanswered, but defendants could reasonably infer from plaintiff's silence and failure to produce any other expert during discovery that she intended to rely exclusively on Caprara's opinions at trial.

This case is also analogous to *Cox* in that plaintiff did not identify which expert she would rely on in lieu of Caprara, either in her response to defendants' summary disposition motions or in her own motion for reconsideration.[5] See *id.* at 316 ("Even on the date of the hearing on plaintiff's motion to add any new expert witness, plaintiff's counsel still had not retained a new expert witness and had not provided any notice of the identity of a new expert witness to defendants ....").

***6** The only notable difference between *Cox* and this case is that plaintiff included her request to rely on a different expert in her response to two of the summary disposition motions, while the *Cox* plaintiff did not raise the issue until after summary disposition had been granted. *Id.* at 298. This distinction does not undermine the authoritative value of *Cox* because the fact remains that plaintiff did not establish a genuine issue of material fact in response to defendants' dispositive motions. When the factual sufficiency of a claim is tested under MCR 2.116(C)(10), the plaintiff may not avoid summary disposition by merely promising to produce additional evidence. *Shaw v City of Dearborn*, 329 Mich App 640, 651-652; 944 NW2d 153 (2019).

The trial court ultimately denied plaintiff's request to name a new expert or rely on a previously named expert, reasoning that doing so would be prejudicial to defendants so late in the litigation. When defendants moved for summary disposition, this case had been pending for over two years, and another seven months elapsed before the trial court denied plaintiff's motion for reconsideration with respect to relying on a different expert witness. Discovery closed several months before the dispositive motions were filed, and two prospective trial dates were adjourned before this case concluded. A plaintiff cannot be given endless opportunities to develop his or her case, and the trial court did not abuse its discretion by concluding that plaintiff's request to rely on a different expert would be unfairly prejudicial. See *Cox*, 322 Mich App at 315-316 (agreeing with the trial court that the defendants would be prejudiced in trial preparation by late amendment).

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2023 WL 8660933

Footnotes

1 The complaint caption named two related entities: "The Manor of Novi" and "Rhema-Novi, Inc., doing business as The Manor of Novi". The substantive allegations, however, suggest that the two entities are one and the

same. An attorney formerly appeared for "Rhema-Novi, Inc., doing business as The Manor of Novi", in the lower court and a separate "The Manor of Novi" entity did not participate below. We presume the caption's identification of two entities is mistaken and will treat The Manor of Novi and Rhema-Novi, Inc., as a single entity.

2 The decedent, Joseph H. Williams, IV, was the original plaintiff in this matter, but he died in 2020. The caption was amended to reflect the proper plaintiff while the instant appeal was pending. *Williams v Ascension Providence Hosp*, unpublished order of the Court of Appeals, entered October 11, 2023 (Docket No. 362008).

3 The trial court noted that Ascension had challenged plaintiff's AOM, but was appropriately included in the court's reconsideration because Ascension also cited plaintiff's inability to establish the standard of care at trial as a basis for summary disposition.

4 *Dean* is not strictly binding on this Court under MCR 7.215(J)(1), *Secura Ins Co v Stamp*, 341 Mich App 574, 581 n 5; 991 NW2d 244 (2022), but the factors identified in that case have been incorporated in more recent, binding decisions, see, e.g., *Duray Dev, LLC v Perrin*, 288 Mich App 143, 165; 792 NW2d 749 (2010).

5 We note that plaintiff refiled her complaint, this time supported by an AOM from registered nurse Laura Elliott, after the trial court's initial grant of summary disposition, but before it granted summary disposition with prejudice on reconsideration. Elliott's AOM and identity as a prospective expert were first made part of the record in *this case* in November 2022, after the trial court granted the final order from which plaintiff appealed. Elliott was not previously identified as a proposed expert, so this issue is most aptly viewed as involving an amendment, despite plaintiff's repeated references to calling a previously named witness.

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